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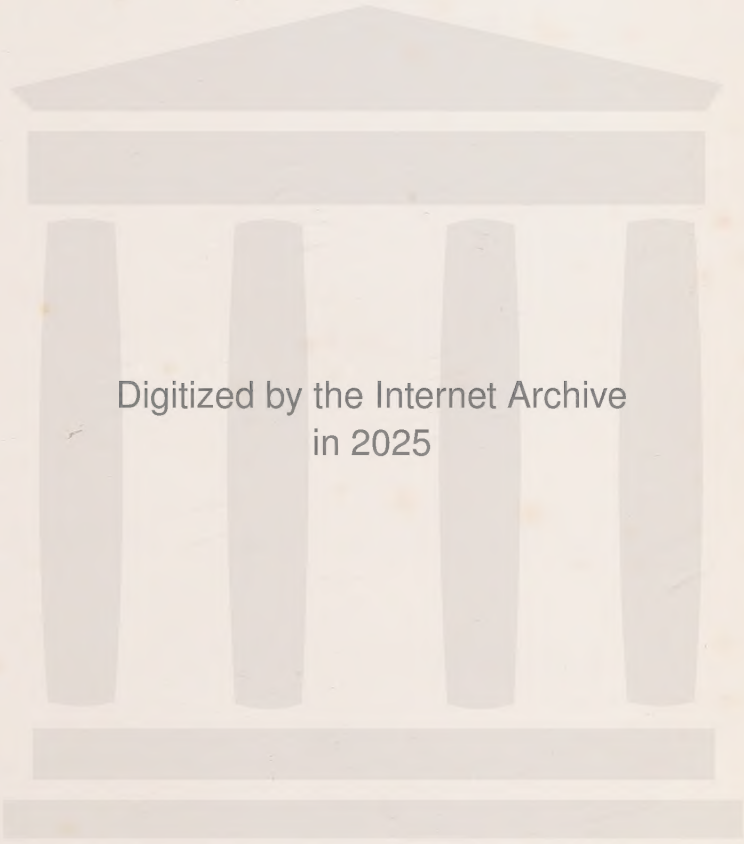
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A

CONCISE, PRACTICAL ABRIDGMENT

OF THE

Common and Statute Law,

AS AT PRESENT ADMINISTERED

IN

THE COMMON-LAW, PROBATE, DIVORCE, AND ADMIRALTY COURTS;

EXCLUDING ALL THAT IS OBSOLETE, OVERRULED, OR SUPERSEDED.

COMPRISING A

Series of Condensed Treatises on the different Branches of the Law,

WITH DETAILED DIRECTIONS, FORMS, AND PRECEDENTS.

AN ALPHABETICAL DICTIONARY OF TECHNICAL LAW TERMS AND MAXIMS, AND A COLLECTION OF WORDS THAT HAVE RECEIVED A SPECIAL JUDICIAL CONSTRUCTION.

THE WHOLE ILLUSTRATED BY REFERENCES TO THE PRINCIPAL CASES IN EQUITY, AND IN THE SCOTCH, AMERICAN, AND IRISH REPORTS, AND THE MOST EMINENT TEXT WRITERS.

SECOND EDITION, RE-MODELLED, AND NEARLY RE-WRITTEN.

BY CHARLES PETERSDORFF,

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ASSISTED BY

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BARRISTERS-AT-LAW.

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A Dictionary

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TECHNICAL LAW TERMS AND MAXIMS,

AND WORDS THAT HAVE RECEIVED A SPECIAL JUDICIAL CONSTRUCTION.

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I. Definition, and General Nature of.

A deed is a writing sealed and delivered by the parties. 1 Inst. 171. It is sometimes called a charter, *carta*, from its materials; but, more usually, when applied to the transactions of private subjects, it is called a deed; in Latin, *factum;* and κατ' ἐξοχην: because it is the most solemn and authentic act that a man can possibly perform with relation to the disposal of his property,[1] and, therefore, a man shall always be estopped by his own deed, or not permitted to aver, or prove anything in contradiction to what he has once so solemnly and deliberately avowed. Plowd. 434. There are two sorts of deeds: 1st. A deed-poll or *shaven*, which is in strictness a declaration of one party only; and 2d. An indenture, which is a writing containing an agreement or conveyance between two or more persons, and was indented at the top, answerable to another part which had the same contents. Co. Litt. 229. This indenting is now of no consequence, but the word indenture is very generally used.

II. What Contracts must be by Deed.

Horsley v. Rush, 7 T. R. 209. Sleiglitz v. Eggington, 1 Holt, N. P. C. 181.

Where the authority is to execute a deed, it is indispensable that it should be under seal.[2]

Action of covenant upon a charter-party, to which the general issue was pleaded, it appearing that the deed was executed by "G. Dwyer, by order and for account of Messrs. Rush and Tolson," but that Dwyer had only a verbal authority from the defendants to execute the charter-party.

Lord Kenyon held that the action could not be maintained; for that a deed could not be executed by an agent, so as to bind the principal, unless he were

[1] Simple contracts are often entered into by men unadvisedly, and without sufficient deliberation, and therefore the law has provided that such a contract shall not bind without a consideration: but where the agreement is by deed, there is more time for deliberation; and when a man passes a thing by deed, first, there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation; and afterwards he puts his seal to it, which is another part of deliberation; and, lastly, he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law, signifying fully his good will that the thing in the deed should pass from him to the other.

[2] And transfers of incorporeal hereditaments must be by deed. Co. Litt. 9, b; 2 Bl. Com. 317. And although an exchange of lands, &c. lying in the same county may be effected without deed (Litt. s. 22), yet an exchange of incorporeal hereditaments may not. Co. Litt. 50, a. But notwithstanding incorporeal hereditaments must be granted by deed, yet they may be parted and divided by parol without deed. Id. 169, a. *Sed vide post*, 8 & 9 Vic. c. 106, s. 3.

A grant of common of pastures, of estovers, turbary, fishing, and the like, must be by deed, and not without, unless it be in case of partition, or of appendancy, as incident to some corporeal thing. 1 Wood's Com. 279.

A reversion cannot be granted in fee-simple, fee-tail for life, or years, without deed, unless it be in a case where it is parcel of a manor. But a reversion may be granted upon a partition by one coparcener to another, without any deed. *Qu.* Since 1845? *see post*, 8. The same rule holds as to a remainder. Shep. Touch. 230.

An advowson in gross cannot be granted

authorised by deed under seal; and that, though one party might bind another by written instruments, he could not do so by deed without a special power under seal for that purpose.

(A) *Feoffments and Leases required to be in Writing must be by Deed.*

The 8 & 9 Vic. c. 106, s. 3, enacts, "that a feoffment made after the first day of October, 1845, other than a feoffment made under a custom by an infant,

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without deed, but an advowson is grantable upon a partition between coparceners without being under seal. And an advowson, incident to a manor or piece of land, is grantable with the manor or land without any deed; and a parsonage or rectory may be granted without deed, and then the tithes, &c. which are incident to it will pass with it. Shep. Touch. 230; 1 Leon. 207; 9 Co. 24; 2 Roll. Abr. 62, G. pl. 13; 10 id. 63; Co. Litt. 85, a. But a parson cannot grant his tithes alone for life or years to a stranger except by deed, for these lie merely in grant, though an agreement to be discharged for one year from the tithes then growing may be good, and operate as a release thereof; but not so of a grant of the tithes of the parish for one year, for one year is the same as two or more years for this purpose. Cro. Jac. 137; 2 Roll. Abr. Grant, pl. 14, 17; Cro. Eliz. 249. Neither can the next presentation to a living be without deed; and it was held clearly that a letter written by the patron was insufficient. Cro. Eliz. 163. *See* Advowson, vol. i. p. 219; *post*, Grant; Tithes.

Although a rent, when created, cannot be granted over without deed, yet it may be reserved originally without deed; and in this respect there is a difference between a rent and re-entry. Co. Litt. 225, a. And a sheep-walk cannot be granted without deed otherwise than as appurtenant to a grant of the land itself, except perhaps in districts where a sheep-walk may be known by the name of land. Cro. Jac. 519. Neither can a right of way, otherwise than as an appurtenant, pass without deed, unless the thing granted is incapable of being enjoyed without. Id. 189. Nor a license to enter the land of another. *Wood v. Leadbetter*, 13 Mee. & W. 840. *See* 17 Q. B. 574; 10 C. B. 744. The same law exists as to common of pasture, franchises, fairs, courts, warrens, ferries, corridors, or the profits thereof respectively; neither is a mere right or title of action, as rights and titles of entry to any real or personal thing, grantable without deed. Offices, for the most part, cannot be granted without deed; and yet some inferior offices, as stewardships, bailiwicks, and the like, may; for such offices a lord of a manor may retain by word, without deed. Shep. Touch. 230, 231.

A surrender of corporeal hereditaments may be without deed; as an estate for life (before 1845) of lands, which may be surrendered without deed, and without livery of seisin; because it is but a yielding, or a restoring of the estate, again to him in the immediate reversion or remainder, which are always favoured in law. Co. Litt. 338, a. So a lease for years, either by deed or parol, might have been, before the Statute of Frauds, and 8 & 9 Vic. c. 106, s. 3, surrendered without deed. *Farmer v. Rogers*, 2 Wils. K. B. 26. But, otherwise, as to the surrender of incorporeal hereditaments, whereof a particular estate cannot commence without deed, and by consequence the estate cannot be surrendered without deed. But where the estate commences without deed it might be surrendered without deed. And although a particular estate be made of lands by deed, yet it may be surrendered without deed, in respect of the nature and quality of the thing demised, because the particular estate might have been made without deed. And so if a man be tenant by the curtesy, or tenant in dower of an advowson, rent, or other thing, that lies in grant, although there the estate begins without deed; yet, in respect of the nature and quality of the thing that lies in grant, it cannot be surrendered without deed. And so if a lease for life be made of lands, the remainder for life, although the remainder for life began without deed, yet, because remainders and reversions, though they be of lands, are things that lie in grant, they cannot be surrendered without deed. Co. Litt. 138, b. A distinction somewhat similar seems to have been taken as to the raising of an use at common law; namely, that where the estate out of which the use was to arise might pass without deed (as by feoffment on the land), there an use may be declared, without deed, of the same estate; but where the estate out of which the use was to arise could not pass without deed, there the use could not be declared without deed, not even though such estate were created by matter of record: for, if a man levied a fine, he could not limit the use thereof to a stranger without deed. *Parvis v. Yeaton*, 2 Roll. Abr. 788. But in no case could an use be created by way of covenant to stand seised, unless by deed. *Callard v. Callard*, Poph. 49; Moore, 687; 2 Roll. Abr. 788. It is observable, that the Statute of Frauds (29 Car. 2, c. 3, s. 7) requires only that the creations or declarations of uses and trusts should be "*by writing* signed by the party," &c. In general, all bodies corporate, such as dean and chapter, mayor and commonalty, &c., can neither grant lands, goods, or chattels, or do any other acts of importance, without deed. *Vide* Corporations, vol. iii. p. 263.

It has been said, that since the Statute of

shall be void at law, unless evidenced by deed; and that a partition and an exchange of any tenements or hereditaments, not being copyhold, *and a lease required by law to be in writing*, of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the first day of October, 1845, *shall also be void at law, unless made by deed.*"[1]

III. Difference between Deeds and Parol Contracts.[2]

IV. ,, Deeds-poll and Indentures.[3]

V. Different Species of Deeds. *See* Analysis, p. 1.

VI. General Requisites of Deeds.

(A) *Parties to Contract.*

(*a*) *All Persons having Legal Capacity.*

All persons having a legal capacity, and sufficient mental ability to contract, may become bound by deed. *See* 5 Co. 119; 4 Co. 124; Roll. Abr. 340. But if an ignorant person be induced to execute a deed, supposing it to operate one way when it operates another, it is invalid. *Doe d. Lloyd v. Bennett*, 8 C. & P. 124.

(*b*) *Agents.*[4]

Frauds there can be no partition without deed. *Johnson v. Wilson*, C. P. Willes, 248.

[1] This statute, it would seem, does not affect agreements for a lease, but only relates to a lease. *Rollason v. Leon*, 31 L. J. Ex. 96. *Stratton v. Pettit*, 16 C. B. 420; 24 L. J. C. P. 182.

[2] The principal points in which a deed differs from a parol contract are, first, in the case of a contract *not under seal;* a consideration is absolutely necessary to give it validity, whereas a writing sealed and delivered is supposed by the law to express fully and absolutely the intention of the party by whom it is executed, and he is, therefore, bound by its execution, even in a court of equity, whether he received a consideration for the grant or engagement which it comprises or not. Bac. Reading on Uses, 79. *Irons v. Smallpiece*, 2 B. & A. 551, 554. *Pratt v. Barber*, 4 Russ. 507; 1 Steph. Com. 462; Plowd. 308; 2 Bl. Com. 446. *Fallowes v. Taylor*, 7 T. R. 475, 477. *Binnington v. Wallis*, 4 B. & A. 650, 652; and *see per Best, C. J.: Morley v. Boothby*, 3 Bing. 111, 112. Second, that in pleading a deed it is not in general necessary to show that it was founded on any consideration. Third, that statements in a deed cannot be controverted, or evidence admitted to show that it was made *diverso intuitu*, except in cases of duress, fraud, or illegality. *Petrie v. Hannay*, 3 T. R. 418; 2 Bl. Com. 295; Com. Dig. Estoppel; 1 Saund. 216, n. 2; Willes, 9. Fourth, that the efficacy of a stipulation by deed cannot be effected but by deed. *Braddick v. Thompson*, 8 East, 344. S. P. *Heard v. Wadham*, 1 id. 619. S. P. *Milne v. Gratrix*, 7 id. 607. S. P. *King v. Joseph*, 5 Taunt. 452. S. P. *Sellers v. Beckford*, 8 id. 31; S. C. 1 Moore, 460; Co. Litt. 222, b.; 3 D. & R. 99. Fifth, that a deed binds the heir, *when named. Barber v. Fox*, 2 Saund. 134, 136; S. C. 1 Vent. 159; Bac. Abr. Heir and Ancestor; F. Plowd. 439, 441; *post*, Heir. Sixth, and a devisee of real estate may be sued in debt, though not in covenant, on such a deed. *Wilson v. Knubley*, 7 East, 128. Seventh, that a deed is in some cases entitled to preference over simple contract debts, in the course of payment of a testator's debts. *Cox v. Joseph*, 5 T. R. 307; *see* Executors and Administrators. Eighth, that a deed is not affected by the Statute of Limitations as to six years. *Mayor of Kingston-upon-Hull v. Horner*, Cowp. 102. And if a deed be expressly given to secure a pre-existing simple contract debt, the latter will be merged. *Drake v. Mitchell*, 3 East, 251. Though if the deed be given as a collateral security, as by a third party, it will not have that operation. *White v. Cuyler*, 6 T. R. 176; 2 Leon. 110. *Ansell v. Baker*, 15 Q. B. 20. *Price v. Moulton*, 10 C. B. 561; 20 L. J. C. P. 102.

[3] There is a material distinction between a deed made *inter partes*, and a deed-poll; for a stranger to a deed *inter partes* cannot avail himself even of a stipulation for his benefit, whereas in the latter case he might. *Gilby v. Copley*, 3 Lev. 138. S. P. *Gesen v. Edwards*, 1 And. 258; *see* also *ante*, p. 7.

[4] A man may execute a deed effectually through the medium of an agent, but the agent must be authorised by deed. *Harrison v. Jackson*, 7 T. R. 206. And he should be very careful to execute the deed in the name of the principal. *Wilks v. Back*, 2 East, 142. *White v. Cuyler*, 6 T. R. 176. *Frontin v. Small*, 2 Ld. Raym. 1418; 9 Rep. 76; 1 Stra. 705.

(*c*) *Aliens.*[1]

(*d*) *Corporations.*[2]

(*e*) *Drunkards.*[3]

(*f*) *Executors and Administrators.* *See* Bond, vol. ii. p. 511, n. 8; *post*, Executors and Administrators.

(*g*) *Idiots.*[4]

(*h*) *Infants.*[5]

(*i*) *King or Crown.*[6]

(*j*) *Lunatics.*[7]

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[1] An alien enemy under safe-conduct may be the obligee in a bond, and sue thereon. *Wells v. Williams*, 1 Ld. Raym. 282; *ante*, vol. i. p. 285, vol. ii. p. 510. An alien may also be grantee in a deed, though formerly he could not hold the land, such alienation being a cause of forfeiture to the Crown, but the law is now essentially modified by 7 & 8 Vic. c. 66, s. 3 (*vide post*, Descent), but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property. *Vide* Co. Litt. 2, b; 5 Co. 52; 1 Leon. 47; 1 Mod. 47; Al. 14; and Aliens, vol. i. p. 285, and Alien Enemy, p. 291.

[2] A corporation sole, as a bishop or parson, may be a party to a deed; and although a corporation aggregate is said to be invisible, immortal, and to exist only in supposition of law, yet such an artificial body is capable, by its creation, of being a party to a deed, and in many cases of acquiring or conveying away real property by deed. But a dean without his chapter, a mayor without his commonalty, or a master of a college without his fellow, cannot, by executing a deed, bind the corporation. *See* 1 Inst. 94, b; 10 Rep. 30, b; 1 Ves. & B. 226, 244; and *see* Bond, vol. ii. p. 510.

[3] It was laid down by the court in *Pitt v. Smith*, 3 Camp. 33, that intoxication is good evidence on a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise (*see* also *Fenton v. Holloway*, 1 Stark. 126), for that such a person has no agreeing mind. It should now be pleaded, *Gore v. Gibson*, 13 Mee. & W. 623. *Alcock v. Alcock*, 3 Man. & G. 268. Pothier says that drunkenness, when it goes so far as absolutely to destroy the reason, renders a person, so long as it continues, incapable of contracting, since it renders him incapable of consent. Thus, therefore, although the courts of equity have in some cases laid it down as a general principle that the mere circumstance of having been in drink is not sufficient to avoid a deed or agreement; and that, for this purpose, it is necessary to prove that, through the management or contrivance of him who gained the deed or agreement, the party was drawn in to drink (*Johnson v. Medlicott*, 3 P. Wms. 130; and *see* 2 Eq. Ca. Ab. 183, pl. 2); is now to be taken as the law upon the subject, and it rests upon sound principles: for, however desirable it may be that drunkenness should be repressed, yet the rules of good faith and justice are not to be violated to attain this purpose; and there can be no reason why a deed should enure for the benefit of a party who has obtained it from another at a time when he was not master of his own actions. *Molton v. Camroux*, 4 Ex. 17. *Gore v. Gibson*, 13 Mee. & W. 623. And in writers on the law of Scotland, the doctrine is laid down without any qualification, and inebriety, however produced, is considered as avoiding contracts on the same ground as insanity. Persons while in a state of absolute drunkenness, and consequently deprived of the exercise of reason, cannot oblige themselves; but a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling the contract. Stair, July 29, 1672, Lord Hatton. An obligation granted by a person while he is in a state of absolute and total drunkenness is ineffectual, because the grantee is incapable of consent, for the law has thought it equitable to protect those who have not the use of their reason (even though they should have lost it by their own folly) from the fraud or circumvention of others. Ersk. Inst. 814, 815.

[4] It was formerly held that an idiot could not avoid his own deed. 1 Inst. 247, a. It is now, however, settled that an idiot is incapable of binding himself by deed. *See post*, Idiot; Non Compos.

[5] All deeds entered into by infants, from which no apparent benefit can arise to them, are either absolutely void or voidable; that is, the law allows the infant when he comes of age to ratify or confirm, or else to avoid them. *See* Bond, vol. ii. p. 510; *post*, Exchange; Feoffment; Infant; Lease; Lease and Release; Partition; and Bingham on Infancy. See *Smith v. Kaye*, H. L. 1860.

[6] By the common law, the king can only grant and take by matter of record; but by 39 & 40 Geo. 3, c. 88, the king and his successors are enabled to convey all lands purchased with their privy purse, and also all such estates as shall come to them by escheat, in the same manner as a subject.

[7] Unsoundness of mind will not vacate a contract if it be unknown to the other contracting party, and no advantage be taken of the lunatic, especially where the contract is executed in whole or in part, so that the parties cannot be restored to their original position. *Molton v. Camroux* (in error), 4 Ex. 17; 18 L. J. Ex. 356, Ex. Ch. S. C. in court below, 2 Ex. 487; 12 Jur. 800; 18 L. J. Ex. 68. *Beavan v. M'Donnell*, 9 Ex.

(*k*) *Married Women.*[1]

(*l*) *Outlaws or Attainted Persons.*[2]

(*m*) *Partners.*

HARRISON v. JACKSON, 7 T. R. 207. S. P. BUCKLAND v. NEWSAM, 1 Taunt. 477. HALL v. BAINBRIDGE, 1 Man. & G. 42.

One partner cannot bind the firm by deed, unless a particular power be given for that purpose.[3]

It was in this case insisted, that one partner might bind his co-partners by deed.

Sed per Cur. The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest. But the power of

309. *Price v. Berrington*, 3 Mac. & G. 486; 15 Jur. 999. See *Jacobs v. Richards*, 18 id. 527, R. *Selby v. Jackson*, 13 L. J. Ch. 249, R. *See* Bond, vol. ii. p. 510. It must be specially pleaded. 28 T. T. 1853. Form B. & P. 354. An inquisition is only presumptive evidence of the lunacy between third persons. *Snook v. Watts*, 11 Beav. 105; 12 Jur. 444. *Faulder v. Silk*, 3 Camp. 126. If a party relies on a deed on the ground that it was executed during a lucid interval, he must clearly show that this was the case. *Creagh v. Blood*, 2 J. & L. 509. *Hall v. Warren*, 9 Ves. jun. 605, 611. As to the effect of partial insanity, id.; and see *Waring v. Waring*, 12 Jur. P. C. 947. Under what circumstances a court of equity will not interfere to set aside deeds executed by a party alleged to be a lunatic, see *Selby v. Jackson*, *supra*.

[1] In some instances, married women are expressly authorised by statute to execute and acknowledge deeds relating to real property. *See* Acknowledgment, vol. i. p. 128; *post*, Husband and Wife; Lease. So also there are certain customs, as well in the city of London as in other cities and places, whereby married women may bind themselves by deed enrolled; which customs are confirmed by 34 & 35 Hen. 8, c. 22. And it has long been settled that a married woman may execute a power, whether appendant, in gross, or simply collateral. 1 Roll. Abr. 329, pl. 12; 1 P. Wms. 149; 3 Atk. 711; 2 Ves. 191; Finch. 346; 1 Ch. Ca. 17. So where both an interest and an authority pass to the wife, if the authority be collateral to, and do not flow out of the interest, because then the two are as unconnected as if they were vested in different persons. 2 Ves. 191. And, as a *feme covert* may, without her husband, convey lands in mere execution of an authority or power, so she may in performance of a condition; as where land is vested in her on condition to convey to others. Sir W. Jon. 137. Otherwise in general the deed of a married woman is absolutely void. *See* Bond, vol. ii. p. 510; Husband and Wife.

If a husband abjures the realm, or is banished, he is thereby become *civiliter mortuus;* his wife is considered as a *feme sole*, and may act in all things as if her husband were naturally dead, and may of course become a competent party to a deed. *See post*, Husband and Wife.

[2] A person outlawed in any civil action may be a party to a deed, which will enure against himself and all others. But this, notwithstanding, shall not bar or exclude the king or other persons from the benefit of forfeiture, which is given and due to them by the outlawry. Shep. Touch. Pres. ed. 232. So persons attainted of treason or felony may give or grant their lands. A freehold interest is not divested out of an attainted felon until office found. Under a demise, therefore, by a felon after attainder, the lessee has a good title against all but the king and the lord of whom the land is held. *Doe d. Evans or Griffith v. Prichard*, 2 Nev. & M. 489; 5 B. & Adol. 765.

[3] But if both partners are present and one seal it is sufficient. *Ball v. Dunsterville*, 4 T. R. 313. Not even if the contract of partnership be under seal, if it do not contain a specific power to that effect (*see supra*), nor though the others afterwards acknowledge the authority. *Sleiglitz v. Egginton*, Holt, N. P. C. 141. The partner executing will, however, himself be bound. *Elliot v. Davis*, 2 B. & P. 338.

It would seem, nevertheless, that one partner can execute a valid release in the name of the firm. *Furnival v. Weston*, 7 Moore, 356. *Arton v. Booth*, 4 id. 192. *Bayley v. Lloyd*, 7 Mod. 250. *Ruddock's case*, 6 Co. 252. *Wallace v. Kelsall*, 7 Mee. & W. 264. But a covenant by one partner not to sue cannot be pleaded as a release in an action by both. *Walmsley v. Cooper*, 11 Ad. & E. 216. *See* Bond, vol. ii. p. 511. And where one of two partners procured the discount of a promissory note of the firm, on an agreement for a mortgage of shares belonging to the firm in certain ships and their freight, and of the policies of insurance effected by the firm on the shares; a mortgage deed was prepared, purporting to be made by both partners, but was only executed by the one. At the time of the execution of the deed one of the ships was lost: but this fact was then not known to the parties:— *Held*, that the security was binding on the firm, notwithstanding the execution of the deed by one partner only, and passed the insurance money, although the deed was not registered according to the Shipping Acts. *Ex-parte Bosanquet*, 1 De Gex, 432.

binding each other by deed is now for the first time insisted on. It has been however said, that if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed; but we deny that consequence, just as positively as the former, for a general partnership agreement, though under seal, does not authorise the partners to execute deeds for each other, unless a particular power be given for that purpose. *See* 2 Roll. Abr. (R.) pl. 3 & 4; Bac. Abr. Authority, cites Co. Litt. 486; Salk. 96; 2 B. & P. 338; 1 Taunt. 477; 10 East, 418.

(*n*) *Persons under Duress.*[1]

(*o*) *Persons Blind, Deaf, and Dumb.*[2]

(*p*) *Effect of Incompetent Person becoming Party to.*[3]

(B) *As to the Consideration.*

(*a*) *Want or Inadequacy of.*

A deed is good without a consideration.[4]

At common law, a consideration was not essentially necessary to the validity of a deed. The solemnity of the act carries with it sufficient evidence of the consideration. Plowd. 308; Bac. Read. 13; 17 Edw. 4, 4 b; 2 Atk. 150; 3 Burr. 1670; 7 T. R. 350; *ante*, p. 9, n. 2. But there are some deeds deriving their effect from the Statute of Uses; viz. a bargain and sale, and a covenant to stand seised to uses: to the first of which a pecuniary consideration, and, to the second, a good consideration, is absolutely necessary; otherwise they are void. *See* Bargain and Sale, vol. ii. p. 372; and *post*, Uses and Trusts.

(*b*) *Illegality of.*[5]

(*c*) *Immoral.*[6]

(*d*) *Future Illicit Cohabitation bad.*[7]

(*e*) *Past Illicit Cohabitation good.*[8]

(*f*) *In Restraint of Trade bad.*[9]

(*g*) „ *Marriage bad.*[10]

(*h*) *To procure Marriage bad.*[11]

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[1] All deeds, bonds, or grants made by persons under duress are voidable. 2 Co. Inst. 482; Shep. Touch. 233. Duress is defined to be where one is manifestly imprisoned or restrained of his liberty contrary to law, until he executes a deed to another. *See* Duress.

[2] In a party to a deed there must be two concurring circumstances; 1st, a legal capacity; and, 2dly, sufficient mental ability. Now it is impossible to suppose that the latter requisite can exist in the case of persons labouring under the three natural infirmities of blindness, deafness, and dumbness. But Perkins (sec. 25) says that a man born deaf and dumb may make a gift if he has understanding, but that it is hard to imagine how such an one could have understanding; for, says he, a man ought to have his perfect understanding by his hearing; yet, nevertheless, some persons have their understanding by their sight.

A person who was born deaf and dumb, who signified by signs that she understood what she was about to do, was allowed to levy a fine of lands. Carth. 53. *See* also Deaf and Dumb, vol. iii. p. 555.

[3] *See* Bond, vol. ii. p. 511, n. 3.

[4] And a deed is open to the objection of being founded upon a bad consideration. *Bunn v. Gay*, 4 East, 190. Under special circumstances it may be shown that all the consideration was not paid. *Bottrell v. Sumners*, 2 Glyn & J. 407. And although evidence is not admissible to show, contrary to the terms of a deed, that by the contract the consideration was not to be paid, as stated in the deed, but in goods; yet such evidence is admissible to show that in fact the consideration was so paid, and that goods were accepted in payment. *Smith v. Battams*, 26 L. J. 232. *See* Bond, vol. ii. p. 515.

[5] Although the want or inadequacy of the consideration for a deed cannot be impugned by extrinsic evidence, yet an illegal consideration (whether the illegality be at common law or by statute) may be pleaded in bar. *See* Bond, vol. ii. p. 516.

[6] A deed cannot be supported when the consideration is *contra bonos mores*. *See* Bond, vol. ii. pp. 516, 517.

[7] *See* Bond, vol. ii. p. 516.

[8] Id. p. 517.

[9] Id. p. 517.

[10] Id. p. 517.

[11] Id. p. 518.

(*i*) *To do any Act Illegal either at Common Law or by Statute.*[1]

(*j*) *Mode of taking Advantage of Illegality.*[2]

(C) *Must be in Writing or Printing.*[3]

(D) *The Character and Language to be adopted.*[4]

(E) *Must be Written or Printed on Paper or Parchment.*[5]

(F) *Stamp on.* *See post*, Stamp.

(*a*) *Generally.*

A deed must have the regular stamp required by the legislature or it cannot be given in evidence, or made available in any manner whatever. 37 Geo. 3, c. 19, s. 3. A deed not otherwise charged, nor expressly exempted, requires a 35*s.* stamp, with a progressive duty on the number of words above 1080, if the whole number amounts to 2160.

The general effect of the 13 & 14 Vic. c. 97, is to charge 10*s.* on each skin of 1080 words whenever the progressive duty comes into operation. And by sect. 11 the words of any document, indorsed, annexed, incorporated, or referred to, are not to be counted, if it be itself liable to duty and duly stamped.

The stamp acts affecting deeds in general are the 55 Geo. 3, c. 184, and 13 & 14 Vic. c. 97.

(*b*) *In Particular Cases.* *See* Analysis, p. 4.

(*c*) *When Stamp may be affixed.*[6]

(*d*) *Effect of Alteration in, and Executing in Blank.*[7]

(G) *Deed should be Read before Execution.*[8]

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[1] *See* Bond, vol. ii. p. 518. [2] Id. p. 518.

[3] Id. p. 518; 2 Bl. Com. 297; 5 B. & Ald. 234.

[4] Any character or language may be adopted to give effect to a deed (Shep. Touch. 55), unless in those instances which fall within the scope of the 4 Geo. 2, c. 26, which requires bonds and proceedings in the courts to be in English. It has been held that a deed may be written on a leaf in a book, or in pencil (*Geay v. Physic*, 5 B. & C. 234), which, if sealed and delivered, may be a good deed. Cro. Eliz. 613; 2 Roll. Abr. 25, z 2. And every deed need not be on a separate piece of parchment. *Salter v. Kidyley*, Carth. 76.

[5] *See* Bond, vol. ii. p. 507, n. 5.

[6] All deeds (with the exception of bills of sale and deeds of arrangement or composition in bankruptcy) can be stamped within two months from the date without penalty; and after two months, but before the expiration of twelve months from date, without penalty, if sufficient proof be given that the deed was not stamped previously to being executed by reason of accident, mistake, inadvertency, or urgent necessity, and without any design to delay or avoid the payment of the duty. A memorial to the Board is requisite. And in all cases where the date of a deed has been altered, or is written upon an erasure, a memorial must be presented, stating the circumstances under which the alteration or the erasure occurred.

Instruments executed abroad may be stamped without penalty "within two months after their arrival in this country, and proof made of the fact." 13 & 14 Vic. c. 97, ss. 12, 13.

Bills of sale must be stamped and registered within twenty-one days. 17 & 18 Vic. c. 36, s. 1; and deeds under the arrangement clauses of the Bankruptcy Act, 1860, within twenty-eight days from the date of execution.

[7] A material alteration in a deed, after it is complete and executed, renders a fresh stamp necessary; but not so if the alteration be immaterial, or according to the original intent of the parties. *Cole v. Perkin*, 12 East, 471. *Byrom v. Thompson*, 11 Ad. & E. 31. Tilsley on Stamps, 177, 357. *Sawtell v. Lowdon*, 5 Taunt. 359. As to executing deed in blank, *see Ex-parte Swan*, 30 L. J. C. P. 113.

[8] If the party who is to execute the deed be blind, or illiterate, and desires to hear it read, it must be read accordingly; for if, upon such desire, it be not done, and he afterwards seal and deliver it, it does not constitute a good deed. Com. Dig. Fait. B. 2; 2 Bl. Com. 304; 2 Rep. 3; id. 9; 12 id. 90; Stra. 159. But it seems, that if the party execute the deed without desiring to hear it read, he shall not avoid it whether he be lettered or unlettered; for it was his own fault not to demand the reading thereof. 2 Roll. Ab. Faits. s. 4; Moor, 184; 2 Rep. 9 b. A deed should always be read by or to the party before execution, and if read falsely, it will be void. Shep. Touch. 561;

(H) *It must be Sealed.*[1] *See* Bond, vol. ii. p. 507.

A deed must be sealed, that is, an impression must be made on the wax or other substance constituting the seal. Shep. Touch. 57. It may be done with any instrument which will make a print. If there are several grantors named in the deed, one piece of wax will serve for all, if every one put his seal upon it, or if another do the same for them. Perkins, sec. 134; 4 Cruise, Dig. 28. And, therefore, if another man seal a deed, and take it up after it is sealed, and declare it is my deed, it is a good deed of mine. 4 Bart. Elem. 378; Shep. Touch. 78; Co. Litt. 231, a; 4 Roll. Rep. 63.

(*a*) *When Seal will be presumed.*[2]

(I) *Signing, though usual, is not necessary.*[3]

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2 Bl. Com. 304. The not reading a deed to the grantor, neither in the draft nor in the engrossment, had great effect with Lord Hardwicke in setting it aside. *Bennet v. Vade*, 2 Atk. 327.

[1] The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians, in the earliest and most sacred records of history (1 Kings, xxi.; Dan. vi.; Esth. viii.); and in the book of Jeremiah (xxxii.) there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase. In the civil law, also (Inst. 2, 10, 2 and 3), seals were the evidence of truth, and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors they were not much in use in England; for though Sir Edward Coke (1 Inst. 7) relies on an instance of King Edwin's making use of a seal about a hundred years before the Conquest, yet it does not follow that this was the usage among the whole nation; and, perhaps, the charter he mentions may be of doubtful authority, from this very circumstance of being sealed, since we are assured by all our ancient historians that sealing was not then in common use. The method of the Saxons was, for such as could write, to subscribe their names; and, whether they could write or not, to affix the sign of the cross; which custom is still continued by illiterate persons. Indeed, this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters. Seld. Jan. Angl. l. 1, s. 42. In like manner, and for the same insurmountable reason, the Normans, at their first settlement in France, used the practice of sealing only, without writing their names; which custom continued when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England. Lamb. Archeson. 51. At the Conquest, the Norman lords brought over to this kingdom their own fashions, and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross (Ingulph.); and in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals. The impressions of these seals were sometimes a knight on horseback, sometimes other devices; but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the First, who brought them from the crusade in the Holy Land, where they were first invented, and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained. This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books, that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds, "sealed and delivered," continues to this day, notwithstanding the stat. 29 Chas. 2, c. 3, before-mentioned revives the Saxon custom, and expressly directs the signing in all grants of lands and many other species of deeds, in which, therefore, signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other. 3 Lev. 1; Stra. 764.

[2] A person who has delivered a deed which purports to have been sealed by him, cannot be afterwards permitted to assert that he did not seal it. The sealing will be presumed after being confirmed by the formal act of delivery. So, in some cases, courts of equity will presume the execution of a deed, as where it has been recited in other deeds, and acted upon as a good and valid instrument, and the charges for the execution thereof have appeared in the books of a deceased solicitor, &c. 11 Ves. 64; *see* 17 id. 134.

[3] It is not absolutely necessary to the validity of a deed that the party should affix his name or cross, or any other signature or mark. It is sufficient if it be duly sealed and delivered. It is, however, an additional

(*a*) *Under Power of Appointment great Strictness is required.*[1]

(*b*) *Under Statute of Frauds.* *See post*, Statute of Frauds.

(*c*) *Effect of Signing and Sealing.*[2]

(J) *Delivery of is Indispensable.*

Cloud v. Nicholson, 8 Mod. 242.

The delivery of a deed is in general indispensable.[3]

Two were jointly bound in a bond, and a verdict was obtained in an action against one alone. A motion was made to arrest the judgment for this cause. The court were of opinion, that as it did not appear upon the record that the other obligor delivered the bond, it was the bond of the defendant alone, even if it had appeared that the other had signed and sealed it; for it is not his deed without the delivery. *See* 2 Saund. 62, b, n; Perk. sec. 137.

(*a*) *As an Escrow.*[4]

(*b*) *Effect of Delivery as an Escrow.*[5]

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security and convenience with regard to the *proof*, which ought never to be dispensed with. Shep. Touch. 60; 17 Ves. 459; and *see* Bond, vol. ii. p. 507.

A deed signed by a third person at the request and in the presence of an illiterate person is well executed. *Rex v. Longnor*, 1 Nev. & M. 576.

[1] Where a deed is executed in pursuance of a power created for that purpose, all the formalities required by the deed creating the power, whether they be signing, sealing, attesting, or delivering, must be strictly complied with, otherwise such execution will in most cases be invalid. *See* Sugden on Powers. *Post*, Powers.

[2] Where a deed runs in the first person, signing and sealing will make a man a party, though he be not named therein. *Nurse v. Frampton*, 1 Salk. 214; 1 Ld. Raym. 28.

[3] *See* also *Owen v. Bowen*, 4 C. & P. 93; Bond, vol. ii. p. 507, n. 8. It may be delivered to a third party (*Lloyd v. Bennett*, 8 C. & P. 124), even though not the agent for the party for whom delivered. *Garnons v. Knight*, 5 B. & C. 671. It may also be delivered by an agent, so long as such agent is duly invested with authority for that purpose. 2 Rep. 4, b. But it seems that the deed of a corporation needs no delivery, because the affixing of their common seal gives effect and perfection to the deed, without any delivery. *Vide* Corporations, vol. iii. p. 263. But it must be observed, that although the affixing of their common seal will have the effect of dispensing with a formal delivery, yet the act of affixing the seal must be absolute, and no reservation can be annexed to it. *Derby Canal Co. v. Wilmot*, 9 East, 360.

[4] The delivery of a deed may, as we have seen, be either absolute, that is, to the grantee himself, or to some person for him; or else conditional, that is, to a third person, to keep it till something is done by the grantee: in which last case it is not delivered as a deed, but as an escrow, that is, a scrowl in writing, which is not to take effect till the condition is performed, when it becomes a good deed. 2 Bl. Com. 306, 307.

The words made use of in the delivery of a deed as an escrow should be apt and proper. The proper words are to this effect:— "I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he deliver to you 20*l.* for me;" or upon any other condition then mentioned (Shep. Touch. 57, 58); otherwise the deed takes effect presently, and the party is not bound to perform the condition. 2 Roll. Abrid. Fait; Co. Litt. 36, a; *see* also Bond, vol. ii. p. 508, n. It is not necessary, however, that the delivery of the deed as an escrow should be by express words, if from the circumstances attending the execution it can be inferred that it was delivered not to take effect as a deed until a certain condition were performed. *Bowker v. Bardekin*, 11 Mee. and W. 128. *Nash v. Flynn*, 1 J. & L. 162 (Irish). *Millership v. Brookes*, 29 L. J. Ex. 369.

The delivery of a deed as an escrow must be to a stranger; for if a person delivers a deed to the party himself, to whom it is made, as an escrow, upon certain conditions, the delivery is absolute, and the deed will take effect immediately: nor will the party to whom it is delivered be bound to perform the conditions. 11 Mee. & W. 145; Co. Litt. 36, a; 9 Rep. 137, a; Shep. Touch. 59; Moore, 642, 696; Hob. 246. *See post*, Escrow.

[5] Where a deed is delivered as an escrow — that is, delivered to a third person to hold until some act is done or conditions fulfilled — it is of no force till the condition is performed. Shep. Touch. 59. But if either of the parties die before the condition is performed, and afterwards the condition is fulfilled, the deed becomes good and takes effect from the first delivery. 3 Rep. 35, b; 2 Roll. Abr. Faits, id. 2; 4 Cruise Dig. 31. And where in an action upon an apprenticeship deed, by the master against the father, the declaration stated that the indenture of

(*c*) *Incapacity at the Time of Delivery.*[1]

(*d*) *Deeds in general cannot be delivered Twice.*[2]

(*e*) *Effect of Delivery on previous Informalities.*[3]

(K) *Attestation of.*[4]

VII. The Formal Parts of a Deed.

(A) *Date of.*

(*a*) *Not Essential.*

Ford v. Grey, 6 Mod. 44.

The accurate dating of a deed is not essential.[5]

A deed bore date 22 Car. 2, *anno domini* 11671. This inaccuracy was objected to.

Sed per Cur. A deed may be good, although it mention no date, or hath a false date, or even if it hath, as in this case, an impossible date, provided the real day of its being dated, or given, that is, delivered, can be proved.

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apprenticeship was sealed by the defendant and his son, and that during the term the son absented himself, and refused to continue in the service. *Pleas*, that the indenture was not the deed of the defendant; that it was not the deed of the plaintiff; that it had not been executed by the plaintiff; and that it had been executed by the defendant and delivered to one W. only as an escrow. It appeared that, when the defendant executed the deed at the office of W., the attorney who prepared it (the plaintiff not being present), he requested that the plaintiff should not be allowed to execute it until an arrangement was made as to expenses; and W. made a memorandum on the deed to that effect, and acted upon it, declining to allow plaintiff to execute it when he called to do so, and he never had executed it. It was held, that though the jury found the defendant intended that the deed should bind him, and deliver it as a complete deed, the evidence showed that the deed was delivered as an escrow, and that the action could not be maintained. *Millership v. Brookes, supra.*

[1] When a person who delivers a deed as an escrow has not power or ability in law at that time to make the deed, and before the second delivery he attains such power, then the deed is void. But when the person, at the first delivery, has power and ability in law to contract, but cannot perfect it till an impediment be removed, then, if the impediment be removed before the second delivery, the deed is good. 3 Rep. 35, b; Cro. Eliz. 448.

[2] In general, the same deed cannot be delivered twice; for if the first delivery is effectual, the second must be void. But where a married woman delivers a deed, and after the death of her husband delivers it again, the second delivery is good, because the first was void. Perk. sec. 134, 154; Bro. Ab. Faits, pl. 28; Co. Litt. 48, b; Cro. Eliz. 483; 2 Roll. Ab. Faits, N. pl. 102; Moore, 300.

[3] In the case of *Arnote v. Breame* (6 Mod. 244; S. C. 1 Salk. 76; S. C. 2 Ld. Raym. 1076), the validity of an award was objected to because it bore no date. But the court said, there is no weight in the objection. The award is alleged to have been made on such a day, which appears to be within the time; and if no date be set out, it shall be intended it had none; and then it is good from the delivery. *See* also 2 Co. Inst. 674; Moore, 40, pl. 128. Still, however, if a deed has a date, the delivery shall always be intended to have been made on that day, and there is not any occasion to aver that it was made at another day; and if the delivery was made on a different day, the party who would take advantage of this must plead and prove it specially. Cro. Jac. 263; Cro. Eliz. 773; 3 Lev. 348; 4 East, 477; 2 Salk. 462.

[4] Attestation by witnesses was never essential to the deed, but only constituted evidence of its authenticity. *Garrett v. Lister*, 1 Lev. 25; 1 Keb. 15; also Attestation of Deeds, vol. ii. p. 3. And if the attesting person was unable to prove the execution, any other person might prove the handwriting, and the sealing and delivery presumed. *Grellier v. Neale*, Peake, 147. And now by C. L. P. Act, 1854, s. 26, it is unnecessary to call the attesting witness to an instrument to the validity of which no attesting witness is necessary. Where, however, as in the case of a power, an attesting witness is requisite, the old law as to attesting witnesses applies. *See* Attesting Witness, vol. ii. p. 3.

[5] *See* also *Cockell v. Gray*, 6 Moore, 483; 3 B. & B. 186. Where by a deed made on the 29th of August, 1832 (being leap year), the plaintiff covenanted to pay a sum of money, with interest, on the 29th of February next ensuing; the words, "29th of February then next," were construed to mean the 29th of February in the next leap year. *Chapman v. Beecham*, 3 Gale & D. 71; 3 Q. B. 723. Executing with blanks, see *In Re Swan*, 30 L. J. C. B. 113; 7 C. B. 400, N. S.

TAYLOR v. HORDE, 1 Burr. 60.

Per Cur. If two deeds bear the same date, both of which form but one transaction, that one shall be presumed to have been executed first which will give effect to the whole, and best support the clear meaning and evident intention of the parties.[1]

(B) *Description of the Parties.*[2]

(C) *Recitals in what.*[3]

(*a*) *When Party Estopped by.*

SHELLY v. WRIGHT, Willes, 9.

It was recited in the condition of a bond that the obligor had received divers sums of money for the obligee, which he had not brought to account; but acknowledged that a balance was due to the obligee.

A general recital in a deed will not conclude, but a party may be estopped by the recital of a particular fact.[4]

Per Cur. A recital does not conclude, because it is no direct affirmation; yet a party may be estopped by the recital of a particular fact. The defendant cannot, therefore, in this case, say that he had not received any money for the use of the obligee.

PEARSE v. MORRICE, 4 Nev. & M. 48; S. C. 2 Ad. & E. 84.

By a local act trustees had power to make leases, provided the lease was duly executed by the trustees, &c., and the rent reserved payable to the treasurer, &c. of the trustees, &c., or in default the lease to be void.

To make a recital in a deed an estoppel, it must, it seems, form part of the deed.

The court said, that *in cujus rei testimonium* is no part of the deed, and that the execution of a counterpart by the defendant, in which it was alleged that to one part of which said indenture the said trustees had affixed their hands

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[1] Deeds take place according to the priority of their dates, or times of delivery, it being a maxim of the common law, *qui prior est tempore, potior est in jure.* There are many cases where a purchaser or mortgagee may, however, by obtaining an assignment of a prior legal estate, obtain a preference over a person claiming under a prior deed; but this is because the deed, by which such prior legal estate was created, is antecedent in point of time to both the other deeds; and, in consequence of the Register Acts, a deed duly registered will take place of a prior deed not registered. *See* 4 Cruise's Dig. 276.

[2] The parties to a deed ought to be described by their proper Christian and surnames, professions, and places of residence. But the reputed name is sufficient if it clearly identifies the person. 1 Inst. 3 a; 4 Bart. Elem. 387; Cro. Jac. 374; Carth. 440. As to what is a sufficient description of parties in bills of sale, and the affidavits required to be filed with them under the 17 & 18 Vic. c. 36, s. 1, *see* Bill of Sale, vol. ii. p. 500.

[3] A recital in a deed is "the key to what comes afterwards" (*Moore v. Magrath*, Cowp. 9), and is the narration of such facts, assurances, and agreements, as are necessary to explain the grantor's title and the motives and reasons upon which the deed is founded. *See post*, Recital.

[4] A statement of a particular fact in the recital will, in general, operate against the parties to the instrument, and they are estopped from denying it. *See* Bond, vol. ii. p. 513. *See* also *Beckett v. Bradley*, 7 Man. & G. 994; 8 Scott, N. R. 843; 2 D. & L. 856. *Wiles v. Woodward*, 5 Ex. 557; 20 L. J. Ex. 261. *Hills v. Laming*, 9 Ex. 256. It must be remembered, however, that though where a recital in an instrument under seal is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all, whether they be parties to the deed by executing it, or only by accepting it. Yet, when it is intended to be the statement of one party only, the estoppel, though all may have executed the deed, is confined to that party; and the intention of the parties is to be gathered from construing the instrument. *Stroughill v. Buck*, 14 Q. B.; 14 Jur. 741; 19 L. J. Q. B. 209. The estoppel to be good, must be certain to every intent, and if one state of facts is admitted which will satisfy the recitals in a particular sense, the party will not be precluded from showing additional facts inconsistent with them in another. *Kepp v. Wiggett*, 10 C. B. 35. If a *feme covert* make a deed, and therein recite that she is a *feme sole*, he will not be concluded, but the deed will be void. Perk. s. 41; 14 Jur 1137; 20 L. J. C. P. 49. And an estoppel to be taken advantage of must be pleaded. *Young v. Raincock*, 7 C. B. 310; 13 Jur. 539; 18 L. J. C. P. 193. *See* Acquiescence, vol. i. p. 128, n.; Admission, id. 195; Estoppel; Pleading.

and seals, could not estop the defendant from calling on the plaintiffs to prove that the lease was executed by the trustees.

(*b*) *Construction of.*[1]

(*c*) *Where Evidence of Facts stated.*[2]

(*d*) *Consequences of a Mis-recital.*[3]

(D) *The Consideration and its Acknowledgment.*[4]

(E) *The Grant or Release.*[5]

(F) *Subject-matter of the Deed.*

(*a*) *Description of must be Precise.*[6]

(*b*) *Particular Description after general will Restrain.*[7]

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[1] The plain effect of the operative part of a deed cannot be cut down or controlled by the recitals; but where the words are of doubtful meaning the recitals and other parts of the deed may be looked at and used as a test to discover the intention of the parties, and to fix the true meaning of the words. *Walsh v. Trevanion*, 15 Q. B. 734; 14 Jur. 1134; 19 L. J. Q. B. 458. *Holliday v. Overton*, 14 Beav. 467; 16 Jur. 346; 21 L. J. Ch. 769. Affirmed on appeal. 16 Jur. 751. And *see* Bond, vol. ii. p. 513.

[2] Where it can be proved that a deed was actually executed and is lost, the recital of it in another deed is evidence of it. *Ford v. Gray*, 6 Mod. 44; 1 Salk. 285. And the recital in a family conveyance by a trustee is evidence of parentage. *Slaney v. Wade*, 7 Sim. 595. And the recital in a deed is always evidence against him who executed the deed, or any person claiming under him (Com. Dig. Ev. B. 5), although not taken advantage of by way of estoppel. *See* also *Bradley v. Bradley*, 5 C. B. 396.

But a recital that a former lease has been surrendered will not amount to a surrender within the third section of the Statute of Frauds. *Roe v. Archbishop of York*, 6 East, 86. So, if the obligation of a bond be to pay 10*l.*, which is for rent of certain lands, this recital, that the 10*l.* is for rent, will not make it rent; and, therefore, the entry of the obligee into those lands will not preclude him from recovering on the bond. *Saint John v. Diggs*, Hob. 130. So, if one recite an estate made for a term of years, and then grant over that term to another, and mistake the recital, this mistake may make all void. Shep. Touch. 76, 77. Neither will a recital in a will, that the testator had devised to A. B. such an estate, where, in truth, he had not, operate as a devise. *Wright v. Wyvell*, 2 Vent. 56. *Banfield v. Popham*, 1 P. Wms. 54. *Right v. Hamond*, 1 Stra. 427: but see *Bibbin v. Walker*, Amb. 661; and *Smith v. Fitzgerald*, 3 Ves. & B. 2.

[3] A mis-recital of a former grant will not invalidate a deed. As where a person made a lease *habendum* from the feast of Purification; afterwards reciting the lease as granted from the feast of the Annunciation, he granted the reversion: it was held good. Hob. 128. So it was held that a mis-recital of the estate of the grantor in the land, or of the date of the deed by which he acquired the land, did not invalidate a deed. *See* 3 Leon. 135; Cro. Jac. 127; Skin. 543.

[4] After the recital comes the witnessing part, which begins with a statement of the consideration; and, if it is a pecuniary one, the payment of it is mentioned, the grantor acknowledges the receipt of it, and releases the grantee from its payment. It is also usual and proper to endorse a receipt for the consideration on the back of the deed, signed by the party who receives the money.

[5] The next thing is the grant or release by which the lands are transferred. The technical words, where necessary, by which the transfer is made, differ according to the different kinds of conveyance. *See* 4 Cruise's Dig. 280.

[6] The grant or release is immediately followed by the description of the thing granted, which cannot be too minute and accurate. Everything intended to be conveyed should be particularly mentioned, and set in its proper order, such as honours, manors, meadows, messuages, cottages, mills, dovehouses, gardens, orchards, lands, meadows, pastures, woods, underwoods, furzes, heaths, moors, rents, commons, fishings, warrens, mines, advowsons, tithes and portions of tithes, oblations, hundreds, ways, ferries, services, &c.; all which should be described by their situation, county, hundred, tithing, and vill, hamlet, and parish, number of acres and boundaries, and in whose tenure and occupation. *See* id. 281. And if, for instance, a deed conveys a prospective interest, it is requisite that the subject-matter of such interest be executory at the time the deed appears to have been executed. *Crisp v. Price*, 5 Taunt. 548.

[7] When the lands are described generally, and afterwards a particular description is added, that shall restrain the general words: thus, if a man grants all his lands in D., which he has by the gift and feoffment of J. S., nothing will pass but lands of the gift and feoffment of J. S.; but if he had granted all his lands in D. called N., which was the estate of J. S., then the lands called N. shall pass, though they never were the estate of J. S. *See* Bro. Abr. Grants, 92.

And even where there is no recital, general

(*c*) *Erroneous Addition will not Vitiate.*[1]

(*d*) *In Particular Cases.* *See* Analysis, p. 5.

(G) *Clause relating to Title-Deeds.*[2]

(H) *Exceptions.*[3]

(I) *Habendum, what.*[4]

(*a*) *Effect of on the Premises.*[5]

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words will be qualified by a subsequent special provision, unless full effect can be given to both parts of the instrument without modifying or altering either. *Rigby v. Great Western Railway*, 4 Ex. 220, 229. *Edwards v. Rees*, 7 C. & P. 340. *Sicklemore v. Theselton*, 6 M. & S. 9. *Wood v. Rowcliffe*, 6 Ex. 407.

[1] But the rule mentioned in the preceding note must be taken with the qualification expressed in the maxim, "*falsa demonstratio non nocet;*" which means, that a subsequent erroneous addition will not vitiate a previous adequate and sufficient description. *Morell v. Fisher*, 4 Ex. 591. *Lewellyn v. Earl of Jersey*, 11 Mee. & W. 183, 189. *Doe d. Hubbard v. Hubbard*, 15 Q. B. 227, 245; Bac. Tracts, 102; Dyer, 376; Plowd. 191; 3 Rep. 9; Hob. 171. But if there be an error in the principal description of the thing intended to be granted, though there be no error in the addition, nothing will pass. Bac. Tracts, 105; 3 Rep. 9; Hob. 172.

[2] The next clause usually inserted in the premises of a deed, where the fee-simple is conveyed, is, "together with all deeds, evidences, and writing, &c. relating to the premises conveyed," &c. For, although in general deeds follow the land, and a purchaser in fee, without warranty, is entitled to them, though not particularly granted, yet it is not amiss to insert this clause; and in conveyances to uses it ought never to be omitted, because in that case the deeds will otherwise pass to the releasees to uses, not to the *cestui que use*. *See* 4 Cruise's Dig. 288; 1 Inst. 6, a.; 1 Saund. 112.

[3] An exception is a clause of a deed, whereby the feoffor, donor, lessor, &c. doth except somewhat out of that which he had granted before by the deed. *See* Plowd. 361, 195; Dyer, 59; Perk. sec. 625; Co. Litt. 47; 3 Hen. 6, 45.

An exception must be part of the thing previously granted, and not of any other thing. Dyer, 59, 57; Plowd. 301, 67, 153, 370. *Doctor & Student*, 98. It must be severable in its nature from the thing granted. Co. Litt. 1520; Shep. Touch. p. 79. It must be a thing which the grantor can retain. 5 Co. Litt. 12, b. It must be a particular thing out of a general thing, and not a particular thing out of a particular one, as if one grant White Acre and Black Acre, excepting White Acre, the exception is void. Co. Litt. 47; Plowd. 53.

The general mode of construing deeds in which there are exceptions, is to let the exceptions control the instrument so far as the words of it extend, and no further; and then, upon the case being taken out of the letter of the exception, the deed operates in full force. *Bowring v. Emslin*, 7 T. R. 216, n; *see* 2 Platt on Leases, 37.

[4] The object of the *habendum* being to limit the certainty of the estate granted, no person can take an immediate estate by the *habendum* of a deed where he is not named in the premises; for it is in the premises of a deed that the thing is really granted. 2 Rep. 55, a; 2 Roll. Abr. 67; *sed vide* 1 Inst. 7, a. n. 3; *see* 2 Platt on Leases, 47, 48.

So, nothing can be limited in the *habendum* of a deed which has not been given in the premises; because, the premises being the part of a deed in which the thing is granted, it follows that the *habendum*, which is only used for the purpose of limiting the certainty of the estate, cannot increase the gift: for, in that case, the grantee would, in fact, take a thing which was never given to him. 2 Roll. Abr. 65; Shep. Touch. 76.

[5] The general rule is that, where there is any apparent inconsistency between the premises and the *habendum*, it shall be construed so as to give effect to the whole, if possible; but if this cannot be done, the greatest regard shall be had for the premises, and the *habendum* shall be considered repugnant and void: as, if lands be given in the premises to one and his heirs, *habendum* to him for life, this *habendum* is void; because it is repugnant to what is already expressed in the premises. Wood's Inst. 229; Cro. Jac. 563. But, if a man gives lands in the premises to another and the heirs of his body, *habendum* to him and his heirs for ever, he will have an estate tail and a fee-simple expectant thereon. Co. Litt. 21, a.; Cro. Jac. 476; *sed vide* 2 Roll. Abr. 19; *see* also 3 Rep. 23. But where part of the words in the *habendum* are contradictory to those in the premises, and part explanatory, the contradictory part only need be rejected. *Doe d. Timmis v. Steele*, 4 Q. B. 663; *see* 2 Platt on Leases, 77.

Where the premises and the *habendum* of a deed are equally clear and explicit, the former will not be controlled by the latter, but both will be allowed to have an operation, it being a rule of law that a deed shall be construed in such manner that each part of it may be effectual if they can stand together. Thus, if lands are given in the premises to the person and the heirs of his body, *habendum* to him and his heirs, he will take an estate tail, with a fee-simple expectant thereon. 2 Rep. 55; 9 id. 476. *Carter v. Madgwick*, 3 Lev. 339. The *habendum* will sometimes explain and enlarge

(J) *Reddendum or Reservation, what.*[1]

(*a*) *Requisites of.*[2]

(*b*) *Will be Construed most Strongly against the Grantor.*

SMITH v. MAPLEBACK, 1 T. R. 441.

It will generally be taken most strongly against the grantor.[3]

There was in this case an agreement that a lessor should have certain premises as mentioned in the lease, and should pay a particular sum *over* and *above* the rent annually towards the good-will to be paid by such assignee. The court held that this was not a sufficient reservation of rent, as it was not reserved by way of rent, but was intended as a payment of a sum in gross; for the lessee was to hold on the terms mentioned in the lease, and to pay 8*l.* 10*s.* *over* and *above* the rent annually reserved; and this could only mean a sum to be paid in gross, and not as rent.

(K) *As to the Conditions.* *See* Analysis, p. 5.

(L) *Clause of Warranty.*[4]

(M) *As to the Covenants.* *See* Analysis.

(N) *The Conclusion.*[5]

VIII. REGISTRATION OF DEEDS.

(A) *The Registration Statutes, what.*[6]

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the premises (Perk. sec. 174; Co. Litt. 183, b.); and it will sometimes abridge them (*Pilsworth v. Pyet*, Sir T. Jones, 4); but in these cases it is declaratory, and not repugnant.

[1] The next formal part of a deed is the *reddendum*, or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted.

[2] The usual words to create a reservation are *yielding*, *paying*, and such-like. But other words may be sufficient. Co. Litt. 47, a. n. 7; Cro. Car. 207; Hard. 325. It may be of money, cattle, corn, &c. Shep. Touch. 80; *see post*, Rent. It must not be repugnant to the grant. Bro. Ab. Reservation, pl. 46; Co. Litt. 142, a. It must be of such a thing as the grantor may distrain. Co. Litt. 47, a. n. 1; 10 Co. Rep. 107, b.; Co. Litt. 143, a. It must be reserved to the grantor, and not to a stranger, though it is said to be otherwise in the case of the king. Co. Litt. 143, b. 2; Roll. Abr. 447; 2 Platt on L. 82.

[3] Hence it should be distinctly and accurately expressed. *Moore v. Plymouth*, 1 B. Moore, 346; 7 Taunt. 614.

[4] Next may follow the clause of warranty, whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted. *See* 2 Bl. Com. 300.

[5] Lastly comes the conclusion, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly or by reference to same day and year before-mentioned (*see* 2 Bl. Com. 304), and may be said to comprise all that follows after the covenants, such as the clause "in witness whereof," &c. the signing, sealing, and attestation. These topics have been already inquired into.

[6] By the common law, every deed took place according to the priority of its date or delivery; in consequence of which purchasers and mortgagees were frequently defrauded by means of prior conveyances with which they were unacquainted. To remedy this inconvenience in certain parts of the kingdom, several acts of parliament have been made, called the Register Acts.

The first of these is the statute of 2 & 3 Anne, c. 4, by which it is enacted that a memorial of all deeds and conveyances which, after the 29th day of September, 1704, shall be made and executed, of or concerning, and whereby any honours, manors, lands, tenements, or hereditaments, in the West Riding of the county of York, may be any way affected in law or equity, may, at the election of the party or parties concerned, be registered. And that every such deed or conveyance that shall at any time after the said day be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof shall be registered, as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim.

By the statute of 6 Anne, c. 35, similar regulations are made for registering all deeds and conveyances that may affect any honours, manors, &c. in the East Riding of the county of York, or the town and county of the town of Kingston-upon-Hull.

By the statute 7 Anne, c. 20, corresponding regulations are made for registering all deeds

(B) *To what Deeds the Statutes apply.*[1]

(C) *Effect of Registering.*[2]

(D) *Time of Registering.*[3]

(E) *The Memorial of Registry.*

(*a*) *Its Contents.*

Memorial is to be directed to the registrar of the office, signed by the grantor and attested.

By the 7th sect. of 2 & 3 Anne, c. 3, which is repeated in the other acts, it is enacted, "that all and every memorial, so to be entered or registered, shall be put into writing on vellum or parchment, and directed to the register of the said office; and, in case of deeds and conveyances, shall be under the hand and seal of some or one of the grantors, or some or one of the grantees, his or their guardians or trustees, attested by two witnesses, one whereof to be one of the witnesses to the execution of the deed or conveyance mentioned in the memorial."

What the memorial is to contain.

By the 8th sect. it is further enacted, "that every memorial of any deed or conveyance shall contain the day of the month and the year when such deed or conveyance bears date, and the names and additions of all the parties to such deed or conveyance, and of all the witnesses to such deed or conveyance, and the places of their abode, and shall express or mention the honours, manors, lands, tenements, and hereditaments contained in such deed or conveyance, and the names of all the parishes, townships, hamlets, precincts, or extra-parochial

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and conveyances that may affect any honours, manors, &c. in the county of Middlesex.

By the statute of 8 Geo. 2, c. 6, similar requirements are made for registering all deeds and conveyances that may affect any honours, manors, &c. in the North Riding of the county of York.

By the 22nd section of this last statute, reciting that deeds had often been destroyed by fire and other accidents, it is enacted that any person having or claiming title to any honours, &c. in the said North Riding, may register at full length in the said register office, all deeds, writings, and conveyances, under which such title shall be claimed, and that all copies of such entries and inrolment of such deeds, &c., signed by the register or his deputy, shall be good evidence of such deeds, &c. destroyed by fire or other accident. And by the 24th section it is enacted that every such inrolment shall be deemed to be the entry of a memorial thereof pursuant to this act, and shall have the same force and effect in relation to all subsequent deeds.

By 17 & 18 Vic. c. 36, s. 1, bills of sale of personal chattels will be void, unless same, or a copy thereof, be filed within twenty-one days, in like manner as warrants of attorney; and by sect. 2, the defeasance or condition of every bill of sale is to be written on same piece of paper. *See* Bills of Sale.

[1] By the 16th sect. of the 2 & 3 Anne, it is provided, that this act shall not extend to any copyhold estates, or to any leases at a rack-rent, or to any term not exceeding twenty-one years, when the actual possession and occupation goes along with the lease. The same exception is made in the 6th Anne; and by the 17th sect. of 7 Anne, it is provided, that the act shall not extend to copyholds or leases at rack-rent, or leases not exceeding twenty-one years, where the possession goes with the lease, or to any Chambers in Serjeants' Inn, the Inns of Court, or Inns of Chancery, or to any messuages, lands, or tenements in the City of London. The same exception as to copyholds and leases, made in the above act, is also repeated in the 8th Geo. 2.

The statute applies to the execution of a power of appointment. *Scraftor v. Quincy*, 2 Ves. sen. 413.

[2] The effect of the Register Acts is merely to render a prior unregistered deed fraudulent and void, as to all subsequent deeds, whereof memorials have been duly registered; so that a purchaser or mortgagee can only be affected by a deed duly registered, of which he may have notice by examining the register; and not by any other deed whatever.

Registering an assignment is not registering the deed assigned. 2 Stra. 1064. A conveyance of lands in Middlesex, by settlement upon the marriage of the settler, registered under the 7 Anne, c. 20, is effectual against a prior unregistered conveyance, notwithstanding the party claiming under the settlement had notice of the unregistered conveyance after the marriage, but before the registry of his settlement. *Elsey v. Lutyens*, 8 Hare, 159. But a judgment registered under the 1 & 2 Vic. c. 110, s. 19, will not charge lands in Middlesex, where it has not been registered in that county, under the 7 Anne, c. 20, s. 18. *Ex-parte Allcard*, 1 Fonb. N. R. 217.

[3] On referring to the acts it will be seen that there is no time limited for registration; it is obvious, therefore, how necessary it is that deeds should be registered immediately on execution. Shep. Touch. 116. *Essex v. Baugh*, 6 Jur. 1030.

places, wherein any such honours, &c., are lying or being, that are given, granted, conveyed, or any way affected or charged by any such deed or conveyance, in such manner as the same are expressed or mentioned in such deed or conveyance, or to the same effect. And that every such deed or conveyance, of which such memorial is to be so registered as aforesaid, shall be produced to the said register, or his deputy, at the time of entering such memorial, who shall indorse a certificate on every such deed or conveyance, and therein mention the certain day, hour, and time, on which such memorial is so entered and registered, expressing also in what book, page, and number, the same is entered; and the said register, or his deputy, shall sign the said certificate when so indorsed.[1]

IX. Inrolment of Deeds. *See* Analysis, p. 5.

X. Custody of a Deed is a Question for the Jury.

Lord v. Wardle, 3 Bing. N. S. 680; S. C. 4 Scott, 402.

In trover for a deed, on the question to whom it belongs, the interest of the party must be left to the jury.

In an action of trover for a deed, it appeared that a father had executed a conveyance in order to qualify his son, which the attorney of the former prepared, and had produced it on behalf of the son before magistrates, but it remained in his custody upon an alleged agreement by the son that he should hold it as a security for the general bill of costs, &c., due from the father. After the death of the father he applied for the costs of the conveyance.

The court held, that if any interest in the property were intended to pass, the deed belonged to the son, and the father could not give a lien thereon; and that the attorney was estopped from saying that no interest passed, the jury

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[1] A lithographed memorial is a memorial put into writing within the 7 Anne, c. 20, s. 5, and ought to be registered by the registrar of deeds for the county of Middlesex. *Ex-parte Ivimey*, or *Reg. v. Middlesex (registrar)*, 7 Q. B. 156; 9 Jur. 371; 14 L. J. Q. B. 200.

A memorial of an assignment of lease, indorsed on the lease, was tendered for registration to the registrar for Middlesex, under the 7 Anne, c. 20, in the following form:—"An indenture of assignment" [then followed a statement of the date and parties to the assignment], "assigning all that brick messuage," &c. [specifying the premises, and giving a full description of them as to locality and occupation], "by the description of the messuage or tenement, out-offices, and premises comprised in and demised by the within-written indenture of lease, with the appurtenances." The memorial did not state the date of the lease itself, or the parties to it. It appeared on affidavit, in support of a rule for a mandamus to the registrar to register this memorial, that the full description of the premises was taken from the lease:—*Held*, that the memorial did not comply with the requirements of the statute, as it did not show that the premises were described in such manner as the same were expressed in the deed to be registered, or in the lease thereby referred to. *Reg. v. Middlesex (registrar)*, 15 Q. B. 976; 14 Jur. 1001; 19 L. J. Q. B. 537.

Where the deed, of which a memorial is to be registered, is indorsed on an earlier deed, it is not sufficient to describe the premises by such memorial in the terms used in the earlier deed without express reference to it, if the deed to be registered describes the premises simply by reference to the earlier deed. (Id.)

The executor of a mortgagee, a memorial of whose security was registered under the Middlesex Registry Act, conceiving that the memorial was invalid, affected to re-execute the mortgage deed, by signing and sealing it himself in the presence of two witnesses, whose names were indorsed as witnesses, attesting his execution of it. Neither of the witnesses had attested the execution of the deed by any of the other parties. After this ceremony the executor memorialised the deed in due form:—*Held*, that the whole course of proceeding (which was said to be in accordance with the practice before the registrar) was nugatory for the purpose of the Registry Act. *Essex v. Baugh*, 1 You. & C. (C. C.) 1030; 6 Jur. 1030.

A subsequent incumbrancer, who, at the time of taking his security, has no notice of the prior incumbrance, may by properly memorialising his security, though after notice, obtain priority over the prior incumbrancer, if the memorial of the security of the latter be defective. (Id.)

An examined copy of a memorial of a purchase deed, registered in Middlesex under the 7 Anne, c. 20, is only receivable as secondary evidence of the deed against the parties to the deed, and all persons claiming under them; and the fact that A. mortgaged the property to B., and delivered this deed to B. as mortgagee, is not sufficient to make it secondary evidence against A. *Doe d. Loscombe v. Clifford*, 2 C. & Kir. 448: Alderson.

having given a general verdict for the defendant. The court granted a new trial, on the ground of misdirection of the judge, who merely left it to the jury whether the deed was the property of the father or the son.

XI. Construction of Deeds.

(A) *Words are to be understood in their Ordinary Sense.*

Barlow v. Rhodes, 1 C. & M. 439.

In the absence of express words, the ordinary legal meaning will be the mode of construction.[1]

In trespass, on the question whether a way not strictly appurtenant passed under the words, "together with all ways thereto belonging, or in anywise appertaining,"—

The court said, that the construction of a deed must be *primâ facie* at least according to the legal meaning of the language used; and that in the present case, unless it could be collected that the parties intended to use the words in a more extensive sense than their ordinary legal signification, the way the subject in dispute did not pass.

(B) *The Intention of the Parties is to be looked at.*[2]

(C) *The Terms of the Deed are to be taken Entire.*[3]

(D) *Subsequent Words may explain preceding Indefinite Words.*[4]

(E) *Where contrary Intentions expressed, precedent Words will prevail.*[5]

(F) *General Words restrained by Special.*[6]

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[1] And words are to be construed according to their plain, ordinary, and primary sense, unless from the context of the instrument they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried out. *Mallan v. May*, 13 Mee. & W. 511, 517. *Tirlens v. Hooper*, 5 Ex. 830. *Robertson v. French*, 4 East, 135. *Parkhurst v. Smith*, Willes, 332. *Lord Dormer v. Knight*, 1 Taunt. 417. *Duncan v. Topham*, 8 C. B. 225.

[2] In the construction of deeds, the intention of the parties is to be always attended to, and too minute a stress will not be laid on the precise meaning of the words. *Cholmondeley v. Clinton*, 2 B. & A. 625. Thus the word "and" has been construed as a disjunctive, in order to carry out the intention of the parties. Plowd. 289; 1 Inst. 252, a. So the word "or" has been for the same object construed "and." 3 Atk. 193; 2 Ves. 243; 2 T. R. 470; 16 East, 67; 12 id. 288. So trifling inaccuracies will be overlooked, such as bad grammar and evident omissions. *Cromwell v. Grumsden*, 1 Ld. Raym. 335; 2 Salk. 462. *Lloyd v. Say and Sele*, 1 id. 341; 10 Mod. 40. And words may be transposed if it be necessary to do so to give effect to the evident intention of the parties. Shep. Touch. 84. In short, the whole object which is to be aimed at in construing a deed, or other contract or instrument, is to give effect to the intention of the parties *verba intentione, debeat inservire.* 2 Bl. Com. 379. *Parkhurst v. Smith*, Willes, 332.

[3] The construction ought to be made on the entire deed, and not merely on any particular part of it. *Ex antecedentibus et consequentibus fit optima interpretatio.* Therefore every part of a deed ought, if possible, to take effect, and every word to operate. *See* Het. 15; Carter, 98, 112; 1 Plowd. 457. *Richards v. Bluck*, 6 C. B. 437; 18 L. J. C. P. 17. *Mason v. Cole*, 4 Ex. 375. *Stavers v. Curling*, 3 Scott, 740; 2 Bl. Com. 379, 380; 1 P. Wms. 457. *Barton v. Fitzgerald*, 15 East, 541. *Payer v. Homersham*, 4 M. & S. 426. "All the clauses of agreements are interpreted by each other, giving to each the sense derived from the entire act." *Code Civil*, book iii. tit. 3, s. 5, art. 1161.

[4] *Verba posteriora propter certitudinem addita ad priora quæ certitudine indigent sunt referenda.* Wing. *Max.* 167. Thus, if a man grants all his lands in D., which he has by the gift and feoffment of J. S., nothing will pass but lands of the gift and feoffment of J. S. But if he had granted all his lands in D. called N., which was the estate of J. S., there the lands called N. shall pass, though they never were the estate of J. S. Bro. Abr. Grants, 92. And generally, where several words preceding a general word point to a confined meaning, the general word shall not have such a meaning as to extend its effect beyond subjects *ejusdem generis. Reg. v. Nevill*, 8 Q. B. 452, 463. *Sandiman v. Breach*, 7 B. & C. 96. Broom's *Max.* 253.

[5] Where contrary opinions are expressed in a deed, the former only are allowed operation. *Cartwright v. Amatt*, 2 B. & P. 43; Hard. 94; 10 Mod. 107.

[6] *Quando charta continet generalem clausulam, posteaque descendit ad verba specialia quæ clausulæ generali sunt consentanea, interpretanda est charta secundum verba specialia.* 8 Rep. 184, b. But it is also a maxim, that *generalis clausula non porrigitur ad ea quæ antea specialiter sunt*

(G) *Construction should be Favourable.*[1]

(H) *Must be Consistent with the Rules of Law.*[2]

(I) „ *with Custom.*[3]

(J) *Construction shall be Reasonable.*[4]

(K) *When Intention cannot be discovered Deed is Void.*[5]

(L) *An Estate cannot arise by Implication.*

DAVIS v. SPEED, 4 Mod. 153; S. C. 2 Salk. 675; S. C. Skin. 351; S. C. 12 Mod. 38.

No estate will arise by implication in a deed.

Per Cur. An estate cannot impliedly arise from the terms of a deed, though in conveyances deriving their operation from the Statute of Uses, a use may arise to the owner of the estate by implication to which the statute will transfer the legal estate.

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comprehensa. Therefore, when a deed first contains special words, and afterwards concludes in general ones, both words, as well general as special, shall stand; for otherwise the general words would have no effect. Carth. 120. And the rule is that general words will be qualified by special, unless full effect can be given to both parts without altering or modifying either. *Rigby v. Great Western Railway Co.* 4 Ex. 220, 229. *Edwards v. Rees*, 7 Car. & P. 340. *Sicklemore v. Thiselton*, 6 M. & S. 9. *Wood v. Rawcliffe*, 6 Ex. 407.

[1] A deed is always construed most strongly against the grantor, *verba chartarum fortius accipiuntur contra proferentem, et quælibet concessio fortissime contra donatorem interpretanda est.* For the principle of self-interest will make men sufficiently careful not to prejudice themselves, by using words of too extensive a meaning. And all manner of deceit is thereby avoided in deeds; for people would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them. 1 Inst. 183, a; 13 East, 80. Thus, if lands be let in the premises of a deed, or a rent granted generally, an estate for life will pass. So, if a man makes a lease for the life of B., and afterwards releases to A. all his right in the land, A. will take an estate for his own life, because that is higher than an estate for the life of another. 1 Inst. 42, a; 183, a; 273, b. And where a deed may enure in different ways, the grantee may elect in which way he will take it. *Dorrell v. Gunter*, W. Jones, 206; 2 Bl. Com. 380; 5 Co. 7, b; Plowd. 140. *Stephens v. Pell*, 2 C. & M. 710. *Hargreave v. Smee*, 6 Bing. 244. *Earl of Cardigan v. Armitage*, 2 B. & C. 197. But this rule is only to be relied on where other rules of construction fail (*Browning v. Wright*, 2 B. & P. 13; 2 Bl. Com. 380), and is only applicable in case of ambiguity. *See* also Co. Litt. 42.

[2] If the words of a deed will bear two different senses, the one conformable to law and the other against it, that sense shall be preferred which is conformable to law, for it is also a maxim, *quod legis constructio non facit injuriam.* Thus, if a tenant in tail creates an estate for life generally, it shall be only for the life of the tenant in tail, for otherwise it would operate as a wrong. *See* 1 Inst. 42, a; 183, a & b.

[3] Ancient charters are to be taken according to ancient usage; for there are many old grants generally and insufficiently made, so that at this day they would be void. But being made before time of memory, and having been used since, they are valid; and many liberties and franchises established thereby are likewise good. *See* Brown's Abr. Grants, 89; 2 Bulst. 298.

[4] If a particular construction would lead to such a result as no rational man could have contemplated, and if the opposite, and if another interpretation can, without doing violence to the terms of the instrument, be adopted, the latter shall be preferred. *Hassell v. Long*, 2 M. & S. 363. And an agreement or contract shall have a reasonable construction according to the intent of the parties. Com. Dig. Agreement (C). *Rawlinson v. Clarke*, 14 Mee. & W. 187, 191, 192.

[5] A gift to A. or B., or to one of the children of J. L., he having four children, is void for uncertainty. 2 And. Rep. 102. But if possible some operation is always given to a deed, *quando quod ago non valet ut ago, valent quantum valere potest.* Hob. 277. And in consequence of this principle, it has been determined that a deed which was intended to operate as a lease and release, or bargain and sale, but could not take effect in that manner, should operate as a covenant to stand seised. A deed intended to operate as a bargain and sale, but which was void for want of a pecuniary consideration, has been held to operate as a confirmation. Cro. Jac. 127. So, where a conveyance was void as a lease and release, because the releasor had only a term for years in the land, it was resolved that it should operate as a grant and assignment. Gilb. R. 143; *see* Comb. 597; 11 Ves. 625; Co. Litt. 42, a; 3 Leon. 211; Noy's *Max.* 14; Bac. Stev. 47; 1 Lev. 272.

(M) *Several Deeds made at same time for one Purpose will be construed as one Assurance.*[1]

(N) *Collateral Instruments referred to will be Incorporated therein.*

ROUTLEDGE v. BURRELL, 1 H. Black. 254.

If a deed refer to any collateral writing, the terms of such writing will be incorporated.

A deed-poll contained an insurance against fire. It referred to conditions in a printed paper, without stamp, seal, or signature. It was a part of those conditions that the insured should procure a certificate of his character, and that the loss happened without fraud.

The court held that these printed proposals were incorporated by reference with the policy, and were to be considered as part of the contract.

Llewellen v. Earl of Jersey, 11 Mee. & W. 183. *Wood v. Rowcliffe*, 6 Ex. 407; 20 L. J. Ex. 285.

(O) *Indorsements on Deed, when they may be looked at.*[2]

(P) *Parol Evidence affecting Deeds.*

(*a*) *Not Admissible to Contradict, Vary, or Add to.*

MEASE v. MEASE, Cowp. 47.

Parol evidence is not admissible to contradict, or vary, or add to, the terms of a deed.[3]

Debt upon a bond conditioned for payment of a sum of money at a certain day. *Plea*, that it was given as an indemnity to the plaintiff's testator against another bond. The question was, whether the agreement stated in the plea could be given in evidence against the express condition of the bond. It was maintained by counsel that the plea was supported in truth and fact.

Per Lord Mansfield. If the fact is true, it is a proceeding by the plaintiff contrary to the agreement, and the court would incline to get at it in another form. I think, therefore, it would be better to make a motion to stay proceedings upon affidavit, and let it stand over. If, upon motion, the court should be against the defendant, he must pay costs, and judgment upon the demurrer shall be final. The plea is clearly bad.

(*b*) *But may be admitted to Explain.*

REX v. INHABITANTS OF LAINDON, 8 T. R. 379.

But it may be admitted to support or explain them

On a question between two parishes respecting the settlement of a pauper, it appeared that the pauper agreed to serve a person three years, to learn the busi-

[1] It is a general rule that several deeds made at one time are to be taken as one assurance. *Lord Cromwell's case*, 2 Rep. 74, b; 75, a. *Earl of Leicester's case*, 1 Vent. 278. *Havergill v. Hare*, Cro. Jac. 510. *White v. West*, Cro. Eliz. 792. *Ferrers v. Fermor*, Cro. Jac. 643. *Selwyn v. Selwyn*, 2 Burr. 1131. *Roe on dem. of Noden, v. Griffiths*, 4 id. 1953. *Vaughan, on dem. of Atkins v. Atkins*, 5 id. 2764. Yet every one has its distinct operation to carry on the main design. And, therefore, where a man covenanted by marriage articles to pay the legacies charged upon his wife's estate, and gave a statute, and also a mortgage of his own estate, to secure the same; and by an indorsement upon the mortgage, the same was to be void, unless the wife's estate was settled upon him for life, &c. according to the marriage articles, this indorsement, though upon the mortgage only, is sufficient to discharge the statute and articles. *Laurence v. Blatchford*, 2 Vern. 457. *See* also *Montague v. Tidcombe*, id. 519.

[2] In the construction of a deed, terms introduced into an indorsement of the same date as the deed, and made before its execution, must be taken into consideration. *Goodright d. Nichols v. Mark*, 4 M. & S. 30. *Steadman v. Purchase*, 6 T. R. 737. But where a deed was executed, referring to a schedule in these words, "as per schedule annexed," and which schedule contained the subject-matter of the contract, but was not annexed at the time of the execution, but indorsed afterwards, this was held to vitiate the deed. *Weeks v. Maillardet*, 14 East, 568.

[3] The conditions of sale cannot be received to contradict the deed of conveyance. *Doe v. Wheeler*, 4 Per. & D. 273. *Meres v. Ansell*, 3 Wils. 275. *Hope v. Atkins*, 1 Price, 143. *See post*, Parol Evidence.

with respect to collateral matters.[1]

ness of a carpenter; and evidence was admitted at the sessions that, at the time of making this agreement, the pauper agreed also to give a sum of money as a premium to be taught the trade; that he paid the money, and that he was not to be employed, nor was he employed, in any other work than that of a carpenter.

The Court of Queen's Bench held that the evidence was properly admitted, as it was not offered to contradict the written agreement, but to ascertain an independent fact collateral to the written instrument, in order to explain the intention of the parties, the instrument being in some measure equivocal.

(*c*) *Or to prove Collateral Fact.*

Collins v. Blantern, 2 Wils. 347.

Or to show fraud or mistake.[2]

This was an action on a bond given to compound a criminal prosecution. The special facts were pleaded in answer to the suit. It was urged that such plea could not be supported, as the law would not endure a fact in *pais dehors* a specialty to be averred against it, and that a deed cannot be defeated by anything less than a deed.

Sed per Cur. It is now objected as a maxim that the law will not endure a fact in *pais dehors* a specialty to be averred against it, and that a deed cannot be defeated by anything less than a deed, and a record by a record, and that if there be no consideration for a bond, it is a gift. We answer, that the present condition is for the payment of a sum of money, but that payment to be made was grounded upon a vicious consideration, which is not inconsistent with the condition of the bond, but strikes at the contract itself in such a manner as shows that, in truth, the bond never had any legal entity; and, if it never had any being at all, then the rule or maxim that a deed must be defeated by a deed of equal strength does not apply to this case.

(Q) *Construction of Particular Deeds.* *See* Analysis, p. 6.

XII. Merger of Simple Contract in Deed.[3]

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[1] *See* also *Beaumont v. Field*, 1 B. & A. 247. In the case of an *ambiguitas patens*, that is, an ambiguity which appears on the face of the instrument, no averment is allowed to explain it; but in the case of an *ambiguitas latens*, an averment to explain it, supported by parol evidence, is admissible. Hence Lord Bacon's Maxim, No. 23, "*ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur.*" A patent ambiguity is to be explained by the judge. *Simpson v. Margetson*, 11 Q. B. 23. *Smith v. Thompson*, 8 C. B. 44; Wigram, 7.

[2] *Paxton v. Popham*, 9 East, 421. And in general, which avoids an instrument, whether fraud, forgery, duress, illegality, &c. may be proved by parol, however contradictory to the deed. *Doe v. Allen*, 8 T. R. 147. *Doe v. Ford*, 3 Ad. & E. 649. It is also admissible to prove another consideration. *R. v. Inhabitants of Scammoden*, 3 T. R. 474, 475. *Mildmay's case*, 1 Co. Rep. 176. So, a deed which recites a pecuniary consideration may be shown to have been founded on the consideration of marriage. *Villers v. Beaumont*, Dyer, 146, a. *Tall v. Parlett*, M. & M. 472. *Clifford v. Turrell*, 14 L. J. Ch. 390. It is admissible to show that a deed was not executed on the day of the date. *Steele v. Mart*, 4 B. & C. 272.

[3] If a deed be expressly given to secure a pre-existing simple contract debt, the latter will be merged. *Drake v. Mitchell*, 3 East, 251. And where to 3000*l.*, parcel of a money claim, the defendant pleaded a subsequent agreement to deliver to the plaintiffs an indenture of covenant to pay the 3000*l.* on a certain day, and that the defendant, in pursuance of such agreement, did, with the consent and at the request of the plaintiffs, execute and deliver to the plaintiffs such indenture, and did thereby covenant to pay the 3000*l.* *Replication*, that the indenture was made by way of security for the payment of the 3000*l.*, and that it was always expressed by the indenture that it was made as such security: — *Held*, that the plea was a good plea of merger as to so much of the debt to which it was pleaded, and that the replication was no answer to it. *Price v. Moulton*, 10 C. B. 561; 15 Jur. 228; 20 L. J. C. P. 102.

Though if the deed be given as a collateral security, or by a third person, it will not have that operation. *White v. Cuyler*, 6 T. R. 176. And if one of two makers of a joint and several promissory note gives the holder a deed of mortgage to secure the amount, with a covenant to pay it, the other maker is

XIII. Assignment of.[1]

XIV. As to Lost Deed.[2]

XV. Remedies on Deeds.

(A) *Form of Action.*[3]

(B) *Parties to.*[4]

XVI. Evidence of Deeds. *See post*, Documents, Proof of.

XVII. Inspection of. *See* Documents; Evidence; Inspection of Documents.

XVIII. Cancellation of Deeds.

Bolton v. Carlisle, 2 H. Black. 259. S. P. Roe, d. Earl of Berkeley v. the Archbishop of York, S. C. 2 Smith's Rep. 166.

If a deed be cancelled it becomes void; but where an estate has actually passed, the cancelling afterwards will not divest any estate out of the persons in whom they were vested by such deed.[5]

In setting forth a conveyance, it was stated that a deed of release was cancelled by the releasor's seal being torn off and destroyed, and that part of the deed was lost with a *profert in curia* of the residue. It was held to be good pleading; and *Lord C. J. Eyre* said, "I hold it to be clear that the cancelling a deed will not divest property which has once vested by transmutation of possession; and I would go further and say, that the law is the same with respect to things that lie in grant. In pleading a grant, the allegation is, that the party at such a time did grant. But if by accident the deed is lost, there are authorities enough to show that other proof may be admitted; the question in that case is, whether the party did grant. To prove this, the best evidence must be produced, which is the deed; but if that be destroyed, other evidence may be received to show that the thing was granted. For God forbid that a

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not thereby discharged, for the remedy on the specialty is not co-extensive with the remedy on the note. *Ansell v. Baker*, 15 Q. B. 20.

[1] As a general rule, choses in action are not assignable, so as to give the assignee a right of action in his own name, and the exception as to bail, replevin, and bastardy bonds, has been pointed out; in respect to which *see* Bail, Bastard, and Replevin. There is also an exception as to assignments of an estate in land, under the 32 Hen. 8, c. 34, which confer the same privileges upon the individual to whom the assignment is made as were vested in the original party to the contract; for which *see* Covenant and Lease. *See* also Bond, vol. ii. p. 512.

[2] Where a deed has been lost, the counterpart, and not the copy, is the best evidence. *Munn v. Godbold*, 3 Bing. 292; 11 Moore, 49; 2 C. & P. 97.

[3] The action of debt lies upon a specialty for the non-payment of money, *ante;* but covenant is the only remedy upon a deed, where the action is not brought for the breach of a covenant to pay money, or where the covenant to pay the money is collateral. *Harrison v. Matthews*, 10 Mee. & W. 768; S. C. 2 Dowl. N. S. 318; and see *Barber v. Butcher*, 15 L. J. Q. B. 289. Covenant lies on an express covenant or upon one implied by law, from particular words used in a deed, as upon the word *demise*, or *grant*, in a lease, as importing a covenant by the lessor that the lessee should quietly enjoy, &c.; and as to the words which are sufficient to constitute a covenant. *Courtney v. Taylor*, 6 Man. & G. 851. *Rigby v. Great Western Railway Co.* 14 Mee. & W. 811. Debt is the proper form of action on a bond. *See* vol. ii. p. 522. Since the C. L. P. Act, 1852, dispensed with the mention of the form of action in the writ, the distinction between forms of action *ex contractu* is immaterial as regards the declaration; and specialties are shown by the word "covenanted," or by alleging that the agreement was "by deed" or "bond." Buller and Leake on Pleading, p. 34.

[4] In general the covenantee may maintain covenant, although he has not executed the deed (1 Chit. Pl. 7th ed. 133. See *Cardwell v. Lucas*, 2 Mee. & W. 111. *Couch v. Goodman*, 2 Q. B. 580); and if there be two, and one has not concurred, but has not disclaimed, both should join. *Petrie v. Bury*, 3 B. & C. 353. If the interest be joint, all parties should unite in bringing the action (Comb. 230); but if several, each must bring a separate action. As to when a covenant is joint or several, see *Sorsbie v. Park*, 12 Mee. & W. 146. Covenant lies upon a deed *inter partes* only between the parties thereto. *Barford v. Stuckey*, 1 Bing. 225. *Berkely v. Hardy*, 5 B. & C. 355. *Lord Southampton v. Brown*, 6 B. & C. 718. *Randall v. Rigby*, 4 Mee. & W. 130. Nor can covenant be maintained by private parties on a deed executed to a corporation of which they are members. *Couch v. Goodman*, 2 Q. B. 580.

[5] If a deed be delivered up to the party,

man should lose his estate by losing his title-deeds." *See* 2 Ch. Ca. 52; Prec. in Ch. 235.

XIX. Disclaimer.[1]

XX. Offences connected with Deeds.

(A) *Stealing Deed.*

(*a*) *Not being Title to Lands.*

Stealing or obliterating any valuable security a felony.[2]

Punishment.

By 24 & 25 Vic. c. 96, s. 27, "whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, or obliterate, the whole or any part of any valuable security, other than a document of title to lands, shall be guilty of felony, of the same nature, and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value with the share, interest, or deposit, to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods, or other valuable thing represented, mentioned, or referred to in or by the security."

(*b*) *Deed being Title to Land.*

Stealing or obliterating any document of title to land a felony.[3]

Indictment for.

By 24 & 25 Vic. c. 96, s. 28, "whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of any document of title to lands, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and in any indictment for any such offence relating to any document of title to lands, it shall be sufficient to allege such document to be or to contain evidence of the title or of part of the title of the person, or of some one of the persons, having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof."

(B) *Forgery of.*

Forging deeds, bond, &c. felony.[4]

By 24 & 25 Vic. c. 28, s. 20, "whosoever, with intent to defraud, shall

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who is bound by it, to be cancelled; or if it be cancelled by a stranger, by the consent of all parties, the deed becomes void. But the bare delivering of it for the purpose of being cancelled will be of no avail to prevent an action, if the party gets it back before it be actually cancelled. Shep. Touch. 70; Cro. Eliz. 483. But if a deed be cancelled, or in any manner defaced or torn by mere accident, or in sport, without malice, so that the sense or meaning can still be made out, this will not invalidate the deed. Bro. Ab. Faits, pl. 88; 6 East, 314; Palm. 403. And in all cases an innocent party will not be affected by the act of an individual jointly interested with him. *Woodward v. Aston*, 1 Vent. 296.

[1] In the case of a deed-poll, the grantee may disclaim the estate intended to be given; in which case no estate will vest in him. But in the case of an indenture, if the grantee executes it, he thereby accepts the estate limited to him, and cannot afterwards disclaim. Bro. Ab. Disclaimer, 54; Joint. Ten. 570; Touch. 68, 70. And where a person assigned the residue of a term to two persons, *Lord Hale* said that the disagreement of one of the assignees made the estate wholly the other's. *Smith v. Wheeler* 1 Vent. 128.

[2] By 24 & 25 Vic. c. 96, s. 1, "the term valuable security shall (*inter alia*) include any debenture, deed, bond," &c.

[3] By sect. 1, "document of title to lands" shall include any deed, map, paper, or parchment, written or printed or partly written and partly printed, being or containing evidence of the title.

No person can be convicted of this offence by any evidence whatever, in respect of any act done by him, if at any time previously to his being charged with the offence he "shall have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency. 24 & 25 Vic. c. 96, s. 29.

[4] The forging of a deed, which is directed to be in a particular form by particular sta-

forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory, having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, or with or without solitary confinement." Penal servitude for life, or not less than three years, or imprisonment for two years, with or without hard labour, or solitary confinement.

(C) *Forging Registry of.*

By 24 & 25 Vic. c. 98, s. 31, "whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any memorial, affidavit, entry, certificate, indorsement, document, or writing, made or issued under the provisions of any act passed or hereafter to be passed for or relating to the registry of deeds, or shall forge or counterfeit the seal of or belonging to any office for the registry of deeds, or any stamp or impression of any such seal; or shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature, of any person to any such memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing, which shall be required or directed to be signed by or by virtue of any act passed or to be passed, or shall offer, utter, dispose of, or put off any such memorial or other writing as in this section before-mentioned, having thereon any such forged stamp or impression of any such seal, or any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and, being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." Forging registry, &c. of deed.

(D) *Causing to be Executed by Force or Threats.*

By 24 & 25 Vic. c. 96, s. 48, "whosoever, with intent to defraud or injure any other person, shall by any unlawful violence to or restraint of, or threat of violence to or restraint of, the person of another, or by accusing or threatening to accuse any person of any treason, felony, or infamous crime as hereinbefore defined, compel, or induce any person to execute, make, accept, indorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." Whoever by violence or threats induces execution of deeds is guilty of felony. Punishment.

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tutes, which had not been complied with, has been decided to be within the 2 Geo. 2. c. 25. *R. v. Lyon*, R. & R. 255. And a power of attorney to transfer government stock, signed, sealed, and delivered, was held to be a deed within that statute. *R. v. Fauntleroy*, 1 Mood. C. C. 52; 2 Bing. 413. But the forging of a power of attorney is now specially provided for. 24 & 25 Vic. c. 98, s. 6. The giving an administration bond to the ordinary in a false name is a forgery. *R. v. Barber*, 1 C. & Kir. 434.

(E) *Causing to be Executed by Fraud.*

Whoever shall by fraud or false pretences induce any person to execute any valuable security, guilty of a misdemeanor.

Punishment.

By 24 & 25 Vic. c. 96, s. 90, "whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to execute, make, accept, indorse, or destroy the whole or any part of *any valuable security*, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made, or converted into, or used, or dealt with as a valuable security, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

DEER.

I. Property in, p. 30.

II. Offences connected with, p. 31.

(A) *Killing with Intent to Steal made Felony*, p. 31.

(B) *Stealing in an Unenclosed Part of Forest*, p. 31.

(C) *Second Offence*, p. 31.

(D) *Stealing in Enclosed Ground*, p. 32.

(E) *Suspected Person in Possession of Venison, Snares, &c., how dealt with*, p. 32.

(F) *Setting Engines for, or pulling down Park Fences*, p. 32.

(G) *Deer-keepers may seize Guns, &c. when*, p. 32.

I. Property in.

Davies v. Powell, C. P. Willes, 46; S. C. 7 Mod. 249.

Formerly deer, like other animals *feræ naturæ*, were not the subjects of absolute property; they could only be the subjects of property *ratione loci*, unless they were tame and reclaimed,

And were considered not distrainable; but the nature of such property is now considerably changed.[1]

An action for trespass was brought for entering the plaintiff's close, and taking and carrying away deer, and the defence was that it was done under a distress for rent, and it did not appear that the close was a lawful park, but that it had been demised by indenture to the plaintiff, without particularly specifying the deer, but with a covenant from the plaintiff to keep up during the term, one hundred living deer; and it was held that the deer were distrainable for the rent in arrear. And,

Lord C. J. Willes, after noticing the ancient law, observed: "Deer were formerly kept only in forests, or chases, or such parks as were so either by grants or prescription, and were considered rather as things of pleasure than of profit; but they are frequently kept in enclosed grounds, which are not properly parks, and are kept principally for the sake of profit, and, therefore, must be considered as other cattle. That possibly in the case of a park, properly so called, which must be either by grant or prescription, the deer may in some measure be said to be incident to the park, and might not be distrainable, and would go to the heir, and not to the executor; but that, with respect to inclosed grounds, when the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure, and not for profit, and were not sold and turned into money, as they are now. But now they are become as much a sort of husbandry as horses, cows, sheep, or any other cattle. Whenever they are so, and it is universally known,

[1] When reclaimed they become personal chattels, and cease to be parcel of the inheritance. *Ford v. Tynte*, 2 Johns. & H. 150.

it would be ridiculous to say that, when they are kept merely for profit, they are not distrainable as other cattle, though it has been holden they were not so when kept merely for pleasure. But, in respect to deer in forests, chases, and parks, properly so called, the court made no determination. Tithe is not payable of common right of things *feræ naturæ*, as of deer of a park, but by special custom tithe may be due."

See 7 Hen. 6; 18 Edw. 4, c. 18; 18 Hen. c. 621; 21 id. 7, c. 30; 11 id. 8, c. 90; Lutch. 120; Com. Dig. Dismes; Hen. 4, c. 16; Owen, 34; Moor, 909; Noy. 148; Gwil. 275; Hetl. 60.

II. Offences connected with.

(A) *Killing with Intent to Steal.*

Killing, with intent to steal, made felony.[1]

By 24 & 25 Vic. c. 96, s. 11, "whosoever shall wilfully kill any animal, with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony."

(B) *Stealing in an Unenclosed Part of Forest, &c.*

Unlawfully hunting, &c. in unenclosed part of forest, &c.[2]

Penalty on.

By 24 & 25 Vic. c. 96, s. 12, "whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the enclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding 50*l.*, as to the justice shall seem meet."

(C) *Second Offence.*

Second offence made felony.[3]

"And," by the same section, "whosoever having been previously convicted of any offence relating to deer, for which a pecuniary penalty shall have been imposed by this or by any former act of parliament, shall afterwards commit any of the offences hereinbefore enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or

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[1] This section will not apply to a first offence of killing with intent to carry away in an unenclosed part of a forest.

[2] The word "deer" in the 7 & 8 Geo. 4, c. 29, s. 26, was held to be a general term, including all kinds, both sexes, and all ages. C. L. C. Acts, Greaves, p. 79.

[3] *Form of Indictment for Second Offence.*

[Commencement, *see post*, Indictment, *setting out the conviction to the words*] her crown and dignity; and the said J. P. therefore adjudged the said J. S., for his said offence, to forfeit and pay the sum of fifty pounds, and also to pay the sum of ten shillings for costs; and in default of immediate payment to be imprisoned in there to be kept to hard labour for the space of calendar months, unless the said sums should be sooner paid [*following the conviction*]. And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S., late of the parish aforesaid, in the county aforesaid, labourer, being so convicted afterwards on the first day of June, in the year aforesaid, in the parish aforesaid, in the county aforesaid, in a certain unenclosed part of the said chase, there situate [*in the unenclosed part of any forest, chase, or purlieu*], one other fallow deer, of the price of forty shillings, then and there being, then and there, in the said last-mentioned unenclosed part of the said chase, unlawfully, wilfully, and feloniously did course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown, and dignity.

The prisoner may take exception to the validity of the previous conviction, and if it be bad, he cannot be convicted upon this indictment. *R. v. Allen*, R. & R. 513. And where a summary conviction for an offence relating to a deer did not state substantially where the place was situate in which the offence was committed, but, in awarding the distribution of the penalty, gave it to the overseers of D., in the said county "where the said offence was committed," it was holden good. *R. v. Weale*, 5 C. & P. 135.

without solitary confinement; and if a male under the age of sixteen years, with or without whipping."

(D) *Stealing in Enclosed Ground, &c.*

Hunting, &c. in enclosed ground, felony.[1]

Punishment.

By 24 & 25 Vic. c. 96, s. 13, "whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the enclosed part of any forest, chase, or purlieu, or in any enclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and if a male under the age of sixteen years, with or without whipping."

(E) *Suspected Person in Possession of Venison, Snares, &c., how dealt with.*

Suspected person found in possession of venison.[2]

Penalty.

Power of the justices.

By 24 & 25 Vic. c. 96, s. 14, "if any deer, or the head, skin, or other part thereof, or any snare or engine, for the taking of deer, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being taken or summoned before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding 20*l.*; and if any such person shall not under the said provisions be liable to conviction, then, for the discovery of the party who actually killed or stole such deer, the justice, at his discretion, as the evidence given and the circumstances of the case shall require, may summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is hereinbefore last mentioned."

(F) *Setting Engines for, or pulling down Park Fences.*

Setting snares, &c.

Penalty for.

By 24 & 25 Vic. c. 96, s. 15, "whosoever shall unlawfully and wilfully set or use any snare or engine whatsoever for the purpose of taking or killing deer, in any part of any forest, chase, or purlieu, whether such part be enclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any enclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 20*l.*, as to the justice shall seem meet."

(G) *Deer-keepers may seize Guns, &c., when.*

Deer-keepers may seize the guns, &c. of offenders.

By 24 & 25 Vic. c. 96, s. 16, "if any person shall enter into a forest, chase, or purlieu, whether enclosed or not, or into any enclosed land where deer shall be

[1] *Form of Indictment for Hunting, &c. Deer in Enclosed Places.*

[Commencement. *see post*, Indictment] in the county aforesaid, in certain enclosed land [*in the enclosed part of any forest, chase, or purlieu, or in any enclosed land where deer shall be usually kept*], there situate, in the occupation of J. N., wherein deer had been, and then were usually kept, one deer, of the price of forty shillings, the property of the said J. N., then and there kept and being, then and there in the said enclosed land, unlawfully, wilfully, and feloniously did hunt, kill, and carry away [*course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound*]; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

[2] As to what is a sufficient possession, see *Reg. v. Sunley*, Bell, C. C. 145. *Reg. v. Satler*, Dears & B. C. C. 525.

usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, every person intrusted with the care of such deer, and any of his assistants, whether in his presence or not, may demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought, for hunting, coursing, or killing deer; and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and if a male under the age of sixteen years, with or without whipping."

Penalty for resistance to keepers.

DEFAMATION. *See post*, Libel; Prohibition; Slander.

DEFAULT. *See* Appearance, vol. i. p. 389; *post*, Descent, p. 47; Judgment; Jury; Tail, Tenant in.

DEFEASANCE. *See* Cognovit, vol. iii. p. 128; Conditions, id. p. 164; Contracts, id. p. 193; *post*, Warrant of Attorney.

I. What it is, p. 33.

II. Must be of as High a Nature as the Instrument creating the Obligation, p. 33.

I. What it is.[1]

II. Must be of as High a Nature as the Instrument creating the Obligation.

Blemerhasset v. Pierson, 3 Lev. 234. S. P. Hayford v. Andrews, Cro. Eliz. 697. S. P. Mease v. Mease, Cowp. 47.

Debt on bond, conditioned for payment of money. *Plea*, that plaintiff agreed to defer the payment till such a day. General demurrer. Judgment was given for plaintiff; for, as the action was founded on a deed, it was essentially necessary that the defeasance should, to be effectual, be by deed.

See 2 Saund. 47, s.

The defeasance must be of as high a nature as instrument creating the obligation.[2]

DEFECT of Fences. *See post*, Distress, p. 78; Fences; Replevin; Trespass.

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[1] A defeasance is a collateral deed containing certain conditions, on performance of which the estate created or grant may be defeated. It differs from a condition in being in a separate deed, executed at the same time. In this manner mortgages were formerly made; but defeasances are now of rare occurrence, the practice in modern times being to include in the same deed (the mortgage) both the conveyance of the land to the alienee, and the conditions, if any, to which it is to be subject, and by which its effect may be defeated. However, in the case of warrants of attorney, the defeasance must, by r. 27, H. T. 1853, be on the same paper or parchment as the warrant. *See post*, Warrant of Attorney; and vol. iii. p. 450.

[2] Every defeasance must contain proper words, as that the thing shall be void. *Lacy v. Kynaston*, 2 Salk. 575; S. C. 1 Raym. 688. *Trevett v. Aggas*, Willes, 107. The general words of a defeasance may be restrained by a particular recital in other parts of the same instrument. 2 Saund. 47, t. n. c. A defeasance dated before, but delivered after a recognisance, is a good bar to it. 3 Dig. 315, pl. 100.

DEFENCE. L. Lat. *defensio*; L. Fr. *défence*, *défense*, from *défendre*, to deny. In pleading, a denial, by the defendant in an action at law, of the truth or validity of the plaintiff's complaint. 3 Bl. Com. 296. A formula by which pleas were anciently, in almost all actions, required to be prefaced. In modern practice, defence includes all the proceedings on the part of a defendant to embarrass, delay, or defeat a plaintiff's action. In a stricter sense, defence is used to denote the answer made by the defendant to the plaintiff's action, by demurrer or plea, at law or answer in equity. This is the meaning of the term in Scotch law. Ersk. Inst. b. 4, tit. 1, sect. 66.

DEFENCE of Possession. *See* Assault and Battery, vol. i. p. 562; *post*, Trespass.

DEFENDANT. *Defendaunt*, L. Fr. and Eng. L. Lat. *defendens*, and sometimes *defensor*; L. Fr. *défendour*, from *défendre*, to deny or defend. In pleading and practice, the party against whom an action at law or in equity is brought; the party denying (in the ancient sense), opposing, resisting, or contesting the action; he is called in Scotch practice, the Defender. Defendant, strictly, is the proper title of the party sued in a personal action; such party in real actions, before their abolition, being termed the tenant. *Termes de la Ley.*

DEFENDER of the Faith. *Fidei defensor* is a peculiar title belonging to the King of England, as *Catholicus* to the King of Spain, &c. These titles were given by the Popes of Rome, and the title *Defensor fidei* was first conferred by Pope Leo the Tenth on King Henry the Eighth, for writing against Martin Luther, and the Bull for it bears date *quinto idus*, Oct. 1521. *Lord Herbert's Hist. Hen.* 8, 105.

DEFENSIVE Allegations. In ecclesiastical law a species of pleading, where the defendant, instead of denying the plaintiff's charge upon oath, has any circumstances to offer in his defence. This entitles him in his turn to the plaintiff's answer upon oath, upon which he may proceed to proofs as well as his antagonist. 3 Bl. Com. 100; 3 Steph. Com. 720.

DEFINITIVE Sentence. L. Lat. *diffinitiva sententia.* The final judgment, decree, or sentence of an ecclesiastical court; the sentence by which a principal cause is determined, as distinguished from an interlocutory sentence, which is on some incidental question arising from the principal cause. 3 Bl. Com. 101.

DEFORCEMENT.[1]

DEGRADATION.[2]

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[1] Deforcement is a species of injury by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer afterwards, rendered unlawful. 3 Bl. Com. 172.

Deforcement, in its most extensive sense, is *nomen generalissimum*, signifying the holding of any lands or tenements to which another person has a right (Co. Litt. 277); so that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from these, it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls not within any of those terms. The learning connected with this subject is, since the abolition of real actions, of no practical utility.

[2] Degradation is an ecclesiastical censure, whereby a clergyman is divested of his holy orders. There are two sorts of degrading by canon law: one, *summary*, by

DEHORS. *See* Conditions, vol. iii. p. 134; Covenant, id. p. 446; Deeds, *ante*, p. 1.

DE Injuria. This was a form of replication, by which the plaintiff could put all the material averments in a plea in issue; and as, in general, he could, in his replication, only take issue on one material allegation, the learning as to where this peculiar form was available was very important. It is, however, now wholly superseded by the C. L. P. Act, 1852, s. 79, which makes a general joinder in issue a denial of the substance of the plea. *See* notes on *Crogate's case*, 1 Smith, L. C. 53, 3d ed.

DEL Credere Commission. *See* Broker, vol. ii. p. 535; *post*, Factor; Insurance; Principal and Agent.

(A) *Definition of.*[1]

(B) *Need not be in Writing.*[2]

(C) *Responsibility only Collateral to that of the Vendee.*[3]

DELEGATES. *See* Ecclesiastical Courts.

DELIVERY. *See*

Bankruptcy, vol. ii. p. 141	Frauds, Statute of	Ship and Shipping
Carriers, vol. iii. p. 29	Lading, Bill of	Transitu, Stoppage in
Deeds, *ante*, p. 1	Process	Vendor and Purchaser
	Sale, Bill of	

DEMAND. *See*

Arbitration, vol. i. p. 427	Covenant, id. p. 443	Lien
Action, id. p. 132	Declaration, id. p. 470	Particulars of Demand
Bills of Exchange, vol. ii. p. 400	Deeds, *ante*, p. 1	Plea
	Deer, id. p. 30	Release
Cheques, vol. iii. p. 95	Ejectment	Rent
Constable, id. p. 182	Game	Replication
Costs, id. p. 287	Judgment	Trover

word only; the other *solemn*, by stripping the party degraded of those ornaments and vestments which are the ensigns of his order or degree. *See* Roger's Ecc. L. 30.

There is likewise a degradation of a lord, or a knight, &c., at common law, when they are attainted of treason, as in Hil. 18, E. 2. Andrew Harcla, earl of Carlisle, who was also a knight, was degraded, and when judgment of treason was pronounced against him his sword was broken over his head, and his spurs hewn off his heels, &c. And there is a degrading by Act of Parliament, for by stat. 13 of Car. 2, c. 16, William Lord Monson, Sir Henry Mildmay, and others, were degraded from all titles of honour, dignities, and pre-eminencies; and none of them to bear or use the title of lord, knight, esquire, or gentleman, or any coat of arms, for ever after. *See* Selden's *Titles of Hon.*

[1] A *del credere* commission is the payment made to an agent or factor, who, for an additional reward beyond the ordinary per-centage, becomes bound, when he disposes of goods on credit, to warrant the solvency of the purchaser; and consequently is responsible to the principal for their value or stipulated price. *Morris v. Cleasby*, 4 M. & S. 574. *Hornby v. Lacey*, 6 id. 166. *Mackensie v. Scott*, 6 Bro. P. C. 280, Tomlin's edit. The phrase is an Italian one, signifying the same as the English term Guarantee or Warranty, or the Scotch term Warrandice. *See* Paley's Principal and Agent.

[2] An agreement by a factor to sell upon a *del credere* commission need not be in writing, not being a promise to answer for the debt, default, or miscarriage of another person, within the 4th sect. of the Statute of Frauds. The higher reward is paid in consideration of the agent taking greater care, and for precluding all questions whether the loss arise from negligence or not, and also for assuming a greater share of responsibility than ordinary agents; namely, responsibility for the solvency and performance of the contracts by the vendees. This is the main object of the reward being given to him, and though it may terminate in a liability to pay the debt of another, that is not the *immediate object* for which the consideration is given. *Couturier v. Hastie*, 8 Ex. 40; 22 L. J. Ex. 97. *Fitzgerald & others v. Dressler*, 29 L. J. C. P. 113; 5 Jur. N. S. 598.

[3] It is now settled that the liability of a *del credere* agent is only collateral to that of the vendee. *Morris v. Cleasby, supra.*

DEMESNE. *See* Copyhold, Estate of, vol. iii. p. 223; *post*, Manor.

DEMISE. *See post*, Descent, p. 47; Ejectment; Landlord and Tenant; Lease.

DEMOLISHING. *See* Hundred; Riot.

DEMURRAGE. *See* Charter-Party, vol. iii. p. 79; *post*, Insurance; Ship and Shipping.

I. Definition of, p. 36.

II. For what Payable, p. 36.

(A) *Meaning of word "Days,"* p. 36.

(B) *In general, counted from Ship's Arrival at usual Place of Discharge*, p. 37.

(C) Aliter *where there is an express Stipulation*, p. 38.

(D) *Substitution of a different Port by Consent will not affect the Lay Days*, p. 38.

(E) *Merchant Liable though Delay not attributable to him*, p. 38.

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IV. Duration and Revival of Claim for, p. 39.

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VI. No Implied Contract to Pay, p. 40.

VII. No Lien for, p. 40.

VIII. Proceedings in Admiralty Courts as to, p. 40.

IX. Action for, when Maintainable, p. 41.

I. Definition of.

Demurrage may be defined as the compensation to be paid by the freighter to the owner or master of a ship, in case she is detained beyond the days allowed by the contract for her laying to load and unload the cargo; or, if no particular time be limited for that purpose, in case the ship be detained beyond a reasonable time for her loading or unloading, the law will imply an understanding and agreement of the parties in the absence of any express contract. Demurrage, indeed, is nothing more than a kind of extended freight, being a reasonable compensation for the use of the ship: *per Heath, J.*, 4 Taunt. 54.

The difference between dead freight and demurrage is this: that the former is payable in case of the merchant's failure to furnish any cargo at all, or such a cargo as he ought; but the latter becomes due though a proper and sufficient cargo be furnished, if it be not provided or received from the ship in the time allowed by the charter-party.

II. For what Payable.

(A) *Meaning of word "Days."*

Cockran v. Retberg, 3 Esp. 121.

The word "days" used alone in a

Declaration on a bill of lading, in the usual form to pay freight, &c., with a memorandum in the margin, "to be discharged in fourteen days, or to pay five guineas per day demurrage." The payment of the demurrage was resisted,

on the ground that, in the computation of the days, Sundays and Custom-house holidays ought not to be reckoned, for during those days no goods could be landed at the Custom House; but it was admitted, that on those days goods could be taken out of the ship into lighters. Contradictory evidence was given as to the interpretation usually affixed to the word "days," and *Lord Eldon* left the question to a special jury of merchants, who gave a verdict for the defendant, construing the general words of the contract to mean working and not running days. "If," said his lordship, "no evidence had been offered, and I was to decide on the clause itself, I should have been of opinion it meant running days; and if so, the parties must abide by the contract, though incapable of performance. If it had been the case of inland trade, it must have meant working days, as the law of the country prohibits the working on any other."

clause of demurrage for unloading in the river Thames, is said to be understood as working days only, and not to comprehend Sundays or holidays.[1]

(B) *In general, counted from Ship's Arrival at usual Place of Discharge.*

KELL v. ANDERSON, 10 Mee. & W. 498.

By the stipulations of a charter-party, the vessel was to take in a cargo of coal at Newcastle, and proceed therewith to London, or as near thereto as she could safely get, and deliver the same to the freighters or their assigns, &c.; to be delivered in five working days—demurrage over and above the said lying days, 2*l.* per day. The vessel arrived in the port of London, off Gravesend, on the 9th March, and on the 10th the cargo was sold, and the vessel entered by the freighters for a meter. On the 20th she received an order from the harbour-master to proceed to the Pool. On Monday, the 22d, she commenced working

In the absence of express stipulation lay days to be counted from ship's arrival at usual "place" of discharge.[2]

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[1] And so much "per day" means working days. *Harper v. M'Carthy*, 2 N. R. 259.

But where there is no custom, running days are taken to be meant. *Brown v. Johnson*, 10 Mee. & W. 331. And where by a charter-party it was agreed that a ship should receive on board a cargo of coals, and proceed with them to Constantinople (and, or) Odessa, contained these words:—"The vessel to be loaded in Liverpool in fourteen days, and to be discharged, weather permitting, at no less than twenty-five tons per working day (holidays excepted), the days to commence on the ship's being in turn, and ready to deliver: all days above the said days to be paid demurrage at the rate of 5*l.* sterling per day:"—*Held*, that the words "holidays excepted" did not apply to the fourteen days within which the vessel was to be loaded; and, therefore, that although two Sundays occurred within the fourteen days, still there was the period of fourteen days only within which she was to be loaded. *Niemann v. Moss & others*, 29 L. J. Q. B. 206; 6 Jur. N. S. 1095.

A clause, allowing a ship seventy days' stay at A. and B., for the purposes of loading and unloading her cargo, means seventy days at each place. *Stevenson and York*, 2 Ch. R. 57.

[2] And where, by memorandum of charter, it was agreed between Captain W. P. of the ship Celerity, now in the Tyne, and G. W.; W. (the defendant), agent for E. W. and Son, of Devonport, merchants, "that the ship shall load at, &c., a certain cargo of coals, &c.," from the agents of the said freighter, and proceed therewith to Plymouth, not higher up than Torpoint or New Passage, or so near thereunto as she may safely get, and deliver the same to the said freighter, or their assigns, on being paid freight, &c. A keel a day to be allowed the said merchants for delivery. Demurrage over and above the said lying days, 3*l.* per day. Ship to be addressed E. Winlo and Son, Devonport." This document was signed by the defendant simply with his own name. The ship loaded pursuant to the charter, and arrived off Plymouth at neap-tides. The consignees, on receipt of notice that she was ready to discharge, ordered her to proceed to a wharf, which was within the limits stated in the charter-party, and was a usual place for the discharge of coals, and could be reached at ordinary spring-tides by vessels of greater burthen than the Celerity. The master requested the consignees to send barges to lighten her, but, none being sent, she proceeded as she was towards the wharf, and became fixed on a mud-bank till spring-tides, when she got alongside the wharf. It was not the practice at Plymouth to use barges for the purpose of lightening ships:—*Held*, that, on the proper construction of the charter-party, and under the circumstances, the consignees had a right to name the wharf they did, and that the lay day did not begin till the ship reached the wharf. *Parker v. Winlo*, 7 E. & B. 942; 4 Jur. N. S. 14; 27 L. J. Q. B. 49. But in *Brown v. Johnson*, 10 Mee. & W. 331, where the words were "for discharging at her destined port," it was held that the lay days

out her cargo, and was cleared on the 27th. It appeared that, in consequence of the factor's certificate that she was a metered vessel, the harbour-master had detained her at Gravesend till the 20th, when her turn arrived for her to proceed to the Pool and discharge her cargo; that if she had not been on the meters' list, this regulation would not have applied, and she might have proceeded to the Pool at once; that it was occasionally the practice for factors not to enter such vessels on the meters' list, but that it was desirable that the cargo should be sold, subject to metage, by a sworn meter.

Lord Abinger, C. B., who tried the cause, was of opinion, on these facts, that the ship had not arrived at the termination of her voyage until the 20th of March, and therefore the defendant was liable for demurrage for one day only, which was covered by the payment into court; and he accordingly nonsuited the plaintiff, reserving leave for him to move to enter a verdict for 20*l.*

On the motion, being pursuant to leave, the court held that as no time was limited by the charter-party from which the demurrage was to be reckoned, it must be reckoned from the ship's arrival at the ordinary place of discharge, and that if she was prevented from discharging sooner by the default of the defendant, that should have been the subject of an action on the case, and not of an action for demurrage.—Rule refused.

(C) Aliter *where there is an express Stipulation.*[1]

(D) *Substitution of a different Port by Consent will not affect Lay Days.*[2]

(E) *Merchant Liable though Delay not attributable to him.*

LEAR v. YATES, 3 Taunt. 387. S. P. RANDALL v. LYNCH, 12 East, 179; S. C. 2 Camp. 352.

Unavoidable delay will not excuse the freighters from paying demurrage.[3]

A general ship took brandies on board under bills of lading, which allowed twenty lay days for delivery of the goods in London, and stipulated for 4*l.* per day demurrage afterwards. Certain of the consignees choosing to have their goods bonded, the vessel could not make her delivery at the London Docks until forty-six days after the twenty days; some of the goods were undermost,

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were to be counted from the arrival of the ship in the *dock*, and not the *place of unloading in the dock*. *See* also *Brereton v. Chapman*, 7 Bing. 559; 5 M. & P. 526.

[1] If, however, the parties to the contract fix a particular place for the discharge of the cargo, other than the usual place of discharge, or provide that the vessel shall discharge at one place or another, according to circumstances, as may seem best to the discretion of the master, the lay days will run from the ship's arrival at the place fixed on or selected by the master within the discretion allowed him. *Gibbons v. Buisson*, 1 Bing. N. C. 283; 1 Scott, 133. *Bailey v. De la Arrogave*, 7 Ad. & E. 919.

[2] Where it appeared that by agreement of charter lay days were to be reckoned from the 16th of December, for loading the ship at Cardiff, and proof was given that afterwards Pembroke was agreed to be substituted for Cardiff, as the port of loading, it was held that the lay days must be reckoned from the 16th of December at Pembroke, as if the vessel had been at Cardiff. *Jackson v. Galloway*, 5 Bing. N. C. 71; 6 Scott, 786.

[3] And it is no answer to show that the delay arose from Customs' regulations (*Bessy v. Evans*, 4 Camp. 131), or from the goods being placed under other goods (*Harman v. Gandolph*, Holt, 35), or that it was occasioned by the frost, or from the neglect of the consignee (*Hill v. Idle*, 4 Camp. 327), or from the bill of lading not having come to his hands. *Jesson v. Solly*, 4 Taunt. 52.

And where the defendants chartered a vessel of the plaintiffs; thirty-five running days were to be allowed for landing and discharging, and ten days more on demurrage, at 5*l.* a-day. The defendants, factors abroad, under a contract put a cargo on board, and the master signed bills of lading, making the goods deliverable to order or assigns, he or they paying freight as per charter-party. The defendants refused to accept a bill of exchange for the price of the goods, on the ground that the goods were not according to contract; and the factor's agents in consequence retained the bill of lading. When the vessel arrived, eight lay days remained for the discharge. The defendants informed the master of the dispute respecting the cargo, and stated that, to prevent delay of the ship, they were ready to receive the cargo for whom it might concern. The factor's agent gave the master notice not to deliver the cargo except on the production of the bill of lading, stating that it would not be pro-

and could not, though demanded, be taken out till the upper tiers were cleared. The court held that each of such consignees was liable on a general count for demurrage — to pay the 4*l.* per day for the forty-six days.

(F) *Nor need the Master give Notice of Arrival.*

HARMAN v. MANT, 4 Camp. 161.

To entitle the owner to demurrage, the master need not give notice of the ship's arrival to the consignee,

In an action for demurrage, it was proved that the defendant's residence was well known, and that it was usual to send notice to all the consignees of the ship's arrival, but that it was merely done by way of courtesy; and that a similar practice prevailed when the demurrage days began. But *Gibbs, C. J.*, "it was the duty of the consignees to watch the ship's arrival. The notice may be convenient, but its omission cannot bind the shipowner."

HARMAN v. CLARKE, 4 Camp. 159.

Especially when the consignees have indorsed the bill of lading.

The facts of this case were similar to the preceding. *Gibbs, C. J.*, expressed himself clearly of opinion that no notice was necessary, and that it was the duty of the defendant, as indorser of the bill of lading, to watch the ship's arrival.

III. RATES OF, HOW REGULATED.

MOORSOM v. BELL, 2 Camp. 616.

If ship detained beyond days of demurrage *primâ facie*, the sum payable for those days is the measure of compensation for extended time.

This ship had been detained beyond the stipulated time of demurrage.

In an action on the charter-party, *Lord Ellenborough, C. J.* — "If a ship be detained beyond her days of demurrage *primâ facie*, the sum allowed as demurrage shall be taken as the measure of compensation. But this rule is open to the shipowner, to show that more damage has been sustained; and to the freighter, to show there has been less than could thus be compensated."

IV. DURATION AND REVIVAL OF CLAIM FOR.[1]

V. PARTY LIABLE TO.

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duced until they received advices from abroad, and suggested the discharging the cargo at some respectable house other than the defendant's. On the last of the demurrage days the factor's agents produced the bill of lading, and received the cargo, which took seven days to deliver: — *Held*, by the Exchequer Chamber overruling the judgment of the Court of Exchequer, that the plaintiffs were entitled to recover from the defendants for the detention of the ship during the demurrage days, and for the few days beyond them that it took to unload. *Erichsen and others v. Barkworth and another*, 28 L. J. Ex. 95; 3 H. & N. 894.

A covenant to unload in "the usual and customary time" does not render the freighter liable to demurrage, if the ship which contains wine be unloaded in her turn in the bonded warehouses. *Rodgers v. Forresters*, 2 Camp. 483. And if there be no stipulation as to the time for unloading, the freighter is not bound to unload within the usual time, if the state of the docks prevent it. *Burmester v. Hodgson*, 2 Camp. 489. So, if the impediment to the ship's sailing be occasioned, not by the loading, but by the ice, the merchant is not liable. *Pringle v. Mollett*, 6 Mee. & W. 80. And the owner has no claim of this sort for a delay occasioned by a hostile occupation of the destined port, although, after such delay, it may be found expedient entirely to abandon the voyage, and thereby the whole employment of the ship becomes unprofitable. *Liddard v. Lopez*, 10 East, 526. Nor is the merchant at any time liable for delay occasioned by the fault of the owners. *Barrat v. Dutton*, 4 Camp. 335. *Benson v. Blunt*, 1 Q. B. 870. *Taylor v. Clay*, 9 Q. B. 713.

[1] The payment of demurrage stipulated to be made while a ship is waiting for convoy, ceases as soon as the convoy is ready to depart; and such payment agreed to continue while a ship is waiting to receive a cargo, ceases when the vessel is fully laden, and the necessary clearances are obtained, although the ship may in either case happen to be further detained by adverse winds or tempestuous weather; and if, after having once set sail on her voyage, she is driven back into port, the claim for demurrage is not thereby revived. *Launoy v. Werry*, 2 Bro. P. C. 60.

Dobbin v. Thornton, 6 Esp. 16.

Where demurrage forms a condition in the bill of lading, which is "to deliver to order or assigns," any person by accepting the goods under it is liable for demurrage.[1]

The bill of lading was to deliver the cargo "to order or assigns," they paying freight with primage; the cargo was to be taken out within ten days after arrival, or to pay three guineas per day demurrage. In an action for fifteen days' demurrage, it was contended that there was no privity between the captain and the defendant; the defendant's contract was with the shipper. But *Lord Ellenborough, C. J.*, said, the goods were to be delivered to "the order of the shipper or his assigns," paying freight, &c. The terms, therefore, of the defendant having the goods was, that of paying for the freight and conforming to all the other stipulations in the bill of lading.

VI. No Implied Contract to Pay.[2]

VII. No Lien for.

There is no right of lien for demurrage which sounds in damages merely (*Phillips v. Rhodie*, cited Lawes on Charter-parties, 208); but when the demand si on account of the use and hire of the ship, by keeping her with the goods on board (especially where a certain sum is due on that account), there does not appear to be any solid distinction between freight and demurrage, as to the right of lien either being equally a debt due to the master or owner of the ship, in respect of the use of the vessel or the carriage of the goods. *See post*, Freight. *Birley v. Gladstone*, 3 M. & S. 205.

VIII. Proceedings in Admiralty Courts as to.

The Admiralty Court will order demurrage to be paid by the captor, where there has been any neglect to proceed to adjudication, especially if there appears to have been misconduct on the part of the captor, indicating an intention of carrying the vessel out of the jurisdiction of the Court of Admiralty. 1 Rob. Rep. 287. Although the freight be made payable on the arrival of the ship, and that is prevented by capture on her outward voyage, and her being brought back to the port or country of her departure, in which case no freight is due; yet it is not clear that this will prevent a claim for demurrage,

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[1] See *Stindt v. Roberts*, 5 D. & L. 460; 2 B. C. Rep. 212; 12 Jur. 518; 17 L. J. Q. B. 166. And in *Jessen v. Solly*, 4 Taunt. 52, it was held that persons taking goods under a bill of lading make themselves liable to all its terms, and consequently to pay demurrage if it be due. And where a charter-party contained a provision for demurrage, and the bill of lading stated the cargo to have been received as against freight, and "other conditions," as per charter-party, and the assignee of the bill of lading accepted the cargo, and paid the freight, but repudiated his liability to pay for demurrage: — *Held*, on an action by the shipper against the assignee for the demurrage, that the judge properly left it to the jury to say whether the defendant was liable for the demurrage. *Wegener v. Smith*, 15 C. B. 285; 24 L. J. C. P. 25. *See* also *Möller v. Young*, 25 L. J. Q. B. 94. But the consignee of a bill of lading which makes the goods deliverable to him or assigns, "paying for the said goods as per charter-party," does not, by taking the goods at the destination, make himself liable to pay for demurrage in the port of loading according to the rate stipulated in the charter-party, though there be an express stipulation for a lien on the goods for such demurrage. So held in the Exchequer Chamber, on appeal, affirming the judgment of the Queen's Bench. *Smith v. Sieveking*, 5 E. & B. 589; 2 Jur. N. S. 1135: Ex. Cham.

[2] Demurrage, properly so called, arises out of the terms of some contract thus expressly entered into between the shipowner and freighter, or thus stipulated in the bill of lading by the master or owners, and adopted (*Harman v. Gandolphi*, Holt, N. P. 35. *Harman v. Clarke*, 4 Camp. 161) and assumed by the consignee. Accordingly it has been held, that the master of a ship who had undertaken, by a bill of lading, to deliver goods to the consignee on payment of freight, cannot maintain an action against the consignee on an implied contract to pay demurrage (*Evans v. Forster*, 1 B. & Adol. 118. *Brouncker v. Scott*, 4 Taunt. 1. *Jesson v. Solly*, id. 52); an inconvenience which may be easily obviated by the insertion of a few words in the margin of the bill of lading, notifying that it is a condition of the contract to carry and deliver the goods, that the consignee shall clear them in a certain number of days after the ship's arrival, or pay so much per day for demurrage.

if the vessel suffer any delay or improper detention on her taking in her outward cargo. 3 id. 183.

Where a ship is not captured at sea, but seized in a British port, into which she has been driven by stress of weather; and, wanting repairs, she stays there for that purpose, as well as for the purpose of proving her neutral character, and proof of the character of the ship takes up more time than that of the cargo, there is no ground for a claim of demurrage against the seizors or the owners of the cargo. 1 Rob. 289.

IX. Action for, when Maintainable.

Common count for.

In schedule B, the form of count for demurrage is, "The plaintiff sues the defendant for money, payable by the defendant to the plaintiff, for the demurrage of a ship of the plaintiff, kept on demurrage by the defendant."[1]

DEMURRER.

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XV. Party may Demur and Plead at the same time, p. 46.
XVI. Demurrer to Plea in Abatement. *See* Abatement, vol. i. p. 37.
XVII. Judgment on Demurrer Generally. *See post*, Judgment.
XVIII. „ „ to Plea in Abatement. *See* Abatement, vol. i. p. 40.
XIX. Costs on Demurrer. *See* Costs, vol. iii. p. 287.

I. Definition of.[2]

[1] This count will only lie where there is an express agreement to pay demurrage *eo nomine*, or against the indorsee of a bill of lading containing an express stipulation, by reference or otherwise, to that effect. Where the consignee becomes otherwise chargeable for the detention of the ship, or delay in accepting the goods carried, he must be sued in a special count. *Evans v. Forster*, 1 B. & Adol. 118. *Horn v. Bensusan*, 9 Car. & P. 709. *Möller v. Young*, 5 E. & B. 755. *Crofton and others v. Pickernell*, 16 Mee. & W. 829. And the breach in a declaration on a covenant to pay demurrage should not exceed the limited number of stated days mentioned in the covenant. *Stevenson v. York*, 2 Ch. 570.

[2] A demurrer (from the Latin *demorari*, or French, *demorer*, to "wait" or "stay") imports, according to its etymology, that

II. Effect of Demurrer.

(A) *Admits all Facts sufficiently Pleaded.*

Rex v. The Bishop of Armagh, 2 Stra. 837. S. P. Phillibrown v. Ryland, 8 Mod. 354. S. P. Rex v. Knollys, 1 Ld. Raym. 18. S. P. Copley v. Delaunoy, 2 Ld. Raym. 1056.

A demurrer admits all such matters of fact as are sufficiently pleaded.

Per Cur. We allow that a demurrer is an admission that the facts alleged are true, and that, in such a case, the only question for the court is, whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged. But it must be remembered, that the rule is laid down with this qualification, that the matter of fact be sufficiently pleaded. Wherever, therefore, as in the case before us, it is not pleaded in a formal and sufficient manner, a demurrer is no admission of the fact.

See Co. Litt. 72, a; 5 Co. 69; Dy. 21; 5 Hen. 7, 1; Doct. Pl. 116; Hob. 81; Plowd. 13, b; 85, a; Steph. Pl. 154.

(B) *It lays open the whole Record.*

Anon. 2 Wils. 150. S. P. Bates v. Cort, 2 B. & C. 474.

A demurrer has the effect of laying open to the court, not only the pleadings demurred to but the entire record.[1]

Debt on bond, with condition for the payment of a certain sum of money on a certain day. The defendant pleaded payment before the day. Plaintiff replied, that the defendant did not pay before the day, *et de hoc ponit se super patriam.* Defendant demurred, and plaintiff joined in demurrer. It was for the plaintiff admitted that the plea at first was bad, but it was insisted that the plaintiff had made it good by replying and tendering issue upon it; or that, if the issue was immaterial, there ought to be a repleader. It was, however, urged that this was a case where defendant had not joined issue to the country, but had put himself upon the judgment of the court, and though the replication was bad, yet, whenever the case is upon a demurrer, the court looks for the first fault, which is in the plea here; and, therefore, judgment ought to be for the plaintiff: and of that opinion was the court, and gave judgment for the plaintiff. *See* Steph. Pl. 155.

III. Special Demurrers Abolished by C. L. P. Act, s. 51.

Objections by way of special demurrer taken away.[2]

By C. L. P. Act, s. 51, "no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer."

IV. Either Party may Demur to Insufficiency of Substance.[3]

By C. L. P. Act, s. 50, "either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be."

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the objecting party will not proceed with the pleading, because no sufficient statement has been made on the other side, but will wait the judgment of the court whether he is bound to answer. Steph. Pl. p. 50. It is the formal mode of disputing the sufficiency in law of the pleading of the opposite party.

[1] This, however, does not apply to a demurrer to a plea in abatement. *See* Abatement, vol. i. p. 37; 1 Salk. 212.

[2] Before this enactment demurrers were of two kinds, *general* and *special.* The former excepted to the sufficiency in general terms, and under it no objection could be taken but to matter of substance. A special demurrer specified the particular ground of exception, and was necessary where it turned on matter of form only. It follows that now there can be no demurrer on matter of form only. But if a pleading be so framed as to embarrass, a summons should be taken out to set it aside under 15 & 16 Vic. c. 76, s. 52.

[3] A departure is an objection to substance. 2 Saund. 84.

The defendant may within four days after the delivery of the issue, or after the delivery of plaintiff's replication, with a joinder of issue for the defendant, strike out such

V. Form of Demurrer, and of Joinder in.

Form of demurrer, and joinder in demurrer.[1]

By C. L. P. Act, s. 89, "the form of a demurrer, except in the cases herein specifically provided for, shall be as follows, or to the like effect:—

"'The defendant by his attorney [*or* in person, &c., *or* plaintiff] says that the declaration [*or* plea, &c.] is bad in substance.'

Must have a marginal note.

and in the margin thereof some substantial matter of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside by the court or a judge, and leave may be given to sign judgment as for want of a plea; and the form of a joinder in demurrer shall be as follows, or to the like effect:—

"'The plaintiff [*or* defendant] says that the declaration [*or* plea, &c.] is good in substance.'"

VI. If Frivolous, may be Set Aside.[2]

VII. Party Demurring may give Four Days' Notice to Join.

Notice to join in.[3]

By Pr. R. 14, "the party demurring may give notice to the opposite party to join in demurrer in four days, which notice may be delivered separately, or indorsed on the demurrer, otherwise judgment."

VIII. The Demurrer-Books.

Part only to which demurrer applicable to be copied into demurrer-books.[4]

By Pr. R. 1853, 17, "when there shall be a demurrer to part only of the declaration, or other subsequent pleadings, those parts only of the declarations and pleadings to which such demurrer relates shall be copied into the demurrer-books, and if any other parts shall be copied, the master shall not allow the costs thereof on taxation, either as between party and party, or as between attorney and client."

IX. How Set Down for Argument.

How demurrers, &c. to be set down.[5]

By Pr. R. 1853, 15, "no motion or rule for a *concilium* shall be required; but *demurrers*, as well as all special cases, special verdicts, and appeals from county courts, shall be set down for argument in the special paper, at the re-

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issue, or joinder of issue, and demur. *Poole v. Pain*, 2 L., M. & P. 609; 6 Q. B. 663; *Heginbotham v. South-Eastern Continental, &c. Co.* 8 C. B. 338.

[1] Only one ground need be specified, but it should be more specific than a mere repetition of the demurrer. *Ross v. Robeson*, 3 Dowl. 779. But where a plaintiff demurs to several pleas on the same ground, it is sufficient to make the statement in the first demurrer, and refer to it in the others. *Braham v. Watkins*, 16 Mee. & W. 77.

The want of a marginal note is no ground for objecting to the argument of the demurrer when called on. *Lacey v. Umbers*, 3 Dowl. 732.

[2] *See* C. L. P. Act, s. 89, *supra*. An application for this purpose cannot be made after joining in demurrer (*Cutts v. Surridge*, 4 D. & S. 642: 16 L. J. Q. B. 193), though it may after an order for a time to join. *Norton v. Mackintosh*, 7 Dowl. 529.

A demurrer will not be set aside as frivolous unless it is palpably so. *Tallis v. Tallis*, 21 L. J. Q. B. 269.

[3] The plaintiff cannot add a joinder in demurrer for defendant without permission. *Mullins v. Cox*, 7 Dowl. 660.

[4] This rule does not prevent the insertion of a plea to which the plea demurred to refers. 9 Ad. & E. 499. *Hooper v. Woolmer*, 10 C. B. 370. When the demurrer is to the whole declaration or other pleading, the demurrer-book contains the whole record.

Either party may make up the demurrer-book, and proceed to argue the demurrer.

[5] The notice must be given in sufficient time to enable the opposite party to prepare his demurrer-books, otherwise the court will refuse to hear the demurrer, and probably allow the objecting party his costs of appearing to make the objection. *Britten v. Britten*, 2 Dowl. 239. *Wilson v. Tucker*, id. 83; 1 C. & M. 795.

The demurrer cannot be set down for argument before the opposite party has joined in demurrer; and, consequently, notice that the demurrer has been so set down cannot be given at the time of the delivery of the joinder in demurrer. *Gibbons v. Mottram*, 1 Dowl. & L. 815; 6 Man. & G. 692; 7 Scott, N. R. 535. *Hall v. Popplewell*, 5 Mee. & W. 341. *Howarth v. Hubbersty*, 3 Dowl. 457.

quest of either party, four clear days before the day on which the same are to be argued, and notice thereof shall be given *forthwith* by such party to the opposite party."

X. Delivery of Demurrer-Books, with the Points of Argument, to the Judges.

Copies of demurrer-books, &c. to be delivered to the judges.[1]

By Pr. R. 1853, 16, "four clear days before the day appointed for argument the plaintiff shall deliver copies of the demurrer-book, special case, special verdict, or appeal cases, with the points intended to be insisted on, to the Lord Chief Justice of the Queen's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior puisne judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority; and in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the master a sufficient sum to pay for such copies. If the statement of the points have not been exchanged between the parties, each party shall, in addition to the two copies left by him, deliver also his statement of the points to the other two judges, either by marking the same in the margin of the books delivered, or on separate papers."

XI. Judgment to be given according to the very Right.

Judgment upon demurrer to be given according to the very right of the cause.

And by the same section, "the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in, or lack of form; and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in, or lack of form."[2]

XII. Amendment before Argument.[3]

XIII. „ on or after Argument.[4]

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[1] If a party seek to make his opponent pay the costs of copies of demurrer-books delivered for him, he must deliver them on the day after the time for his opponent delivering them expires. *Fisher v. Snow*, 3 Dowl. 27. *Hooper v. Woolmer*, 10 C. B. 370. If all the demurrer-books are not delivered to the judges by one party or the other, the case will be struck out of the paper. *Abraham v. Cook*, 3 Dowl. 215. *Somers v. Miller*, 2 H. & W. 117. *Scott v. Robson*, 2 C., M. & R. 29; Tyr. 717.

The rule as to the points for argument is intended for the advantage of the court, and not of the parties. *Few v. Backhouse*, 8 Ad. & E. 793. *Scott v. Chappelow*, 2 Dowl. N. S. 78; 5 Scott, N. R. 148; 4 Man. & G. 336. The points on each side should be stated. *Arbouin v. Anderson*, 1 Q. B. 498. *Clark v. Davis*, 7 Taunt. 72. And in one case, where one party had not delivered any points, it was held that he could only answer the arguments of the other side. *Golliffe v. Bourne*, 5 Scott, 674. But the judges are not very strict in this respect. *Friend v. Butterfield*, 11 Ad. & E. 841. *Scott v. Chappelow*, 4 Man. & G. 336.

As a matter of courtesy, it is usual for the parties to exchange their points; but it is not necessary, and each party can obtain a copy from the judge's clerk. *Scott v. Chappelow*, *supra*.

[2] And the court will adjudicate without argument upon a substantial point which may suggest itself to the judges, although not mentioned in the margin of the demurrer, or in the points of argument. *Arbouin v. Anderson*, 1 Q. B. 498. *Devaux v. Anstice*, C. P. Arch. p. 887, n. o. And if the demurrer be too large, the judgment of the court will be given in favour of the party demurring for so much of the pleading as is insufficient and against him for the residue. *Briscowe v. Hill*, 10 Mee. & W. 741. *Slade v. Hawley*, 13 id. 757. But this was formerly not so. *Hinde v. Gray*, 1 Man. & G. 201. *Parrett Navigation Co. v. Stower*, 6 Mee. & W. 564.

[3] A party is usually allowed to amend his pleading when demurred to on payment of costs, and sometimes without. *Tomlinson v. Bollard*, 4 Q. B. 612. *Collins v. Aaron*, 4 Bing. N. C. 233. *Solomons v. Lyon*, 1 East, 370.

[4] When a case is called on for argument, the court will sometimes suggest an amendment; but if counsel insists on arguing, they seldom afterwards permit an amend-

XIV. Withdrawing Demurrer.[1]

XV. Party may Demur and Plead at same time.

By C. L. P. Act, s. 80, "either party may, by leave of the court or a judge, plead and demur to the same pleading at the same time, upon an affidavit by such party or his attorney, if required by the court or judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact; and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law; and it shall be in the discretion of the court or judge to direct which issue shall be first disposed of." As to pleading and demurring together.[2]

DEMURRER to Evidence.

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II. Object of, p. 46.
III. How Allowed, p. 46.
IV. How Argued, p. 46.

I. What it Admits.

Cocksedge v. Fanshawe, 1 Dougl. 119.

Per Cur. It is the province of a jury alone to judge of the truth of facts and A demurrer to

ment. *Skuse v. Davis*, 10 Ad. & E. 635; 7 Dowl. 774.

However, a party has been allowed to amend after argument, and after a *cur. adv. vult* (*Rivis v. Watson*, 5 Mee. & W. 255. *Wheeler v. Senior*, 7 id. 562), but before judgment, where the justice of the case required it. 2 Saund. 6th ed. 402. It is entirely a matter of discretion with the court, and no general rule can be laid down on the subject. The following cases may, however, be consulted: — *Bishop v. Stacey*, 2 Stra. 954. *Steel v. Sowerby*, 6 T. R. 173. *Mattravers v. Fossett*, 3 Wils. 295. *Hamilton v. Wilson*, 1 East, 391. *Potten v. Bradley*, 2 M. & P. 78, 81. *Edmonds v. Walter*, 2 Chit. Rep. 292. *Morant v. Sign*, 2 Mee. & W. 95. *Heydon v. Thompson*, 1 Ad. & E. 210; 1 Nev. & P. 219. *Solomons v. Lyon*, 1 East, 369. *Wheeler v. Senior, supra. Metcalfe v. Booth*, 18 L. J. Q. B. 247. The court in general, before giving a defendant leave, will always require an affidavit of merits. *Ayres v. Wilson*, 1 Doug. 335. *Waters v. Ogden*, 2 id. 452. *Alder v. Chip*, 2 Burr. 755. *Cholmely v. Paxton*, 3 Bing. 1; 2 M. & P. 127. *Howell v. M'Ivers*, 4 T. R. 690. *Alexander v. Townley*, 6 Scott, N. R. 135. *Hensworth v. Fowkes*, 1 Nev. & M. 330. *Bramah v. Roberts*, 1 Scott, 364; 1 Bing. N. C. 481. *Morant v. Sign, supra. Gibbons v. Mottram*, 7 Scott, N. R. 513. And leave to amend after argument will not be given to a plaintiff in a *qui tam* action (*Rex v. Holland*, 4 T. R. 459. *Evans v. Stevens*, id. 224. *Wood v. Grimwood*, 10 B. & C. 689); or in a hard action (*Saxby v. Kirkus*, Say. 117. *Noble v. King*, 1 H. Black. 37); or to a defendant after the plaintiff had lost a trial (*Jordan v. Twells*, Hard. 171); or after the argument of a second demurrer to the same pleading (*Kinder v. Paris*, 2 H. Black. 561); or after issues in fact have been tried, and contingent damages assessed as to the demurrer. *Robinson v. Raley*, 1 Burr. 322. *Baden v. Flight*, 4 Bing. N. C. 35. *Pearson v. Rogers*, 9 Ad. & E. 310. *Crucknell v. Trueman*, 9 Mee. & W. 684. The defendant has been allowed to amend his plea after judgment where the court took time to consider such judgment, and the defendant's counsel was not present when the judgment was delivered. *Hayward v. Bennett*, 16 L. J. C. P. 95. *Atkinson v. Bayntum*, 1 Scott, 424; 1 Bing. N. C. 740.

[1] A party may in general withdraw his demurrer before argument, unless the other side would be prejudiced by his doing so. But reasonable terms will be enforced by the judge, and a defendant withdrawing will not, as a matter of course, be let into plead. *Wilson v. Tucker*, 2 Dowl. 83. *Bramah v. Roberts*, 1 Scott, 360; and by Pr. R. 1853, r. 8, the defendant shall not be at liberty to waive his plea, *or enter a relicta verificatione after a demurrer*, without leave of the court or a judge, *unless by consent of the plaintiff or his attorney*. Under the old practice, this was a mode of evading paying costs on a demurrer. *Cooper v. Paynter*, and *Hutton v. Turk*, cited in 13 Mee. & W. 734, n.; S. C. 2 D. & L. 712, n.; 1 Chit. Arch. 274.

[2] *See post*, Pleading several Matters.

evidence admits the truth of every conclusion of fact which the jury could have inferred.[1]

the credibility of witnesses, and the party cannot by a demurrer to evidence, or any other means, take that province from them, and draw such questions *ad aliud examen*. I think the plain and certain rule is this: The demurrer admits the truth of all facts which, upon the evidence stated, might be found by the jury in favour of the party offering the evidence.

II. Object of.[2]

III. How Allowed.[3]

IV. How Argued.[4]

DEMY Mark. *See* Right, Writ of.

DENIAL. *See* Bankruptcy, vol. ii. p. 141; *post*, Lien; Payment; Pleas; Set-Off; Tender; Traverse; Trover.

DENIZEN and Denization. *See* Naturalisation and Denization.

DEODAND. Abolished by 9 & 10 Vic. c. 62. Formerly any personal chattel which moved *ad mortem*, or was the immediate cause of the death of a human being, was forfeited to the king for pious uses. It was originally designed as an expiation for the souls of those suddenly snatched away by violent death. 1 H. P. C. 419; Fleta, lib. i. c. 25; 3 Inst. 57.

DEPARTURE. *See* Insurance.

DEPARTURE in Pleading. *See* Pleas; Replications; Variance.

DEPASTURING, Right of. *See* Common, vol. iii. p. 113.

DEPOSIT. *See* Execution; Payment of Money into Court; Principal and Agent; Pawnbroker.

DEPOSIT in Lieu of Bail. *See* Bail Below, vol. ii. p. 76; Bail Above, id. p. 90.

DEPOSITIONS. *See* Bankruptcy, vol. ii. p. 141; Chancery, vol. iii. p. 73; Coroner, id. p. 225; *post*, Ecclesiastical Court; Evidence; Excise and Customs; Justice of the Peace; Police Courts; Witness.

DEPRIVATION. *See* Ecclesiastical Persons.

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[1] So that on a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the proposed evidence conduces to prove. *Gibson v. Hunter*, 2 H. Black. 187.

[2] The object in demurring to evidence is to withdraw from the jury the application of the law to the facts, as the jury may give a general verdict, and so the facts not appear on the record. *Gibson v. Hunter*, 2 H. Black. 187. *Cocksedge v. Fanshawe*, 1 Dougl. 119. *Chichester v. Phillips*, T. Raym. 404. The question on demurrer is whether, if the matters shown are true, they are sufficient to maintain the issue. The motion for a new trial, however, is a more satisfactory mode of taking the objection than a demurrer to the evidence, and the latter has, consequently, fallen into disuse.

[3] The judge may overrule the demurrer if he think right, but, in that case, the party objecting may tender a bill of exceptions. *Gibson v. Hunter*, 2 H. Black. 205. When it is allowed, it is tacked to the *nisi prius* record, and the jury may either assess contingent damages, or they may be discharged, and the damages afterwards be assessed on a writ of inquiry. The latter would seem to be the more usual course. Bull. N. P. 313; Tidd. 916.

[4] The demurrer is argued in the court out of which the record issued, and error lies on the judgment. *Gibson v. Hunter*, *supra*. On the argument, no advantage can be taken of a deposit in the pleading. *Cort v. Birkbeck*, 1 Dougl. 222. But this, of course, does not affect any objection to such defect on a subsequent motion for arrest of judgment. (Id.) The court may infer what the jury might have inferred. *Cocksedge v. Fanshawe*, p. 45 in text.

DEPUTY. *See* Churchwardens, vol. iii. p. 111; Constable, id. p. 182; Coroner, id. p. 225; Corporations, id. p. 263; *post*, Overseer; Principal and Agent; Sheriff.

DESCENT. *See* Curtesy, vol. iii. p. 531; *post*, Dower; Ejectment; Heir; Inheritance.

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I. General Nature of.[1]

[1] At common law, descent or hereditary succession is the title whereby a person on the death of his ancestor acquires his estate by right of representation as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir is in law called the inheritance. *See* 2 Bl. Com. 201; 3 Com. Dig. 362. And it is so inviolable that it cannot be altered or varied by the parties. *Roe d. Aistrop v. Aistrop*, 2 Bl. Rep. 1228;

II. Distinction between Descent and Purchase.[1]

III. How it Differs from Descent by the Civil Law.[2]

IV. Who may be Heirs.

(A) *Aliens.*[3]

(B) *Bastards.*[4]

Co. 1; Co. Litt. 27, a; Plowd. 251; 7 Co. 40, b; 1 Brownl. 45; 2 id. 334. Yet though the lands are cast on the heir by the law itself, the heir has not *plenum dominium*, or full and complete ownership, till he has made an actual corporeal entry into the lands; for if he die before *entry* made, *his* heir shall not be entitled to take the possession, but the heir of the person who was last actually seised. It is not, therefore, only a mere right to enter, but the actual entry that makes a man a complete owner, so as to transmit the inheritance to his heirs; *non jus sed seisina facit stipitem.* Com. Dig. Descent, C. 8, 9, 10. For, although the right of inheriting be known to the laws of every civilised country, and is founded on the best principles of reason, yet it is not derived from natural law, or which can belong to any man in a state of nature; from which it follows that numerous and arbitrary rules, by which its course is either directed or interrupted, can never properly be esteemed or objected to as violations of natural justice. 3 Cru. Dig. 362.

[1] The difference between the acquisition of an estate by descent and by purchase consists principally in two points. First, that by purchase the estate acquires a new inheritable quality, and is discendible to the owner's blood in general, as a feud of indefinite antiquity. Secondly, that an estate taken by purchase will not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent will. *See* 3 Cru. Dig. 452. *See* 3 & 4 Wm. 4, c. 106, *post*, p. 56.

The acquisition of an estate by purchase is, in legal signification, where the title thereto is vested in a man by his own act and agreement, by some kind of conveyance, either for money or for some other consideration, or freely of gift. Sir W. Blackstone has enumerated the following modes of acquiring an estate by purchase:—Escheat, occupancy, prescription, forfeiture, and alienation.

The instances in which a person takes by descent, and not by purchase, may be classed under the following heads: First, where an estate descends in a regular course of succession from father to son, or from any other ancestor to his heir-at-law. *See* 1 Co. 98, a, b; Walk. Descent, 28. Secondly, where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail. See *Shelley's case*, 1 Co. 104; Walk. Descent, 233; 4 Cru. Dig. 377. Preston's Estates, 263, 321; 11 Rep. 80; 5 Burr. 2615; S. C. 2 Bl. Rep. 687; 1 Vent. 372; 2 Bl. Rep. 698; 2 T. R. 444; 1 Ld. Raym. 326. Thirdly, where an ancestor by deed, or by his will, limits a particular estate to a stranger, or either limits over the remainder (or rather a reversion) to his right heirs, or leaves the same undisposed of. *See* Walk. Descent, 271; and Chitty's Treatise on Descents, 4.

[2] By the civil law, the heir is defined to be he who is universal successor to all the goods and rights of the deceased, and who is bound to acquit all the charges and burdens of the said goods. 1 Domat. b. 1, t. 1, s. 1, p. 558. And this definition embraced the two sorts of heirs known to that law, viz. those who were instituted or named by a testament, called testamentary heirs, and those to whom the law gave the inheritance on account of their proximity in blood, who were called for that reason heirs-at-law; and the latter were also called heirs to intestates, because they succeeded, if they were not excluded by a testament. (Id.) But the law of England makes a distinction between these two sorts of heirs, and gives them different names. For the heir, in the legal understanding of the common law, is he to whom lands, tenements, or hereditaments, by the act of God, and right of blood, do descend of some estate of inheritance. And by the common law a man cannot be heir to goods or chattels; for, as to these, the person who succeeds to them is called in the law, executor, if he succeeds by the appointment of the deceased in his last will and testament; or administrator, if he succeeds by the appointment of the ordinary in the case of dying intestate. *See* Co. Litt. by Thomas, vol. ii. p. 156.

[3] Aliens were not allowed to hold lands at common law. *See* Alien, vol. i. pp. 287, 288. 7 & 8 Vic. c. 66. And it has been held that a person born abroad, whose father was a foreigner, cannot inherit through his mother, though the latter be a natural-born subject. *Doe d. Durouré v. Jones*, 4 T. R. 300.

[4] *See* Bastard, vol. ii. 385. The presumption of law arising from the fact of husband and wife sleeping together, is irresistible as to the legitimacy of a child of the wife, unless there is clear and satisfactory evidence that some physical incapacity existed. *Legge v. Edmonds*, 25 L. J. Ch. 125.

A domiciled Englishman being the putative father of an illegitimate child, born in France of a French woman, and afterwards becoming domiciled in France, cannot, on his subsequent marriage with the mother of the child, legitimatise the child under the provisions of the French law, so

(C) *Idiots and Lunatics.*[1]

(D) *Monsters.*[2]

(E) *Persons Attainted.*[3]

V. Descent of Corporeal Hereditaments.

(A) *By the Common Law.*[4]

(1) *Of Estates in Possession.*

(*a*) *General Remarks.*[5]

as to enable it to share in a bequest to his children contained in the will of a person in England. *In re Wright*, 2 Kay & J. 595; 2 Jur. N. S. 465; 25 L. J. Ch. 621; and *see* Bastard, vol. ii. 385.

[1] Idiotcy and lunacy are no impediments to the heritable blood of the persons subject to such aberrations of the mind. Co. Litt. 2, 8; and Collinson on Lunacy.

[2] A monster which has not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, has no inheritable blood, and cannot be heir or inherit any lands, albeit it be brought forth in marriage; but, although he has deformity in any part of his body, yet if he has human shape, he may be heir. 2 Bl. Com. 246, 247; Co. Litt. 7, b; 29, b.

[3] Before the 3 & 4 Wm. 4, c. 106, persons attainted of high treason or felony were incapable of inheriting lands, or of transmitting them by descent to their children. And *see* 1 Vent. 8, a; 391, b; Noy. 165: but now *see* Attainder, vol. ii. p. 1.

[4] These rules apply to the case of a descent upon the death of the owner before the 1st January, 1834. *See post*, p. 55.

[5] As the doctrine of descent depends on the nature of kindred, and several degrees of consanguinity, a correct knowledge should be obtained of this kindred or alliance in blood. Consanguinity, or kindred, is defined to be the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral. Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between, father, grandfather, and great-grandfather. Collateral consanguinity is that which subsists between persons lineally descended from the same ancestor, who is the *stirps* or root; the *stipes*, trunk, or common stock, but who do not descend the one from the other, as brothers, and the children, grandchildren, &c. of brothers. *See* 2 Bl. Com. 202, 206. The method of computing these degrees in the canon law, which our law has adopted, is as follows:—We begin at the common ancestor and reckon downwards, and in whatever degree the two persons, or most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related to each other. *See* 2 Bl. Com. 206. The civilians take the sum of the degrees in both lines to the common ancestor. This is important in ascertaining who are entitled to administration, and the distributive shares of intestate personal estate.

No inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor be previously dead. *Nemo est hæres viventis.* Before that time the person who is next in the line of succession is called an heir-apparent, or heir-presumptive. Heirs-apparent are such whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son, or his issue, who must, by the course of the common law, be heir to the father whenever he happens to die. Heirs-presumptive are such who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs, but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son; nay, even if the estate hath descended by the death of the owner to such brother, or nephew, or daughter, in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally divested by the birth of a posthumous son. Bro. Descent, 58; 2 Bl. Com. 208.

It is also another rule of the common law respecting descents, that no person can properly be such an ancestor as that an inheritance can be derived from him, unless he had an actual seisin. Co. Litt. 15. For the law requires this notoriety of *possession* as evidence that the ancestor had the property in himself which is to be transmitted to his heir. The seisin, therefore, of any person makes him the root or stock, from which all future inheritance by right of blood must be derived.

The nature of the seisin which a person acquires, and which will render such person an ancestor, to whom the next claimant must make himself heir, depends materially on the question of whether the estate was obtained by purchase, or by descent. Where any person acquires hereditaments by purchase, and such hereditaments are of a corporeal nature, he generally at the same time also acquires, or receives, the corporeal seisin or possession. Watk. Descent, 3. Where the deed of purchase, or instrument by which such hereditaments are conveyed to the ancestor, is founded upon feudal principles, it is always attended with actual livery of seisin, which is exactly similar to the investiture of the feudal law, and, without which, such instrument was in no in-

(*b*) *Canons of Descent.*[1]

(1) *Inheritances descend lineally to the Issue of the Person who last Died actually Seised.*[2]

stance sufficient to transfer an estate of freehold. Co. Litt. 48, a. Where the instrument derives its essence from the Statute of Uses (27 Hen. 8, c. 10) the *cestui que use* is clothed with the actual possession of the lands by the operation of the act. And in case of a devise by will of lands to a man in fee, and who dies after the devisor, the freehold, or interest in law, is in the devisee before entry; and, on his death, his heir may and will take by descent. Co. Litt. 111, a; 1 Show. 71. As to incorporeal hereditaments, and as to reversions and remainders, of which, when expectant on an estate of freehold, there can be no corporeal seisin, the property, whether vested in possession, or only in interest, or merely contingent, is fixed or settled in the purchaser at the time of the purchase, so as to render them transmissible to his heirs. Watk. Desc. 9, 10. Whether, however, the hereditaments be of a corporeal or incorporeal nature, or in possession or expectancy, the purchaser, on the purchase being completed, and the property in them being transferred, becomes immediately the root, or stock, of descent, and the hereditaments become descendible to his heirs. Watk. Desc. 4. In the instance, therefore, of a purchase, the question is, whether such property was legally vested or fixed in the purchaser, so as that, had he lived, he might have had the actual possession or enjoyment of it; and he may, in many instances, transmit it to his heirs, though he never had an actual seisin of it himself, and even where he never had any kind of seisin whatever; for it is a rule, that where the heir takes any thing which might have vested in the ancestor, the heir shall be in by descent. 1 Co. 98, a; Moore, 140. Thus, in the case of a fine levied, or recovery suffered, though the party die before execution, yet the execution afterwards shall have relation to the act of the ancestor, and the heir be in by descent. *Shelly's case*, 1 Co. 93, b; 106, b; Co. Litt. 361, b; 7 Co. 38, a; Burr. 2786. The execution of the writ consists in the delivery of seisin by the sheriff to the demandant; but it is now only returned, and never, in fact, executed. 5 T. R. 179, 180. And in the instance of an exchange, if both parties to the exchange die before either enters, the exchange is altogether void; but, if either of the parties enters, and the other dies before entry, his heir may enter, and be in by descent. 1 Co. 98, a.

But where a person takes an estate by descent, he thereby acquires only a seisin in law of the estate descending, unless the estate were, on the death of the ancestor, held by any person under a lease for years (though otherwise, if leased for an estate of freehold); for then the heir had not merely a seisin in law, but, by the possession of such lessee for years, acquires a seisin or possession in deed. Co. Litt. 15, a; 3 Atk. 469; Moore, 126; Case, 272; Watk. 65, n. g. This seisin in law alone is not sufficient to make him an ancestor; but, in order to make himself the stock, or root, of descent, the fountain from which the hereditary blood of future claimants must be derived, and so enable him to turn the descent, and render the hereditary possessions descendible to his own heirs, it is requisite that such heir, who has thus succeeded to the estate by descent, should gain an actual seisin, or possession; or, what is equivalent thereto, according to the nature and quality of the estate descending. Watk. Desc. 36, 37, 57. *Ratcliffe's case*, 3 Co. 37. This actual seisin may be acquired by entry into the lands descended, if of an estate in possession, which is the usual and direct mode of acquiring it; which may be made by the heir himself, or by his guardian (if he is under age), or by his attorney, or even a stranger entering on his behalf. So also the heir may acquire an actual seisin by granting a lease for years, or at will, and the entry of such his lessee under the lease, and the seisin in law cast upon him by the law, will be sufficient to enable him to grant such lease. Plowd. 87, 137, 142; 6 Com. Dig. Seisin, A. 2; Bac. Abr. Lease, L. 5; 2 Stra. 1086; H. Chit. Desc. c. 4, s. 3, p. 48, 62.

[1] All possible hereditary successions, says Sir Matthew Hale, may be distinguished into three kinds, viz. first, in the *descending* line, as from father to son or daughter, nephew or niece; that is, grandson, or grand-daughter. Secondly, in the *collateral* line, as from brother to brother, or sister; and so to brother and sister's children. Thirdly, in an *ascending* line, either direct, as from son to father, or grandfather (which is not admitted by the common law; or in the transversal line, as to the uncle or aunt, great-uncle or great-aunt, &c. And, because this line is again divided into the line of the father, or the line of the mother, this transverse ascending succession is either in the line of the father, grandfather, &c. *on the blood of the father*, or in the line of the mother, grandmother, &c. *on the blood of the mother*. The former are called *agnati*, and the latter *cognati*. 2 Hale, H. C. L. c. 11, p. 113, 114.

[2] Whenever a person dies seised in fee-simple of a real estate, having issue, it immediately descends to such issue on whom the freehold in law is cast before entry. 3 Cru. Dig. 375.

But, although lands shall always descend to the person who is heir at the time of the death of the ancestor, consistently with the rule that the freehold shall never, if possible, be in abeyance, such descent

(2) *Male Issue shall be admitted before Female.*[1]

(3) *When Males, Eldest shall Inherit; but when Females, they shall take jointly.*[2]

(4) *Lineal Descendants shall represent their Ancestors* in infinitum.[3]

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may be defeated by the birth of a nearer heir. Thus, where a person dies, leaving his wife *enciente*, the common law, not considering the infant *en ventre sa mère* as in existence, casts the freehold on the person who is then heir; but, when the posthumous child is born, his guardian may enter upon such heir, and take the estate from him. 1 Inst. 11, b; 3 Cru. Dig. 375. Such heir is not, however, entitled to any profits that accrued before his birth; because the entry of the heir was congeable till the posthumous child was born. 3 Wils. 516.

[1] Thus sons are admitted before daughters, but daughters succeed before collateral relations, and in all cases of descent, females are preferred to more remote males; our law steering a middle course between the absolute rejection of females and the putting them on a footing with males. 3 Cru. Dig. 377.

This preference of males to females is entirely agreeable to the law of succession among the Jews, and among the states of Greece, or, at least, among the Athenians, but was totally unknown to the laws of Rome. *See* 2 Bl. Com. 213. With us, the true reason for preferring males must be deduced from feudal principles; for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services for the sake of which that system was established. But our law does not extend to a total exclusion of females, it only postpones them to males.

[2] When any person dies seised, leaving several sons and daughters, the inheritance goes to the eldest son solely. Roll's Rep. 36; Co. Litt. 24, a. This right of primogeniture obtained amongst the Jews. *See* Selden de Succ. Ebr. c. 5; Dalrympl. pp. 167, 169, 4th edit.; 2 Bl. Com. 214, 215. This rule is clearly of feudal origin. When honorary feuds or titles of nobility began to be created abroad, it was found necessary, in order to preserve their dignity, to make them impartible (2 Feud. 55), or, as they styled them, *feuda individua*, and in consequence descendible to the eldest son alone. Hale, H. C. L. 221. These reasons occasioned an almost total change in the method of feudal inheritances abroad, so that the eldest male began universally to succeed to the whole of the lands in all military tenures; and in this condition the feudal constitution was established in England by William the Conqueror. As late, however, as the reign of Henry the Second, we find that knights' fees, on estates held by military services, should descend to the eldest son, and socage fees should be partible among the male children. Glanvil. l. 7, c. 3; Mirror, c. 1, s. 3; 2 Bl. Com. 215; Wright's Ten. 176, 177. This distinction, however, seems to have ceased about the time of Henry III.; or, according to Dalrymple, p. 166, in the reign of Henry II., and socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture. 3 Cru. 354. And at this day, with the exception of estates pursuing a course of customary descent, all lands in this country devolve universally on the eldest son only, exclusively of all the other children.

As to females, there is no reason why the eldest should be preferred so that they shall all equally inherit, and make but one heir (Litt. s. 24), and are called parceners by descent. *See post*, Parceners.

However, the succession by primogeniture, even among females, takes place as to the inheritance of the crown. And the right of sole succession, though not of primogeniture, was also established as to female dignities and titles of honour. *See post*, Titles of Honour.

[3] This rule of descent is, "that the lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living." Hales, H. C. L. c. 11. This right transferred by representation, is infinite and unlimited, in the degree of those that descend from the represented; for the son, the grandson, the great grandson, and so all downwards *in infinitum*, enjoy the same privilege of representation as those from whom they derive their pedigree had, whether it be in descent lineal or transversal. (Id.) And from hence it follows, that the nearest relation is not always the heir at law; as the next cousin, *jure propinquitatis*. 1 Inst. 10, b. Proximity of blood, therefore, is twofold, either positive or representative. It is positive when the parties claim in their individual right, as between the second and third son, or between the uncle and grand-uncle. It is representative when either of the parties claims as being lineally descended from another; in which case he is entitled to the degree of proximity of his ancestor. Thus, the grandson of the elder son of any person proposed is entitled, before the second son of any such person, though in common acceptation nearer by two degrees; and this principle of representative proximity is by the law of England so peremptory, that a female may avail herself thereof, to the total exclusion of a male claiming in his

(5) *On failure of Lineal, Collateral Descent (to the blood of first purchaser) shall take place, subject to the three preceding rules.*[1]

(6) *Proximity to Collateral Ancestor last Seised must be by whole Blood.*[2]

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own right: for in descents in fee-simple the daughter of the eldest son shall, as claiming by representation of her father, succeed in preference to the second, or younger son. *See* 3 Cru. Dig. 378, 379; H. Chitty's Desc. p. 84.

[1] The fifth rule of descent is, "that on failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, *subject to the three preceding rules;*" viz. 1st. Preference of males to females in equal degree (*ante*, p. 52); 2dly. Primogeniture among males, and coparceny among females (id.); and 3rdly, The right of representation. (Id.)

This is, says Sir W. Blackstone, the great principle upon which the law of collateral inheritance depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor, from whom it really has, or is supposed by fiction of law, to have originally descended. According to the rule laid down in the Year-Books (M. 12 Edw. 4, 14; Fitzherbert, Abr. Descent, 2; Brook, Abr. Descent, 38; Hale, H. C. L. 243), "that he who would have been heir to the father of the deceased (and, of course to the mother, or any other real or supposed purchasing ancestor), shall also be heir to the son; a maxim that will hold universally, except in the case of a brother or sister of the half blood." 2 Bl. Com. 223.

As to half blood *see* 3 & 4 Wm. 4, c. 106, s. 9; *post.*

But where an estate has really descended in a course of inheritance to the person last seised, none are admitted but those through whom the inheritance has passed. Hale, 206; Chit. Desc. 96. It follows that where lands descend to a person *ex-parte paternâ*, none *ex-parte maternâ* can inherit, *et vice versâ*. But where a person seised *ex-parte maternâ* acquires the character, by means of some conveyance of the estate, of a new purchaser, the estate will become descendible to his heirs general. No conveyance, however, of a particular estate, will alter the mode of descent of the reversion. *Godbol v. Freestone*, 3 Lev. 406. But it must be observed, that inheritance of this kind cannot be created by any act of the parties, for if a person gives lands to another, to hold to him and his heirs on the part of his mother, yet his heirs on the part of his father shall inherit, for no person can create a new kind of inheritance not allowed by the law; therefore the words "on the part of the mother" are void. *See* 3 Cru. Dig. 382.

If a person be seised of lands as heir of the part of his mother, and makes a feoffment in fee, and takes back an estate to him and his heirs, this is a new purchase; and if he dies without issue, the heirs of the part of the father shall inherit. 1 Inst. 12, b. So, if a person seised of lands *ex-parte maternâ* makes a feoffment in fee of them, reserving a rent to himself and his heirs, this rent will go to his heirs *ex-parte paternâ*, because the feoffment in fee was a total disposition of the estate, and the rent was acquired by purchase. (Id.) *See* Prec. in Ch. 319; 1 Atk. 480.

Where a person seised *ex-parte maternâ* makes a feoffment in fee, and the use is expressly limited to the feoffor and his heirs; or if there is no declaration of uses, and the feoffment is not on such a consideration as to raise a use in the feoffee, so that the use results to the feoffor in either case, he is in of the ancient use, and not by purchase, therefore the descent is not altered. 1 Inst. 12, b; 1 Rep. 100, b.

It will sometimes happen that two estates or titles — the one legal, and the other equitable — will descend upon the same person, in which case they will become united, and the equitable shall follow the line of descent, through which the legal estate descended. *Goodright d. Alston v. Wells*, Dougl. 771.

And in *Langley v. Sneyd* (1 Sim. & Stu. 45), where an infant died seised of an equitable estate, descending *ex-parte maternâ*, the legal estate being vested in trustees, his incapacity to call for a conveyance of the legal estate (by which the course of descent might have been broken) was held not to be a sufficient reason to induce a court of equity to consider the case, as if such a conveyance had actually been made, it not being according to the terms of the lease any part of the express duty of the trustees to execute such conveyance.

[2] The sixth rule or canon is, that the collateral heir of the person last seised must be his next collateral kinsman of the whole blood. 2 Bl. Com. 224. But this is modified by the 3 & 4 Wm. 4, c. 106, s. 9. *See post.*

Where a posthumous son was born, his mother being in possession of the lands whereof the father died seised, it was holden that she became the guardian in socage, and the infant son was thereby deemed to be actually seised so as to exclude the half blood. *Goodtitle d. Newman v. Newman*, 3 Wils. 516. *Doe d. Barnett v. Keen*, 7 T. R. 386.

(7) *In Collateral Inheritances, Male Stock preferred to Female, unless Estate descended from Female.*

(2) *Of Estates in Remainder or Reversion.*

Kellow v. Rowden, 3 Mod. 253; 3 Lev. 286; Carth. 126; 3 Salk. 178; 1 Show. 244; Holt, 71, 336.

A person who claims a remainder or reversion by descent, must establish that he is heir to the first purchaser at the time when it comes into possession.

In this case the court held, that where an estate for life, or in tail, is created, and the reversion in fee expectant thereon descends from the donor or settlor through several intermediate heirs before it falls into possession, every person claiming it by descent must make himself heir to the donor or settlor, and take it as such, and not as heir to the intermediate heirs, who need not be so much as named in an action brought against the person so acquiring the possession as heir to the donor or settlor; for the intermediate heirs never had such a seisin as to transmit the reversion from them by descent to any person who was not heir to the donor or settlor.

See also *Jenkins v. Pritchard*, 2 Wils. 45; Cru. Dig. vol. iii. p. 431. But *see* 3 & 4 Wm. 4, c. 106, s. 2, *post*, p. 55.

(3) *Of Estates Tail.*[2]

The descent of an estate tail is regulated by the statute *De Donis Conditionabilibus*. It resembles that of a *feudum novum*, for the person to whom an estate tail is originally given or limited is the first purchaser of it, and none but those who are lineally descended from him can derive a title to it by descent. *See* Cru. Dig. 438.

(B) *By Custom.*

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[1] The last canon or rule of descent is, that in collateral inheritances the male stocks shall be preferred to the female; that is, kindred derived from the blood of the male ancestor, however remote, shall be admitted before those from the blood of the female, however near, unless where the lands have in fact descended from a female. 2 Bl. Com. 235; 3 Cru. Dig. 398.

Sir W. Blackstone observes, that this rule was established in order to effectuate and carry into execution the fifth rule or principal canon of collateral inheritance, that every heir must be of the blood of the first purchaser; for when such first purchaser was not easily to be discovered, after a long course of descents, the lawyers not only endeavoured to investigate him by taking the next relation of the whole blood to the person last in possession; but also considering that a preference had been given to males by virtue of the second canon, through the whole course of lineal descent from the first purchaser, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors. The right of inheritance, therefore, first runs up all the father's side, with a preference to the male stocks in every instance, and if it finds no heirs there, it then, and then only, resorts to the mother's side, leaving no place untried, in order to find heirs that may by possibility be derived from the original purchaser. *See* Cru. Dig. 398.

[2] The maxim *Seisina facit stipitem* (*ante*, p. 50) does not apply, it being only necessary in deriving a title to an estate tail to deduce the pedigree from the first purchaser, and to show that the claimant is heir to him; for the issue in tail claim *per formam doni*. 3 Cru. 439.

Nor is the rule as to the exclusion of the lineal ancestors applicable, inasmuch as it must have passed them already before it came to the stock from whence the descent is now to be derived. *See ante*, p. 52.

But the male issue in tail should be admitted before the female (*ante*, p. 52), unless where the estate is limited in tail female, in which case the male issue could never be admitted. H. Chit. Desc. 156.

The third rule of descent relating to primogeniture and coparceny also applies in the descent of estates tail. *See ante*, p. 52.

The right of representation also takes place, and the issue of any deceased person shall stand in the same place as the person himself would have done had he been living; that is, if such issue are capable of being heirs *secundum formam doni*. *See* Litt. s. 23; Co. Litt. 25, a; id. b; 3 Rep. 41, b; 2 Bl. Rep. 695; Burr. 2609.

The fifth canon also applies to estates tail (*see ante*, p. 53); but the subsequent rule for the exclusion of half-blood does not. *Doe d. Gregory v. Whichelo*, 8 T. R. 211.

(*a*) *Borough English.*[1] *See* Borough English, vol. ii. p. 531.

(*b*) *Copyholds.* *See* Copyholds, vol. iii. p. 223.

(*c*) *Gavelkind.* *See post*, Gavelkind.[2]

VI. Act for Amending the Law of Inheritance, 3 & 4 Wm. 4, c. 106.[3]

(A) *Meaning of Words used in.*

By 3 & 4 Wm. 4, c. 106, s. 1, it is enacted, "that the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or a different meaning, shall, in this act (except where the nature of the provision of the context of the act shall exclude such construction) be interpreted as follows; (that is to say,)—the word 'land' shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law or according to the custom of gavelkind or borough English, or any other custom; and to money to be laid out in the purchase of land; and to chattels and other personal property transmissible to heirs; and also to any share of the same hereditaments and properties, or any of them; and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs; and to any possibility, right, or title of entry or action; and any other interest capable of being inherited; and whether the same estates, possibilities, rights, tithes, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words 'the purchaser' shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word 'descent' shall mean the title to inherit land by reason of consanguinity, as well as where the heir shall be an ancestor or collateral relative, as where he shall be a child or other issue; and the expression 'descendants' of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression 'the person last entitled to land,' shall extend to the last person who had a right thereto, whether he did or

Meaning of words.

"land."

"purchaser;"

"descent;"

"descendants;"

"person last entitled to land;"

[1] The Inheritance Act, 3 & 4 Wm. 4, c. 106, has not affected this custom. *Muggleton v. Barnett*, 1 H. & N. 282; 2 Jur. N. S. 1026. *See* also this case as to what is not sufficient evidence of the custom.

[2] The descent of lands held in gavelkind, in the right line, is among all the sons as coparceners; and, in default of sons, among all the daughters in the same manner. But though females claiming in their own right are preferred to males, yet they may inherit together with males by representation, for the right of representation takes place in customary descents as well as in descents at common law. Litt. s. 210, 265; Rob. Gav. 90. The partible quality of lands held in gavelkind is not confined to the right line, but is the same in the collateral line. 1 Inst. 100, a; Rob. Gav. 92.

A remainder or reversion of gavelkind lands, being but the residue of the estate in land, shall descend in the same manner as lands in possession of the same tenure would do. As if an ancestor dies seised of gavelkind lands in reversion or remainder in fee, or fee-tail expectant on an estate for life, or in tail, this shall be divided among all the heirs male; and a remainder in borough English would likewise be subject to the same customary descent as an estate in possession of the same tenure; and where borough English lands are in settlement, the reversion which remains unsettled is considered as part of the old estate, and will descend accordingly. *See* H. Chit. Desc. 242.

It is a rule, that the customary descents in gavelkind or borough English cannot be altered by any limitation of the parties; therefore, where A., seised in fee of lands held in borough English, made a feoffment to the use of himself and the heirs male of his body, according to the course of the common law, the words "according to the course of the common law" were held void, for customs which go with the land, as this one and gavelkind, and fix and order the descent of inheritance, can only be altered by parliament. Jenk. Cent. 5; Dyer, 179, b.

[3] This act leaves the law of inheritance, in cases absolutely plain, as it found it, and was only intended to lay down rules where any doubt exists. *Cooper v. France*, 14 Jur. 214; 19 L. J. Ch. 313. And *see* Shelford's Real Property Acts, 5th ed. 408–429; Sugd. V. & P. 11th ed. 549–559; Hayes, Conv. 5th ed. 310–322; First Rep. of Real Prop. Coms. 9–18.

"assurance." did not obtain the possession, or the receipt of the rents and profits thereof; and the word 'assurance' shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend to and be applied to a female as well as a male."

(B) *Descent to be traced from Purchaser, but Last Owner to be deemed Purchaser, unless contrary be proved.*

By sect. 2 it is enacted, "that in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same."[1]

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[1] Where an illegitimate child became the purchaser of lands, which descended to his son, who died without issue and intestate, it was held that the heirs of the party last seised were not entitled, but that notwithstanding this act the lands escheated to the Crown; the above section having provided that in future descents shall be traced from the purchaser, and not from the person last seised. *Doe d. Blackburn v. Blackburn*, 1 Moo. & R. 547: *Parke, B.;* Sugd. V. & P. 11th ed. 551.

Where a coparcener dies intestate, leaving a son, the whole of her share descends on her son. T., tenant in fee of certain hereditaments, died in 1826 intestate, leaving two daughters, E. & S., his co-heiresses at law. E. continued seised of her moiety till 1st June, 1835, when she died intestate, leaving G., her eldest son and heir at law. S. continued seised of her moiety till Jan. 16th, 1839, when she died intestate, leaving B. her eldest son and heir at law. The devisees of G., in a suit for a partition against B., claimed five-eighths of the hereditaments, contending that, under this act, on the death of E., her moiety descended in moieties on S. & G., as co-heirs of T. who was assumed to be the purchaser; therefore S. obtained three-fourths or six-eighths, and G. one-fourth or two-eighths, and that on the death of S., her six-eighths descended in moieties on B. and G., therefore B. took three-eighths, and G. five-eighths.

Shadwell, V. C. "I cannot bring myself to entertain the least doubt that E.'s four-eighths descended on her son G. Can you suppose that an act of parliament, by any portion of it, meant to introduce doubt into a case that was so plain before the act passed? Was it not the meaning of the act to leave the law of inheritance, in such parts as were plain, absolutely as it was found, and only to alter it where it was doubtful? Just observe what is the purview: 'to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require.' That is the general object in distinct words. 'The person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same.' There the act is speaking of what ought to be the rule in cases where the thing is doubtful; but where the thing is so plain that nobody could doubt, you must make it consistent, and if you see an act was passed to make the thing clear, do not say that the act was to make it doubtful. On looking through the act, that portion of the second section appears to me so plain, that I shall not send the case to law." It was declared that on the death of E. her moiety descended upon G., and that on the death of S., her moiety descended upon B. *Cooper v. France*, 14 Jur. 214; 19 L. J. Ch. 313.

Real estate was devised to A. for life, with remainder to B. in fee. B. died in 1821, in the lifetime of A., leaving C. and D. her co-heiresses at law. C. died in 1824, in the lifetime of A., without having in any manner dealt with the property, leaving a son, E. It was held that it was not necessary to trace the descent as to C.'s moiety from B., but that E. for every purpose ought to be taken as standing in C.'s place, with reference to that moiety. *Paterson v. Mills*, 19 L. J. Ch. 310. *See* further 5 Jur. 641, 763; 23 Law M. 279; 1 Hayes, Conv. 5th ed. 314; 1 Jarm. & Byth. Conv. by Sweet, 139, 140. The subject of descent amongst coparceners is much discussed in 10 Jur. 71–75, 112, 132, 160, 173.

(C) *Heir entitled under Will to take as Devisee.*

By sect. 3 it is enacted, "that when any land shall have been devised by any testator, who shall die after the 31st December, 1833, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited by any assurance executed after the said 31st December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof."

(D) *Limitation to Grantor or his Heirs to create an Estate by Purchase.*

By sect. 4 it is enacted, "that when any person shall have acquired any land by purchase under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance executed after the 31st of December, 1833, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said 31st December, 1833, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land."

(E) *Brothers to trace Descent through Parent.*

By sect. 5 it is enacted, "that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent."

(F) *Lineal Ancestor may be Heir in preference to Collateral Persons claiming through him.*

By sect. 6 it is enacted, "that every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue."[1]

(G) *Male Line to be preferred.*

By sect. 7 it is enacted, "that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors shall have failed; and also that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed, and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed."

(H) *Mother of more remote Male Ancestor preferred to Mother of less remote Male Ancestor.*

By sect. 8 it is enacted, "that where there shall be a failure of male

[1] A man and a woman, natives of and domiciled in Scotland, cohabited together, and had issue a son. They afterwards married in Scotland, and thereby the son became legitimate. The son died seised of lands in England, intestate, and without having married:—*Held*, that the father did not inherit the lands under the 3 & 4 Wm. 4, c. 106, s. 6, and that the lands escheated to the Crown. *In re Don*, 3 Jur. N. S. 1192; 27 L. J. Ch. 98; 4 Drew, 190, 193.

paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male paternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor, and her descendants."

(I) *Half-Blood to Inherit.*

By sect. 9 it is enacted, "that any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood, on the part of the father, shall inherit next after the sisters of the whole blood, on the part of the father, and their issue, and the brother of the half blood, on the part of the mother, shall inherit next after the mother."

(J) *After Death of Person attainted, Descendants may Inherit.*

By sect. 10, it is enacted, "that where the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the 1st of January, 1834."

(K) *Extension of Act.*

By sect. 11 it is enacted, "that this act shall not extend to any descent which shall take place on the death of any person who shall die before the said 1st of January, 1834."

(L) *Limitation made before 1st January, 1834, not affected by Act.*

By sect. 12 it is enacted, "that where any assurance executed before the said 1st of January, 1834, or the will of any person who shall die before the same 1st of January, 1834, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said 1st day of January, 1834."

VII. How Descent to be Traced under 22 & 23 Vic. c. 35, s. 19.

By 22 & 23 Vic. c. 35, s. 19, "where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent shall thenceforth be traced from the person last entitled to the land, as if he had been the purchaser thereof."

By sect 20, the last section shall be read as part of the 3 & 4 Wm. 4, c. 106.

VIII. Descent of Incorporeal Hereditaments.

(A) *Advowsons.*[1]

(B) *Commons.*[2] *See Common*, vol. iii. p. 144.

(C) *Dignities.* *See post*, Titles of Honour.

(D) *Franchises.*[3]

(E) *Offices.*[4]

(F) *Rents.*[5]

(G) *Tithes.*[6]

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[1] On the death of the owner of an advowson, the law immediately casts the descent upon his heir, and he thereby acquires a seisin in law. Such seisin in law is not sufficient to make the heir an ancestor from whom all future claimants must derive title; but it is required, where the advowson is in gross, that he should actually present to the church before he can acquire a seisin to make him the stock of descent, which presentation makes a seisin and fee, and shows at the same time how it arose, and is the proper evidence of it. *Per Lord Hardwicke, Rex v. Ep. Landaff*, 2 Stra. 1010.

For a further illustration of this part of the law, *vide* Advowson, vol. i. p. 223.

[2] Of commons, like all other incorporeal hereditaments, there can be no corporeal entry or seisin. But of such commons as are annexed and appertain to any house or land, a seisin is acquired by the seisin of such house or land, and without any exercise of such right of common, they will pass with the same. And even though the right has been put in use, yet, if a seisin has not been obtained of the principal, to which the same is annexed, the right will descend, not to the heir of the person exercising the same, but to the heir of the person who was last seised of the principal; for the exercise of the appurtenance will not give seisin of the house or land to which the same is annexed. But of a right to common in gross there can be no seisin as annexed to a house or land, being a mere personal inheritance; but the exercise of the right alone will give what is equivalent in corporeal hereditaments to a seisin, so as to enable the person exercising such right to transmit the same to his own right heirs. *See* Chitty on Descent, 203, 204.

[3] Franchises are enumerated by Blackstone as being counties palatine, corporations, rights to hold courts-leet, manors, waifs, wrecks, treasure trove, royal fish, deodands, to have a court of one's own, or liberty of holding pleas and trying causes; to have the cognisance of pleas; to have a bailiwick exempt from the sheriff of the county, fairs, markets, rights of taking toll; and, in respect of game, a forest, chase, park, warren, or fishery endowed with privileges of royalty. 2 Black. c. 37, 38.

Of such, the only seisin, of course, which can be obtained, is by the exercise of the peculiar right which such franchise bestows; for there cannot be a corporeal seisin any more than of the other incorporeal hereditaments which have been noticed. *See* Chitty on Descent, 225.

[4] All offices which concern or relate to land, or which are to be exercised within any particular district, are considered real property, and are classed among the number of incorporeal hereditaments. As to the estate which may be had in an office, many of the great offices of state were, and still continue to be, hereditary. 4 Inst. 58, 127; 5 Bac. Ab. 199; Dyer, 285; 7 Mod. 125. Some offices are described to be, and are called, offices in fee; yet the estate in them is not, strictly speaking, an estate in fee-simple; for it is only inheritable as a *feudum novum* by the lineal descendants of the first grantee of the office; and would not, on failure of lineal blood, descend in the collateral line. 3 Cru. Dig. 116. Offices which are of a real nature, and which may be granted in fee-simple, are also entailable within the statute *De donis*. Co. Litt. 20, a; 7 Rep. 33, b; 1 Roll. Ab. 838; H. Chitty's Desc. 208. Where an office is inalienable, though it may be granted in tail by the Crown, as in the case of the office of Earl Marshal, yet it cannot be entailed by the person possessed of it. 3 Cru. Dig. 120; Sir W. Jones, 96; Collins's Claims, 181.

Where an office descends in coparcenery it is usual to appoint a deputy to exercise the same, not under the degree of a knight; and thus the offices of Earl Marshal and High Constable may be exercised. Dyer, 285; Keilw. 170, b; Harg. n; 8 Co. Litt. 165, a 9; 2 Bro. P. C. 146; Journ. Dom. Proc. 25th May, 1781; Parl. Reg. 1780, 1781, vol. iv; H. Chitt. Desc. 209.

Seisin of an office may be obtained by exercise thereof, or by receipt of the profits and fees issuing out of the same. Roll. Ab. 270; 5 Bac. Ab. Office; 2 Lev. 108.

[5] The right to a rent-service is real property, and descendible to the person entitled to the reversion of the lands out of which it issues. 3 Cru. Dig. 325.

A rent-charge of inheritance is also a real property descendible to the heir. But from the moment that a payment of it becomes due that payment is personal property, and will go to the executor or administrator. 1 P. Wms. 180; 3 Cru. Dig. 327.

[6] Tithes in the hands of lay impropriators may be held in fee-simple, fee-tail, for life,

(H) *Ways.*[1]

(I) *Other Rights.*[2]

or years, are assets for the payment of debts, and are governed by the same rules of descent as temporal inheritances, and have all other similar incidents belonging to them. 3 Cru. Dig. 61, 62; Co. Litt. 159; id. 62. Seisin of tithes, which will enable the person taking by descent to convey the same to his own heirs, can only be acquired by actual receipt of tithes, as they issue out of the lands; for there is not any land itself of which he can obtain a seisin. H. Chit. Desc. 200.

They are not, however, subject to the custom of gavelkind. *Doe d. Lushington v. the Bishop of Landaff*, 2 N. R. 491.

[1] It has been said, that a way cannot, like a right of common, be in gross, but must be claimed as appendant or appurtenant to a house. Yelv. 159. In such cases a seisin is acquired by the seisin of such house. H. Chitty's Desc. 206. But it seems that it may be *quasi* appendant to a house, and thus pass by a grant of the same. Cro. Jac. 190. And if a right of way may thus be in gross, it is conceived that the owner must acquire that which is tantamount to a seisin; namely, he must exercise his right of way before he can transmit the same to his own heirs. H. Chit. Desc. 206.

[2] Under this head we notice the law connected with the descents of certain rights appertaining to realty, which are not classed in the text; such as conditions, powers, rights, possibilities, and terms attendant; as also certain interests in land, of which the courts of law do not take cognisance, and which are solely under the guidance and protection of courts of equity. A condition being an inheritance entirely of a new creation, and independent in its nature of the estate to which it is annexed, will always descend to the heir-at-law, and not to the heir to the estate; and he will be the proper person to enter for the breach of the condition: thus, for a breach of a condition annexed to a grant of lands in gavelkind or borough English, the eldest son in both cases will be entitled to enter. But on the entry made by the heir-at-law the ancient estate will be revived; the heir is in of the old estate, and consequently by descent. Jenk. Cent. 249, pl. 40; Co. Litt. 126, 176, a, 202, a, b; 1 Co. 95, a; 99, a; F. N. B. 143; Watk. Desc. 267; Roll. Abr. 474; Dyer, 344, a; 4 Co. 24, a; Co. Cop. 82, 88; 1 Bac. Abr. 660. Thus, if a man makes a feoffment in fee of lands in borough English, the heir at common law, that is, the eldest son, shall enter; but the younger son shall enter upon him, and enjoy the estate. Gobb. 3. If a condition be annexed to lands descending *ex-parte maternâ* (Co. Litt. 11; 12 Lamb. 608), the heir on the part of the father, who is heir at common law, shall enter for a breach of the condition; but the heir on the part of the mother shall enter upon him, and enjoy the land. 1 And. 184, 2d edit. 22; 1 Inst. 12, b; 2 Cru. Dig. 44, 3d ed. 363), but this doctrine has been questioned, and is declared by Mr. Preston to be an anomaly, and a departure from first principles. Rob. Gav. b. 1, c. 6, p. 121; 2 Prest. Abr. 427. Conditions are subject to forfeiture for attainder. By the common law, the king was not entitled to conditions vested in persons attainted; nor were they forfeited by any act in which they were not expressly named; for, by the general words of all hereditaments, "they would not pass, although clearly hereditaments." *Winchester's case*, 3 Rep. 1. But, by the 33 Hen. 8, c. 20, the benefit of rights, entries, and conditions, was expressly given to the Crown; that is, not the land itself, but the benefit of the condition only by which the land might be reduced into the possession of the party attainted, had he not been attainted. *See* 1 Hale, P. C. 244, s. 4; 2 Hawk. P. C. 453, s. 26; Sugd. Pow. 171, 2d ed.; H. Chit. Desc. 250.

As to the descent of powers, it should seem that such as are annexed to an estate, and to be enjoyed with it, will descend accordingly, as an appendant to the same: for instance, a power may be given to the grantee of a rent, which is limited in use to him and his heirs, to enter and hold till payment of the arrears; and such power will follow both the descent and alienation of the rent: but as to those powers which are not to be considered as appurtenant, but powers in gross, the same being limited for an estate which in point of duration is of an hereditary nature, will descend to the objects of the limitation of the power, in the same manner as has been already noticed with regard to the descent of remainders and reversions, it being sufficiently evident of a power there can be no seisin which can cause a *possessio fratris*, and render the same descendible as an estate in possession.

A right is either of possession or of property. These arise when one person has the actual possession or seisin of certain lands, and another the right of possession or seisin, or the right of property; as, if a person enters wrongfully into the lands of another, the disseisor will have the actual possession, but the rightful owner may enter and oust him if he please, as the right of possession is still in him. But in this case, if he should not exert his right and make entry within a limited time, his power of entry is taken away, and he is driven to his action to recover the seisin; and if he should not avail himself of such his possessory action, he would have only a right of property, a mere right, left. *See* Watk. Conv. 113; Gilb. Ten. 21; 2 Bl. Com. 195. The right of a disseisee will descend to his heir-at-law in the same manner as an estate in possession. But if such heir die also, then

IX. Descent of the Crown.[1]

a right, like an estate in expectancy, will descend to a brother of the half blood in preference to a sister of the whole; for there can be no seisin to cause a *possessio fratris*, and enable such heir of the disseisee to turn and convert the descent to his own stock of heirs. *See* Watk. Desc. 82. So the right to bring a writ of error for the reversal of a recovery descends to the person to whom the land would have descended in case the recovery had not been suffered. 1 Leon. 261; Treat. on Recov. 305; H. Chit. Desc. 253.

Possibilities descend to the heirs of the persons entitled to the same. Bro. Feoffment to Uses, 59; 3 Co. 20; Poll. 55; Co. Litt. 219, b. *Marks v. Marks*, 1 Stra. 131; 2 Bl. Com. 290; 2 Vent. 347; 1 P. Wms. 566, b. Being but the title or right to estates which may probably or possibly arise *in futuro*, and not any estate *in præsenti*, they are, of course, descendible in the same manner as remainders or reversions, for there can be no actual seisin of a possibility. See *Chauncey v. Graydon*, 2 Atk. 618; Forr. 123; 2 Burr. 1134; 3 T. R. 88; H. Chit. Desc. 254.

Terms assigned to attend being considered as absolutely annexed to and a part of the inheritance (*Whitechurch v. Whitechurch*, 2 P. Wms. 236; 6 Cru. Dig. 90; 2 Atk. 72), descend with the same to the heir, and follow all alienations made by him. They will follow all estates created out of inheritance, and all incumbrances subsisting upon the same, and are so connected with it that equity will not suffer them to be severed to the detriment of a *bonâ fide* purchaser. 3 P. Wms. 328; 3 Atk. 476; 5 Bac. Abr. 19; 1 Cru. Dig. 510; H. Chit. Desc. 255.

Next, as to the descent of estates considered in equity as real property. Of this nature are trust estates, equities of redemption, the benefit of contracts, and money considered as land.

It may be laid down as a general rule that trust estates are descendible in the same manner as legal ones. 3 Cru. Dig. 361. So equities of redemption, being still inherent in the land until foreclosed, will descend to and vest in the same persons as the land itself would in case there had been no mortgage or incumbrance whatsoever. 5 Bac. Abr. 22; Hard. 465. It is not a new kind of inheritance separate and distinct from the original one, but the same inheritance, descending under the direction of another court only. H. Chitty's Desc. 274. It appears to be settled that, in the contemplation of a court of equity, there may be a seisin of an equity of redemption; or, at all events, that there are certain acts, the exercise of which will have the same effect in equity as an actual corporeal seisin would in the consideration of the courts of law. Id. 274. It should therefore seem that there may be a *possessio fratris*. 1 Co. 121, b; 2 P. Wms. 713; Hard. 488, 491; 1 Saund. Uses and Trusts, 217. But there must have been some act done by the elder brother equivalent in the eye of the court of equity to a seisin or possession, so as to authorise the claim of the sister. Thus the receipt of the rents, or bringing a bill for redemption, will amount to a seisin. Mosely, 72, 122; 1 Atk. 604.

With reference to contracts in equity, it may be remarked that where an ancestor enters into articles of agreement for the purchase of an estate, and dies previous to the completion of the purchase, although such an interest is incapable of an actual seisin, and at law cannot be the subject of a descent, yet, in consequence of the rule that equity looks upon things agreed to be done as actually performed, a court of equity will consider the vendor as a trustee for the purchaser, or his heir, of the estate so agreed to be sold, and the purchaser as a trustee of the purchase-money for the vendor; and the estate shall, in contemplation of such court, be deemed in such purchaser from the time of the execution of the articles of contract, so as to be capable of being devised by such ancestor, or inheritable by his heir. Sugd. V. & P. 154; H. Chit. Desc. 277.

Again, as to money considered as land, it is a principle of our courts of equity that any thing which is agreed to be done shall be considered as actually performed. Therefore, where money is covenanted or agreed to be laid out in land, equity, whose duty it is to enforce the execution of agreements, will look upon the money as real estate, which will descend to the heir; and this rule of equity applies not only to money covenanted or agreed, as between party and party, but also to money devised, or directed by will to be laid out in land. Seisin does not appear to be necessary in the case of money directed to be laid out in land; for, in the case of *Sweetapple v. Bindon*, 2 Vern. 536, the husband was decreed curtesable, though the money had not been invested according to the trust. The interest of the money did not appear to have been received during the coverture, either by the husband or the wife, so as to form a quasi-seisin of the principal; nor, in fact, is such receipt of interest necessary to entitle a husband to curtesy of money-land, provided the money still continues impressed with the character of land, and remains unconverted into personal property: but, in the case of a descent, it is conceived that there must of this, as of other trust estates, be some equivalent to a seisin, in order to cause a *possessio fratris*, and render the owner the stock of descent (Watk. Desc.; Ch. Desc. 284); and now by the Inheritance Act, 3 & 4 Wm. 4, c. 106, s. 1, such money is to be deemed within the meaning of the word "land."

[1] The Crown is, says Sir W. Blackstone (1 Bl. Com. 191), by common law and con-

X. Descent of Heirlooms.[1]

XI. How a Descent may be Qualified or Destroyed.

(A) *By Act of the Ancestor.*

(*a*) *By a Devise.*[2]

stitutional custom, hereditary in a manner peculiar to itself; and though the right of inheritance may from time to time be changed, or limited by act of parliament, as was done at the Revolution in 1688, still, under such limitations, the Crown continues hereditary. This rule is admirably illustrated by Sir W. Blackstone, by an Historical Sketch of the Titles of the Kings of England. The rules of inheritance which govern the descent of private estates are, in general, equally applicable to the descent of the Crown. 5 Bac. Abr. Prerog. A., 1 Wood, V. L. 69; 1 Bl. Com. 193. The few differences which exist were introduced on grounds of political necessity. The general doctrine, that all the daughters of the father, who died seised, are entitled to his estate on failure of a male heir (*see* Litt. s. 241), does not apply to the descent of the Crown; so that the eldest daughter of the last king is, under such circumstances, exclusively heiress to the throne. Co. Litt. 15, b; 7 Co. 12, b; 1 Bl. Com. 194; 1 Wood, 69. So the rule of *possessio fratris* does not hold on the descent of the Crown; nor is half-blood any impediment in such case. Therefore, if the king has issue a son and a daughter by one venter, and a son by another venter, and die, on the death of the eldest son without issue the younger brother is entitled to the crown, to the exclusion of the daughter. Plowd. 245; 4 Inst. 206: Co. Litt. 15, b; 1 Woodn. 69. Even the doctrine which anciently prevailed in the law of descents, that when the eldest son was already provided for the next brother should take the rest of their father's inheritance, was never adopted as a rule of public succession. 1 Bl. Com. 200; Chitty on the Prerogatives of the Crown, 9.

[1] Not only every thing which falls under the denomination of real estate descends to the heir, but also heirlooms, and all such other chattels as are annexed to, or connected with, the freehold; as wainscots, benches, doors, windows, and the like. Every species of tree, whether timber or not, standing on the land at the death of the ancestor, together with the grass actually growing, though ripe for cutting, descend to the heir. But corn and every other vegetable produced annually by labour and cultivation, go to the executor or administrator of the ancestor, as a compensation for the expense of raising them. 3 Cru. Dig. 363.

Heirlooms in general are such things as cannot be taken away without damaging or dismembering the freehold; otherwise the general rule is, that no chattel interest shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor. Co. Litt. 388. But deer in a park, fish in a pond, doves in a dove-house, &c. though in themselves personal chattels, yet they are so annexed to, and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase. (Id. 8.) For this reason also the ancient jewels of the crown are held to be heirlooms (id. 18); for they are necessary to maintain the state and support the dignity of the sovereign for the time being. Charters likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heirlooms, and shall not go to the executor. Bro. Abr. Chattels, 18. By special custom, also, in some places, carriages, utensils, and other household implements, may be heirlooms (Co. Litt. 18, 185); but such custom must be strictly proved. On the other hand, by almost general custom, whatsoever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, *quod ab ædibus non facile revellitur* (Spelm. Gloss. 277. *See post*, Fixtures), is become a member of the inheritance, and shall thereupon pass to the heir; as chimneypieces, pumps, old fixed or dormant tables, benches, and the like. 12 Mod. 520. Other personal chattels there are, which also descend to the heir in the nature of heirlooms; as a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the personal and other ensigns of honour, suited to his degree. In this case, albeit the freehold of the church is in the parson and these are annexed to that freehold, yet the parson or any other cannot take them away or deface them, but is liable to an action from the heir. Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir. 3 Inst. 202; 12 Rep. 105.

[2] We have seen, *ante*, p. 57, that by 3 & 4 Wm. 4, c. 106, s. 3, the heir entitled under will is to take as purchaser, though this was formerly not so. *See* Dyer, 124, pl. 38; Cro. Eliz. 833; 1 Roll. Abr. 626; Vaugh. 271; 1 Salk. 233; 1 Ld. Raym. 568; 2 Burr. 830; 3 Lev. 127. Even when the estate devised was charged with the payment of money. *Clarke v. Smith*, 1 Salk. 241. *Allan v. Heber*, 2 Stra. 1270. *Emerson v. Inchbird*, 1 Ld. Raym. 728.

(*b*) *By a Feoffment and Re-Enfeoffment.*[1]

(*c*) *By Fine or Recovery.*[2]

(B) *By Operation of Law.*[3]

(C) *By the Acts of Third Parties.*[4]

DESERTER. *See* Martial Court; Mutiny; Soldier.

DESERTION. *See* Child, Abandonment of, vol. iii. p. 95; *post*, Husband and Wife; Martial Court; Mutiny; Soldier.

(A) *Wife deserted by Husband may obtain Order to protect her Earnings, &c.* 20 *&* 21 *Vic. c.* 85, p. 64.

(B) *Requisites of Affidavit on Application for*, p. 64.

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[1] If tenant *ex-parte maternâ* make a feoffment to the use of his maternal heirs, and the feoffee re-enfeoff him expressly to the use of those heirs, yet the re-enfeoffment shall enure to the paternal heirs. *Doe d. Balch v. Putt*, 2 Dougl. 773.

[2] Formerly the descent might be altered by a fine or recovery (*Doe d. Baldwere v. Crowe*, 5 T. R. 104); but these, however, were abolished by 3 & 4 Wm. 4, c. 74, under which act the disposition of lands by tenant in tail is now regulated.

[3] Formerly attainder caused corruption of blood, and prevented the transmission of lands to the descendants of the attainted person. This corruption of blood and the forfeiture of lands after death were abolished in all cases except treason, petty treason, and murder, by the 54 Geo. 3, c. 45; but now as we have seen, *ante*, p. 50, it is abolished in every case by 3 & 4 Wm. 4, c. 106, s. 10; so that now on attainder the criminal only forfeits his goods and chattels, and the profits of the land during life, while his real estate comes in the ordinary channel of descent to his heir, who is thus restored to a full capacity to inherit. And it was always a general rule that, where there was no necessity to name or derive title through a person attainted in making out a claim by descent, the corruption of the blood by the attainder of such person would not impede or vitiate the same, though the ancestor to whom the pedigree is to be traced be ever so remote. Estates tail are not affected by the corruption of blood of any lineal or collateral ancestor. H. Chit. Desc. p. 350.

[4] A descent may be affected by the acts of third parties, amounting to an ouster, or a motion of possession. By the ouster of the owner of an estate, the actual seisin is in the person committing the injury; and the disseisee, or person ousted, has no more than a right which will be transmitted to his heirs in a regular course of descent, in the same manner as if clothed with the possession (Watk. Desc. 823); but with this exception, that not being attended by the actual seisin or possession, it would not, after the death of the disseisee, and a descent to his heir, be subject to the rule of *possessio fratris;* for if one is disseised and dies, and the right descends to his heir, and such heir dies also, leaving a brother of the half blood, and a sister of the whole blood, and without having ever recovered the possession, the brother of the half blood would succeed to the inheritance, and not the sister of the whole. And here it may be observed that such right is not capable of being so transferred, or the interest of the owner so far exercised over the same, as to enable him to become an ancestor by any of the modes before specified in the instance of estates in possession. *See* 1 Cru. Dig. 262. For such heir having had only a right, and no actual possession or seisin, he could not have turned the descent; so that, on his death, the person should succeed who could make himself heir, not to such heir of the disseisee, but to the disseisee himself, he being the person who was last actually seised. For though the disseisin deprived him of the actual possession or seisin, yet it only related to the time of such disseisin made, and would not have relation to any prior event; so that, as he was once actually seised, that actual seisin shall not be in this case *ab initio* defeated; but the pedigree shall run, and the claim be made, from him, as being so seised. *See* Watk. Desc. 83; H. Chit. Desc. 348. By the ouster, the estate of the person divested of the possession, and of his descendants or heirs, is reduced to a right possession, by virtue of which he may enter at any time on the person committing the ouster. *See* Bl. Com. 175. But if such person dies, the estate descends to his heir, and the right of possession becomes twofold: the actual right of possession is in the disseisee or his representatives, and the apparent right of possession is in the heir of the disseisor; and this right of entry is tolled, that is, taken away, by the descent, except in certain cases, on account of the disabilities of the persons entitled to enter; and by such descent the interest of the disseisee is reduced to a right of action. 3 Bl. Com. 377; H. Chit. Desc. 349; Watk. on Descents, p. 83.

(A) *Wife deserted by Husband may obtain Order to protect her Earnings.*

Wife deserted by her husband may apply to a police magistrate or justice in petty sessions for protection, who may make order protecting her earnings and property.

The "Act to Amend the Law relating to Divorce and Matrimonial Causes in England," 20 & 21 Vic. c. 85, besides making, in sect. 16, desertion without cause for two years a ground for the sentence of judicial separation, enacts that, by sect. 21, "a wife deserted[1] by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country to justices in petty sessions, or in either case to the court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices of the court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property, acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole:* Provided always, that every such order, if made by a police magistrate, or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the county court, within whose jurisdiction the wife is resident;[2] and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the court, or to the magistrate or justices by whom such order was made, for the discharge thereof: Provided also, that if a husband or any creditor of, or person claiming under the husband, shall seize, or continue, or hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: If any such order of protection be made, the wife shall, during the continuance thereof, be, and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a decree of judicial separation."

(B) *Requisites of Affidavit on Application for.*

Ex-parte Dorothy Sewell, 28 L. J. P. & M. Court, 8.

The affidavit in support of a motion for protection must state sufficient to satisfy the court of the fact of desertion.

This was an application for protection of the wife's earnings under the above section.

The affidavit of the wife stated that the marriage took place in December, 1850, and that there were two children surviving; that the parties cohabited together till 6th of March, 1854, on which day the husband deserted her, and went to Australia, and had not since returned.

Per Cur. Where the husband has not opportunity of opposing the application the affidavit on which it is founded should be very precise, so that the

[1] A. married a woman, and after cohabiting with her at her father's house for some weeks, left her. At his request she shortly afterwards went to him, and remained with him for two or three days. He then sent her back to her father, saying that he could not support her. After the lapse of eighteen months, during which she did not hear from him, he went to her father's house, and asked to be allowed to see her. Her father refused to allow him to have any communication with her, until he should be in a condition to support her. He then left, and never returned, or asked her to return to him. It would seem that these facts do not amount to a case of desertion. *Harris v. Harris*, 31 L. J. P. & M. Court, 6.

[2] This proviso is directory only, and not imperative: and the will of a married woman who has obtained such an order is valid, although the order may not have been registered within the time specified in the act. *In the Goods of Farraday*, id. 47.

court may be satisfied of the fact of desertion. This affidavit omits to state many material circumstances; *e.g.* in what capacity the husband went to Australia, whether as a mariner, an emigrant, or how otherwise. Whether, since his departure, he has failed to contribute to his wife's support. Whether he has neglected to write to her; or if he has written, what was the nature of the communication. The order must be refused.[1]

DESERTION of Premises. *See* Landlord and Tenant; Vacant Possession.

DESIGNS. *See* Copyright, vol. iii. p. 252.

DESIRE, Words of. *See* Devise; Will.

DESTROYING, or Concealing Instruments. *See* Evidence; Malicious Injuries to Property.

DESTRUCTIVE Substance or Thing, sending of, &c.

(A) *Causing any Explosive Substance to Explode, or sending same with Intent to Injure, &c. Felony*, p. 65.

(B) *Administering so as to Endanger Life, &c. Felony*, p. 65.

(C) *Maliciously Administering Poison or other Destructive Thing with Intent to Injure, a Misdemeanor*, p. 66.

(D) *If Jury not satisfied of Felony, may find Prisoner guilty of Misdemeanor*, p. 66.

(E) *Attempting to Administer with Intent to Murder*, p. 66.

(A) *Causing any Explosive Substance to Explode, or sending same with Intent to Injure, &c. Felony.*

Sending destructive substance with intent to injure, made felony.

By 24 & 25 Vic. c. 100, s. 29, "whosoever shall unlawfully and maliciously cause any gunpowder or other *explosive substance to explode*, or send or deliver to or cause to be taken or received by any person any explosive substance, or any other *dangerous or noxious thing*, or put or lay at any place, or cast or throw at or upon or otherwise apply to any person, any corrosive fluid, or any destructive[2] or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

Punishment; what.

(B) *Administering so as to Endanger Life, &c. Felony.*

By 24 & 25 Vic. c. 100, s. 23, "whosoever shall unlawfully and maliciously Administer-

[1] The order for protection of property acquired by a wife after she has been deserted by her husband should, in terms, be for the protection of her property generally, and not of specific property, so as to leave open any question as to her title. *Ex parte Mullineux*, 27 L. J. P. & M. Court, 19.

Upon the death, in the lifetime of her husband, of a married woman, intestate, who has obtained a protection order under sect. 21 of 20 & 21 Vic. c. 85, on the ground of the desertion of her husband, administration will be granted to her next of kin, limited to such property as she may have become possessed of since the commencement of the desertion. Such grant must be in general terms, and must not include specific property. *In the Goods of Woman*, 29 id. 164.

[2] Boiling water was held to be "destructive matter" within the 7 Wm. 4, and 1 Vic. c. 85, s. 5. *R. v. Crawford*, 1 Den. C. C. 100; 2 C. & Kir. 129.

ing destructive substance so as to endanger life, made felony.

Punishment.

administer to, or cause to be administered to, or taken by any other person, any poison or *other destructive or noxious thing*, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

(C) *Maliciously Administering Poison or other Destructive Thing with Intent to Injure.*[1]

Maliciously administering any poison or *destructive* thing, with intent to injure, a misdemeanor.

Punishment.

By 24 & 25 Vic. c. 100, s. 24, "whosoever shall unlawfully and maliciously administer to, or cause to be administered to or taken by any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

(D) *If Jury not satisfied of Felony, may find Prisoner guilty of Misdemeanor.*

If jury not satisfied of felony in 23d section, they may find the prisoner guilty of the misdemeanor in the 24th section.

By 24 & 25 Vic. c. 100, s. 25, "if upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor."

(E) *Attempting to Administer with Intent to Murder, a Felony.*

Attempting to administer *destructive* thing with intent to murder, a felony.

Punishment.

By 24 & 25 Vic. c. 100, s. 14, "whosoever shall attempt to administer to, or shall attempt to cause to be administered to or be taken by any person, any poison or *other destructive thing*, &c., with intent to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

DETAINER. *See* Arrest on Mesne Process, vol. i. p. 525; *Capias ad Satisfaciendum*, vol. iii. p. 26; *post*, Prisoners, Proceedings against. When a defendant is arrested, he is considered in custody under all writs at that time in the sheriff's hands. *Barratt v. Price*, 9 Bing. 570. *Reynolds v. Newton*, 1 Q. B. 525. *Collins v. Yewens*, 10 Ad. & E. 570. *Watson v. Carroll*, 4 Mee. & W. 592. And the sheriff may, even after payment of the debt and costs in the action in which he was arrested, detain him for a reasonable time to see if there be detainers against him (*Taylor v. Brander*, 1 Esp. 45); and he may detain him for his fees (*Martin v. Francis*, 2 B. & A. 402); but he has no right to detain him, although he has been compelled to pay the debt and costs under an attachment. *Rimmer v. Turner*, 3 Dowl. 601. Where the defendant is in custody *illegally*, as under an irregular or void writ, or whilst he is privileged from arrest, he cannot lawfully be detained under another writ. *Ex-parte Scott*, 9 B. & C. 446. *Birch v. Prodger*, 1 N. R. 137. *Hall v. Hawkins*, 4 Mee. & W. 591. *Barratt v. Price*, 9 Bing. 566. The

[1] Where the defendant administered cantharides to a woman with the view of exciting her sexual passion, it was held to be an "intent to injure, aggrieve, and annoy her." *R. v. Wilkins*, Nov. 1861; Arch. C. P. 578.

process to detain a defendant in custody is the same as where he is at large. Arch. Pr. 744. *See* Execution, Charging in; Prisoner.

DETERMINATION of Suit. *See* False Imprisonment; Malicious Arrest; Malicious Prosecution.

DETERMINATION of Tenancy. *See* Landlord and Tenant; Lease, Notice to Quit.

DETINET. *See* Action, vol. i. p. 138; Debt, vol. iii. p. 557; *infra*, Detinue.

DETINUE.

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(*a*) *Non Detinet*, p. 69.
(*b*) *Denial of Plaintiff's Property*, p. 69.
(*c*) *Lien*, p. 69.
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V. Damages, in, p. 70.

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(A) *Judge may order Return of Specific Chattel*, p. 70.

VIII. Staying Proceedings in, p. 70.

IX. Detinue is within the Jurisdiction of the County Courts, p. 70.

I. When Maintainable.[1]

[1] An action of *detinue* lies for the specific recovery of personal chattels wrongfully detained. 3 Bl. Com. 151. It will lie though the defendant has *bonâ fide* sold the chattel before action. *Jones v. Dowle*, 9 Mee. & W. 19; 1 Dowl. N. S. 391; 11 L. J. Ex. 52. But it is only sustainable for the recovery of a personal chattel, and not for real property (*see* Cro. Jac. 39); therefore, it lies not for a house. (Id.) And it is requisite that the thing detained should be capable of being specifically identified or clearly distinguishable from the other property; hence it will not lie for money, unless in a box (*see* Cro. Eliz. 457; 1 Inst. 286); nor corn out of a sack; because those things have no peculiar mark or quality whereby a person who has the right to possession of goods may maintain detinue. *Roberts v. Wetherall*, 1 Salk. 223; 5 Mod. 193. *Wilkin v. Despard*, 5 T. R. 112. And it is enough to show that he is entitled to the possession (*Gledstane v. Hewitt*, 1 C. & J. 565), although he never had actual possession. Bro. Ab. Detinue, pl. 65, 30. But merely a property in reversion will not suffice. *Bradley v. Copley*, 1 C. B. 685. Therefore, the owner of goods let to another for a term cannot maintain this action. *Gordon v. Harper*, 7 T. R. 9. Nor can the owner of goods in the possession of another who is entitled to a lien upon them. *Milgate v. Kebble*, 3 Man. & G. 100. But any special or temporary ownership, with immediate possession, as under a lien, is sufficient (*Legge v. Evans*, 6 Mee. & W. 36. *Cooper v. Willomott*, 1 C. B. 672); and upon any bailment of goods, which does not exclude the right of the absolute owner to immediate possession, either the bailor or bailee may maintain the action against a

II. By whom it may be Maintained.

III. Against whom it may be Maintained.

Atkinson v. Baker, 4 T. R. 229.

But detinue does not lie against an heir who is possessed of property as special occupant.[1]

The declaration by an administratrix in detinue to recover certain indentures of bargain and sale; and release alleged that A. B. being seised for his own life of certain freehold estates, conveyed them to his heirs and assigns, and that the defendant as heir became possessed of them by finding. On demurrer,—

Per Cur. If an estate *pur auter vie* be limited to a man, his heirs, and assigns, and if it be not devised, it goes to the heir under the Statute of Frauds, and is liable to the same debts as a fee-simple is. Where it is granted to a person, his executors, administrators, and assigns, the executors take it, subject to the same debts as personalty of any description is; and by stat. 14 Geo. 2 it is distributable. The first limitation here is to the heirs; and in the ordinary course of this species of property it goes to the heir-at-law, because it is a real estate. He is entitled to it as a special occupant, and has, consequently, a right to detain the possession of the documents which belong to it.

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third party. *Nicholls v. Bastard*, 2 C., M. & R. 659. *Rooth v. Wilson*, 1 B. & A. 59.

The gist of this action is the continued and wrongful detainer, and not the original taking (*see* 3 Bl. Com. 157); therefore, it may be sustained against any person who has acquired possession of the chattel by lawful means, as by bailment, finding, or borrowing (*see* F. N. B. 138); and the old statement of a bailment in the declaration was surplusage and not traversable. *Clossman v. White*, 6 D. & L. 563; 7 C. B. 43. *Whitehead v. Harrison*, 2 D. & L. 122; 6 Q. B. 423.

[1] This action cannot in any case be supported against a person who never had possession of the goods in question, as against personal representatives on a bailment to the deceased, unless they came actually into their possession (*see* 2 Bulst. 308. *Jones v. Dowle*, 9 Mee. & W. 19); but if, after the death of the bailee, a stranger take the property, detinue lies against him (*see* Roll. Abr. 607). Nor does it lie against a bailee, if before demand he lose them by accident (*see* id. B. 2; Detinue, pl. s. 33, 40); though if he wrongfully deliver the goods to another he will continue liable. *See* 2 B. & A. 704.

It cannot be maintained by an administrator against a person who has had possession of the goods of the intestate, but has ceased to hold them prior to the grant of administration. *Crossfield v. Such*, 8 Ex. 825; 22 L. J. Ex. 325.

So a *cestui que trust* cannot maintain detinue for the deed under which he claims against a bailee of the trustee. *Foster v. Crabb*, 12 C. B. 136; 16 Jur. 835; 21 L. J. C. P. 189. And where one of two tenants-in-common of goods committed an act of bankruptcy, and by the direction of his co-tenant sold the goods: — *Held*, that the assignees of the bankrupt could not *maintain detinue*, nor recover the proceeds of the sale as money had and received. *Morgan v. Marquis*, 9 Ex. 145; 23 L. J. Ex. 21; 2 C. L. R. 276. Where two or more who are jointly interested in a chattel deposit it with a stranger, a demand by one in his name only, and not on behalf of all, will not entitle such one to maintain detinue for it. *Atwood v. Ernest*, 13 C. B. 881; 17 Jur. 603; 22 L. J. C. P. 225; 1 C. L. R. 738. An attorney who has received his client's deed to keep for him, and has lost it for want of proper care, cannot set up such loss as an answer to an action of detinue. *Reeve v. Palmer*, 27 L. J. C. P. 337; affirmed 28 id. 168. A party to a suit having obtained from his own attorney or agent documents in a cause, in custody of a court, and by the court entrusted to the agent, on his undertaking to return them: — *Held*, that the agent was entitled to maintain either detinue or assumpsit against his employer to recover them. *Craig v. Shedden*, 1 F. & F. 553: *Pollock*. The general rule of law being, that the party who has a freehold estate has a right to the title-deeds, a mortgagee in fee, with whom the mortgagor deposited the counterfeit of a conveyance to himself (the mortgage purporting to convey the deeds) is entitled to recover the genuine deed from a third party, with whom the mortgagor had subsequently deposited it as security for advances. *Newton v. Beck*, 27 L. J. Ex. 272; 3 H. T. n. 220.

In this action, if the defendant acquired possession of a chattel belonging to a *feme covert* before the marriage, the husband alone must sue, because the law transfers the property to him, and the wife has no interest, the wrongful detention being the cause of action (*see* Sid. 172; Noy, 70; Bull. N. P. 50); and if goods be delivered to a *feme covert* anterior to the marriage, and afterwards be detained, the action must be brought against the husband and wife (*see* Co. Litt. 351): but if the bailment were to them both subsequent to the marriage, the husband must be sued alone. *See* Roll. Rep. 128; and *see* Husband and Wife.

IV. Pleadings in.

(A) *The Declaration.*

The Form of Declaration given by C. L. P. Act, 1852, sched. B. 29, is—

"That the defendant detained from the plaintiff his title-deeds of land called Belmont, in the county of ; that is to say [*describe the deeds*], and the plaintiff claims a return of the goods therein mentioned, or their value, and £ for their detention." Form of declaration.[1]

(B) *Pleas in.*

(*a*) *Non Detinet.*

By r. 15, H. T. 1853, "in actions for detaining goods, the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea." What *non-detinet* puts in issue.[2]

(*b*) *Denial of Plaintiff's Property.*

The plaintiff's property in the goods must be specially traversed. A lien may be given in evidence under such plea. *Lane v. Tewson*, 12 Ad. & E. 116, n; 1 Gale & D. 584. But see *Mason v. Farnell*, 12 Mee. & W. 674, 683. *Barnwell v. Williams*, 7 Man. & G. 403. In detinue for goods, to wit, 1000 yards of broad cloth and two pieces of other cloth, the defendant by his plea claimed a lien for fulling the cloths mentioned in the declaration; and it appeared at the trial that originally eight pieces of cloth had been delivered at the same time to the defendant to be fulled, and that six out of the eight pieces had afterwards been re-delivered:—*Held*, that the plea only extended to the two pieces actually detained, and that the defendant could not, under that plea, set up a claim of lien for fulling more than two pieces, but should have asserted specifically his claim in respect of the eight. *Coombs v. Noad*, 10 Mee. & W. 127; 2 Dowl. N. S. 315; 11 L. J. Ex. 409.

(*c*) *Lien. See supra, Denial of Plaintiff's Property.*

(*d*) *Leave and License.*[3]

(*e*) *Payment into Court.*

By C. L. P. Act, 1860, 23 & 24 Vic. c. 126, s. 25, it is enacted (*inter alia*), "that in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms Money may be paid into court by leave.[4]

[1] The goods must be described in the declaration with sufficient certainty and accuracy for the purpose of identification. 2 Saund. 74, b. The date of a deed need not be mentioned. *Alcorn v. Westbrook*, 1 Wils. 116. The word *detain* in this declaration means an adverse detention. *Clements v. Flight*, 16 Mee. & W. 42. Other forms of action may be joined with this count.

[2] This plea only puts in issue the fact of the detention; therefore, a defence that the goods were not the property of the plaintiff, or that the defendant was justified in detaining them, cannot be given in evidence under this plea. *Richards v. Frankum*, 6 Mee. & W. 420. The detention in this action means an adverse withholding from the plaintiff. *Clements v. Flight*, 16 id. 42. Nor, it seems, can the defendant, under this plea, or under a plea that the goods were not the goods of the plaintiff, set up a tenancy in common with the plaintiff. *Mason v. Farnell*, 12 id. 674. Nor can he under that (or *semble* any) plea set up a defence that there were other persons co-tenants with the plaintiff, who are not joined in the action. *Broadbent v. Ledward*, 11 Ad. & E. 209. *Austin v. Kolle*, 1 Ex. 586. But a defence, that the defendant has sold the goods under the direction of a person who was tenant-in-common with the plaintiff, may be given in evidence under *non detinet*. *Morgan v. Marquis*, 9 Ex. 145; 23 L. J. Ex. 21. A tender of the goods before action may be given in evidence under this plea. *Clements v. Flight*, 16 Mee. & W. 42), and so may a defence that the articles claimed were delivered by the defendant to a third person with the consent of the plaintiff. *Anderson v. Smith*, 29 L. J. Ex. 460.

[3] This plea is not supported by proof of a delivery by the plaintiff to the defendant in error and without authority. *Greyson v. Ruck*, 4 Q. B. 737.

[4] Before this statute, payment into court

as he or they shall think fit, to pay into court a sum of money to the value of the goods alleged to be detained, and such payment into court shall be made and pleaded in the like manner and according to the provisions of the C. L. P. Act, 1852."

V. Damages in.[1]

VI. Judgment in. *See* Judgment.

VII. Execution in.

(A) *Judge may order Return of Specific Chattel.*

Judge may order return of specific chattel detained.[2]

By C. L. P. Act, 1854, s. 78, "the court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel, or at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel: Provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action."

VIII. Staying Proceedings in.[3]

IX. Detinue is within the Jurisdiction of the County Courts.[4]

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could not be made in this action in respect of the claim for a return of the goods (*Allan v. Dunn*, 26 L. J. Ex. 185), though it might be in respect of the claim for damages for the detention. *Crossfield v. Such*, 8 Ex. 159; 22 L. J. Ex. 65.

[1] In detinue, the damages are in general merely nominal; but the jury find the value of the articles detained, and the common-law judgment is, that the plaintiff recover the articles or their value, together with the damages and costs found by the verdict, and the costs of increase. *Phillips v. Jones*, 15 Q. B. 859; 19 L. J. Q. B. 374. Special damages may also, it would seem, be recoverable for the detention, if laid in the declaration. *Phillips v. Hayward*, 3 Dowl. 362. *Williams v. Archer*, 5 C. B. 318. *Crossfield v. Such*, 8 Ex. 159; 22 L.J.Ex. 65. Where there are separate parcels of goods, the jury ought to find the value of each; for the defendant may, perhaps, give up some in specie, and pay damages for the rest. *Pawly v. Holly*, 2 W. Black. 853. *Sandford v. Alcock*, 10 Mee. & W. 689. *See* also *Chilton v. Carrington*, 15 C. B. 730.

[2] Before this statute, if defendant paid the sum assessed as the value, there was no common-law process by which he would be compelled to restore the thing itself (*Phillips v. Jones, supra*); and the above section does not apply where the jury have not assessed the value. *Chilton v. Carrington*, *supra*.

[3] If no special damage be alleged, or be but colourably so, the defendant may in general obtain an order for a stay of the proceedings on delivering up the goods or deeds in question, and paying nominal damages and costs; or if the plaintiff insists on proceeding for damages, the order will be for the delivery up of the deeds or goods, and that the plaintiff shall be subject to the costs of the action, unless he recover damages beyond nominal damages for the detention of the deeds, &c. *Phillips v. Hayward, supra. Rex v. Clarke*, 3 Burr. 1362. *Pickering v. Truste*, 7 T. R. 53. *Bowington v. Parry*, 2 Stra. 822. *Olivant v. Perineau*, id. 1191. *Earl v. Holdernesse*, 4 Bing. 462. *West v. Taunton*, 4 M. & P. 79; 6 Bing. 408. *Lucas v. London Dock Co.* 4 B. & Adol. 378. Also, where the defendant admits the plaintiff's right to part of the deeds, &c. in dispute, but disputes it as to the rest, the defendant may, on delivering up the deed, &c. which he admits to be the plaintiff's, and payment of costs, obtain a stay of proceedings; or, if plaintiff still insists on proceeding for damages, or for the other deeds, &c., then he may obtain a rule or order, that the plaintiff shall be subject to the costs of the action, unless he obtain a verdict for some of the other deeds, &c., or damages beyond nominal damages for the detention of the deed, &c. in question. *Phillips v. Hayward*, 3 Dowl. 362. *Peacock v. Nicholls*, 8 id. 367. But where the goods have been sold by the defendant, and it is an uncertainty whether they were sold for the real value, the court or a judge will not, in general, interfere to stay proceedings. *Gibson v. Humphrey*, 2 Dowl. 68; 1 Car. & M. 544.

[4] The county courts have jurisdiction in this action (*Taylor v. Addyman*, 13 C. B. 309; 17 Jur. 461; 22 L. J. C. P. 94); and

DEVASTAVIT. *See* Executor and Administrator.

DE VENTRE inspiciendo. An obsolete writ. Where a widow was suspected of feigning herself pregnant, with a view to produce a supposititious child, the presumptive heir might have had a writ *De Ventre inspiciendo*, to examine whether she be pregnant or not; and if she be pregnant, to keep her under a proper restraint till she be delivered. *See* 1 Inst. 8 b. n. 1.1 ; 123, b. n. 1.

DEVIATION. *See* Insurance; Railway; Witness.

DEVISE. *See* Curtesy, vol. iii. p. 531; Executor and Administrator; Grants; Legacy; Trusts; Will.

DIES non Juridicus. *See* Day, vol. iii. p. 554; Holiday; Time, Computation of.

DIGNITIES. *See* Precedence, Table of; Prerogative; Titles of Honour.

DILAPIDATIONS. *See* Ecclesiastical Persons; Fixtures; Landlord and Tenant; Waste.

DILIGENCE.[1]

DIMINISHING Coin. *See* Coin, vol. iii. p. 135.

DIOCESE.[2] *See* Bishop, vol. ii. p. 502; *post*, Ecclesiastical Persons.

DIPLOMA. *See* Physician.

DIRECTION of Process. *See* Process; Writ.

DISABILITIES. *See* Alien, vol. i. p. 285; Husband and Wife; Infant; Lunatic.

DISCHARGE. *See* Arrest, vol. i. p. 538; Bankruptcy, vol. ii. pp. 277, 283, 318, 335; Imprisonment; Jury; Master and Servant; Receipt; Release.

DISCLAIMER.

I. Of Estate. *See* Deed, *ante*, p. 1.
II. Of Patent. *See* Patent.
III. Of Title, p. 72.
(A) *What it is*, p. 72.

per Jervis, C. J., the machinery for execution would be the same as in the old county court, now being provided for in the County Court Act. (Id.)

[1] In Scotland, process by which persons, lands, or effects are seized in execution on a security for debt, or for enforcing the attendance of witnesses, or the production of writings. Esp. in H. 2 tit. 11.

[2] A diocese signifies the circuit of a bishop's jurisdiction, or ecclesiastical division of the state. 1 Inst. 94. The kingdom is said to be divided in its ecclesiastical jurisdiction into two provinces, of Canterbury and York; each of which provinces is divided into dioceses, and every diocese into archdeaconries, and archdeaconries into parishes, &c. Wood's Inst. 2. The bounds of dioceses are to be determined by witnesses and records, but more particularly by the administration of divine offices. To which purpose, there are two rules in the canon law: in one case, upon a dispute between two bishops upon this head, the direction is, that they proceed in the business by ancient books or writings, and also by witnesses' reputation, and other sufficient proof; in the other case, where the question was, by whom a church, built upon the confines of two dioceses, should be consecrated, the rule laid down is, that it should be consecrated by the bishop of that city who, before it was founded, baptized the inhabitants and administered to them other divine offices. Gibs. 133.

The jurisdiction of the city is not included in the name of diocese; so says the canon law; and accordingly, in citations in general resolutions directed to the clergy, it is ordered to cite the clergy of the city and diocese. *See* id. 193.

A bishop may perform divine offices, and use his episcopal habit in the diocese of another without leave, but may not perform therein any act of jurisdiction, without permission of the other bishop. *See* id. 133.

(B) *What amounts to, is a Question for the Jury*, p. 72.
(C) *Effect of*, p. 72.
(*a*) *Operates as a Forfeiture, when*, p. 72.
(*b*) *Does away with Necessity for Notice to Quit*, p. 72.
IV. Waiver of, p. 73.

III. Of Title.

(A) *What it is.*[1]

(B) *What amounts to, is a Question for the Jury.*

Doe v. Cooper, 1 Man. & G. 135; S. C. 1 Scott, N. S. 36.

What amounts to a disclaimer is a question for the jury.[2]

H., holding for the life of K., let the premises to the defendant year by year, with an agreement for a lease for seven years, or for his own lease; and on the expiration of the seven years, having sold his interest to the plaintiff, the latter demanded first the possession, to which the defendant replied that he held on lives, and should hold as long as they lived; a quarter's rent was then demanded, to which the defendant answered, that he held of H., who had directed him to pay K., and that he should do so.

The court held, that it was properly left to the jury, and that they were justified in finding that there was no disclaimer, the defendant asserting no title in himself, but merely that he insisted on standing by the agreement; and in the absence of any notice to quit, the plaintiff was not entitled to recover the premises.

(C) *Effect of.*

(*a*) *Operates as a Forfeiture, when.*

Doe d. Graves v. Wells and Trowbridge, 10 Ad. & E. 427; 2 Per. & D. 396.

A tenant for a

Ejectment for lands. The demises were alleged in the declaration to have

[1] A disclaimer is where a tenant, who holds of any lord, neglects to render him the due services, and upon action brought to enforce them disclaims to hold of his lord; which disclaimer of tenure, in any court of record, is a forfeiture of the lands to the lord. *See* Finch. 270. And so, likewise, if in any court of record the particular tenant does any act which amounts to a virtual disclaimer: if he claims any greater estate than was granted him at the first introduction, or takes upon himself those rights which belong only to tenants of a superior class; if he affirms the reversion to be in a stranger by accepting his fine, attorning as his tenant, collusive pleading, and the like, such behaviour amounts to a forfeiture of his particular estate. *See* Co. Litt. 253; 2 Bl. Com. 276. As ordinarily met with in practice, it is a renunciation by the occupier of his character of tenant, either by setting up a title in a third person, or by claiming title in himself. *Doe d. Williams v. Cooper*, 1 Man. & G. 139. 2 Platt on Leases, 494.

[2] A disclaimer must be express, it cannot be presumed. *Doe d. Lewes v. Lord Cawdor*, 1 C., M. & R. 398; S. C. 4 Tyr. 852. And a mere assertion of title will not do if there be no act nor matter of record amounting to a disclaimer. *Doe d. Graves v. Wells*, 10 Ad. & E. 427. 2 Platt on Leases, 497. But a tenant attorning to a different lessor is a disclaimer. *Doe d. Mee v. Litherland*, 6 Nev. & M. 313; S. C. 4 Ad. & E. 784. So, if A. let B. into possession; on a demand of rent by A., and B. says, "I have no rent for you, because C. ordered me to pay none," this is evidence of a disclaimer. *Doe v. Pittman*, 2 Nev. & M. 673. And declining to pay the landlord rent without satisfactory proof of his title, is such a disclaimer as to render no notice necessary. *Doe d. Calvert v. Frowd*, 4 Bing. 557; S. C. 1 M. & P. 480. But an avowal by a tenant that he shall insist on the contract of purchase, and that he was ready to perform it, is not a disclaimer. *Doe d. Gray v. Stanion*, 1 Mee. & W. 695; S. C. 1 T. & G. 1065. A mere verbal or written disclaimer is not sufficient to warrant a forfeiture of a definite term created by deed; some act must be done adversely. 1 C., M. & R. 137; 10 Ad. &. E. 427. Under a devise to trustees, one trustee may disclaim the estate by deed. *Begbie v. Crook*, 2 Bing. N. S. 70. *See* also *Davies v. Evans*, 9 Mee. & W. 48. *Doe d. Phillips v. Rollings*, 4 C. B. 188. *Doe d. Bennett v. Long*, 9 Car. & P. 773.

been made on 17th October, 1836, *habendum* for seven years, from 15th October, 1836. On the trial it was proved, on the part of the plaintiff, that Graves, the lessor of the plaintiff, was entitled to the reversion upon a lease under which Trowbridge held, which lease was for ninety-nine years, to end in 1888, determinable on certain lives not yet expired, at a rent. It was further proved, that on 17th October, 1836, Graves's agent, in a conversation with Trowbridge, who was then in possession, demanded the rent of him, but Trowbridge then refused to pay it, and asserted that the fee was in himself. The counsel for the plaintiff contended that this was a disclaimer, working a forfeiture of Trowbridge's term; the defendant's counsel disputed this, and contended further, that even supposing this to be a forfeiture, the demise was laid too early, being on the very day of the supposed forfeiture. The learned judge directed the jury to find for the plaintiff, if they were of opinion that the words used by Trowbridge were not mere idle language, but a serious claim of the fee. The jury having found for the plaintiff, the learned judge reserved leave to the defendant's counsel to move to enter a verdict for the defendant.

term does not, upon demand of rent made by his landlord, forfeit his term by orally refusing to pay, and claiming the fee as his own.[1]

A rule was accordingly obtained.

Sed per Cur. No case has been cited where a lease for a definite term has been forfeited by mere words. We know that mere words cannot work a disseisin, although some acts have been held to work a disseisin at the election of the party disseised, which as against him would not work a disseisin. An attornment, again, is an act. Here there is no act; and if we held that there was a forfeiture, we should be going much beyond any previous decision. It is sometimes said that a tenancy from year to year is forfeited by disclaimer, but it would be more correct to say that a disclaimer furnishes evidence in answer to the disclaiming party's assertion that he has had no notice to quit; inasmuch as it would be idle to prove such a notice where the tenant has asserted that there is no longer any tenancy.

(*b*) *Does away with Necessity for Notice to Quit.*[2]

IV. Waiver of.[3]

DISCONTINUANCE of Actions. *See post*, Ejectment.

I. Meaning of Term, p. 74.

II. Rule for, p. 74.

(A) *When granted*, p. 74.

(B) *Must contain Undertaking to pay Costs*, p. 74.

(C) *On what Terms granted*, p. 74.

(D) *The same as to an Executor*, p. 75.

[1] This is opposed to the general rule that the tenant will commit a forfeiture if he disclaim. Bac. Abr. Leases, T. 2.

[2] No notice to quit is necessary where the tenant does an act which amounts to a disavowal of the title of the lessor (*Doe d. Williams v. Pasquali*, Peake, 19. S. P. *Doe d. Jefferies v. Whittick*, Gow. 195; Bull, N. P. 96; Esp. N. P. 463. *Doe d. Calvert v. Frowd*, 4 Bing. 557; 1 M. & P. 480); as where the tenant has attorned to some other person, or answered an application for rent by saying that his connexion as tenant with the party applying has ceased. *Doe d. Grubb v. Grubb*, 10 Barn. & Cres. 816; 5 M. & R. 666.

In the case of an adverse possession, it is not necessary to give a notice to quit to the tenants in possession. Where, therefore, a party defended an action of ejectment as landlord, and the occupiers suffered judgment to go by default, it was held that the defendant could not object that the occupiers had not received notice to quit from the lessors of the plaintiff, who claimed adversely to the party under whom the tenants occupied. In such cases, as the tenant sets his landlord at defiance, the latter may consider him either as his tenant or as a trespasser, and in the latter case need not give him a notice to quit before he brings an action of ejectment. *Doe d. Cheese v. Creed*, 2 M. & P. 648. S. P. *Doe d. Foster v. Williams*, Cowp. 622.

[3] A subsequent distress by the landlord is a waiver of a disclaimer. *Doe d. Williams*, 7 C. & P. 322.

III. Only the Plaintiff can Discontinue, p. 75.
IV. Mere Service of Rule no Discontinuance, p. 75.
V. After Rule, Plaintiff may be compelled to Enter up Judgment of, p. 75.
VI. If Improperly Obtained may be Set Aside, p. 76.
VII. Can only be Proved by Rule itself, p. 76.
VIII. Discontinuance of Proceedings in Error, p. 76.
IX. „ of Estate, p. 76.
X. „ of Action against Bankrupt by Proof of Debt. *See* Bankruptcy, vol. ii. p. 275, 276.
XI. „ in Pleading, p. 76.

I. Meaning of Term.

Elworthy v. Bird, 2 Bing. 258.

The term discontinuance means "putting an end to the suit in a legal way."

In a declaration upon an agreement, made pending a judgment on an indictment whereon the defendant had been found guilty, that all other indictments "should be discontinued," it was averred that all such indictments had been wholly discontinued, and not further proceeded with; and it appeared that the plaintiff had taken no steps by *nolle pros.* or otherwise towards putting an end to such indictments.

The court held that the term discontinuance meant "putting an end to the suit in a legal way," and this not having been shown, the plaintiff was properly non-suited.

II. Rule for.

(A) *When granted.*[1]

(B) *Must contain Undertaking to pay Costs.*

Rule to discontinue must contain undertaking to pay costs.

By Pr. H. T. 1853, r. 23, "to entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent that if they are not paid within four days after taxation, defendant shall be at liberty to sign judgment of *non pros.*"

(C) *On what Terms granted.*[2]

[1] Before argument on demurrer, verdict, or execution of a writ of inquiry, this is a mere side-bar rule, and may be had, as a matter of course, at the proper office. This rule may be obtained at any time before trial or inquiry. *See* 1 Salk. 178, 179. And leave has been given to discontinue after argument, and before argument on demurrer (id.); but it is never granted after a writ of inquiry executed and returned (*see* Carth. 86); nor after judgment on demurrer (*see* 1 Salk. 172); nor after special verdict, in order to adduce fresh proof in contradiction of the verdict. *Roe d. Gray v. Gray*, 2 Black. 815. And leave to discontinue was denied, after a rule for judgment upon a demurrer. *Turner v. Turner*, 2 Ld. Raym. 856, n.; 1 Salk. 179; S. C. Holt, 156. It is too late to discontinue after verdict for the defendant, with leave for the plaintiff to move to enter a verdict for himself. *Goodenough v. Butler*, 3 Dowl. P. C. 751. But a discontinuance has been permitted after a special though not after a general verdict. *Price v. Parker*, 1 Salk. 178.

[2] The terms on which a party is allowed to discontinue are in the discretion of the court. The payment of costs is imposed, *supra;* but this may be dispensed with if anything has been done by the defendant to mislead the plaintiff. *Poensgen v. Chanter*, 6 Scott, 300. In some cases it must be on payment of the full costs, given in lieu of double costs. 5 & 6 Vic. c. 97, s. 2. *Devenish v. Mertins*, 2 Stra. 974. And where a plaintiff moved to discontinue upon payment of costs, after judgment given for him on demurrer, but not entered of record, and a writ of error brought and bail put in thereupon, the court refused to

(D) *The same as to an Executor.*[1]

III. Only the Plaintiff can Discontinue.

Long v. Buckeridge, 1 Stra. 112.

In replevin. It was prayed that the avowant might discontinue, because he was an actor; but the Court said "it is the plaintiff's suit, and how can one man discontinue another's suit?"

In replevin, the avowant, though an actor, cannot have a rule to discontinue.

IV. Mere Service of Rule no Discontinuance.

Whitmore v. Williams, 6 T. R. 765. S. P. Molling v. Buckholtz, 3 M. & S. 153.

By Reg. Gen. it is ordered, "that on payment of costs to be taxed, &c. the action be discontinued." In this case a rule was served to discontinue, but no appointment was taken out to tax the costs. It was contended that taking out an appointment in this case was unnecessary, as no costs were due. But the court said some costs must be due, and that the rule to discontinue, without an appointment, does not amount to a discontinuance.

See 2 Stra. 1209; Barnes, 399.

Merely serving the rule is no discontinuance.[2]

V. After Rule, Plaintiff may be compelled to Enter up Judgment of.[3]

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make a rule to discontinue, without payment of costs on the writ of error. *See* Barnes, 169. So where, after a notice of trial given and regularly countermanded, the plaintiff in the C. P. obtained a rule to discontinue upon payment of costs; and it appearing that after the notice of trial, and before the countermand, a witness for the defendant, who resided in London, had set out for the York assizes; the question was whether the expense of this witness could be allowed the defendant in costs. The court held that, as the countermand was regular, the costs for this witness could not be allowed. *See* Barnes, 307. On a discontinuance before notice of trial, the defendant is not entitled to the costs of the drafts of briefs. *Doe d. Postlewhaite v. Neale*, 2 Mee. & W. 732.

And where, upon setting aside a verdict for plaintiff, the costs are to abide the event, the plaintiff discontinues, the defendant is not entitled to the costs of the trial. *Howarth v. Samuel*, 1 B. & A. 566. And where a plaintiff obtained a verdict, which was set aside, and a new trial granted, and the plaintiff, instead of proceeding to the new trial, discontinued the action, it was held that he was not liable to the costs of the former trial. *Gray v. Cox*, 5 B. & C. 458; 8 D. & R. 220. *Earl of Macclesfield v. Bradley*, 7 Mee. & W. 570; 9 Dowl. 312. *Patterson v. Powell*, 2 id. 738. See *Daniel v. Wilkin*, 22 L. J. Ex. 73; 8 Ex. 156.

After a plea *puis darrein continuance*, the plaintiff may discontinue without costs. *Woollen v. Smith*, 1 Per. & D. 374. And if the defendant become insolvent after the commencement of the action, and the plaintiff take no further steps in it after knowledge of the insolvency, the court may, it seems, allow him to discontinue without payment of costs. *Ford v. Stock*, 1 Dowl. N. S. 763.

[1] The same terms apply to an executor when he has knowingly brought a wrong action (*Harris v. Jones*, 1 Black. 451); as, where three actions had been instituted, the court refused to permit him to discontinue without payment of costs. *Melhuish v. Melhuish*, 2 N. R. 72. But it is otherwise where blame is imputable. *Wright v. Jones*, 2 Smith's Rep. 260; *see* 2 Stra. 871; 4 Burr. 1927.

[2] And where plaintiff has leave to discontinue upon payment of costs, there is no discontinuance till the costs be paid. *Bereton v. Jupp*, 15 Mee. & W. 149. *Brandt v. Peacock*, 1 B. & C. 649. And if the plaintiff, instead of paying, proceed and recover a verdict, the judgment is regular. *Baker v. Jupp*, 3 D. & L. 474. *Breton v. Jupp, supra.* But if the rule be obtained after plea pleaded, and contain, as it should do, the plaintiff's consent, that if they are not paid within four days after taxation the defendant shall be at liberty to sign judgment of *non pros.* (*see* Form of entry on roll, Chit. Forms); then, if they be not so paid, the defendant may sign such judgment as of course. *See* r. 23, H. T. 1853, *ante*, 74. The plaintiff is not, it seems, liable to an attachment for the non-payment of these costs. *Stokes v. Woodeson*, 7 T. R. 6; and see *Rese v. Fenn*, 2 Dowl. 182. *Turner v. Gill*, 3 Dowl. 31.

[3] Where the plaintiff has obtained a rule to discontinue, the defendant may, by motion or summons and order, compel the plaintiff to enter the judgment of discontinuance, and carry in the judgment-roll (*Mayor of Macclesfield v. Gee*, 13 Mee. & W. 470); but otherwise if it be on payment of costs.

VI. May be Set Aside if Improperly Obtained.[1]

VII. Can only be Proved by Rule itself.

Fanshawe v. Heard, 1 M. & P. 191; S. C. 3 C. & P. 190.

The discontinuance of an action can only be proved by the rule to discontinue.[2]

An action having been brought by the plaintiff against the defendant, it was agreed between them that the plaintiff should discontinue, and that the defendant should pay him the legal costs incurred as between party and party. The costs were afterwards taxed, and an action brought to recover the amount; and in his declaration the plaintiff averred that he had discontinued, but he had not obtained a rule to discontinue.

Per Cur. The plaintiff clearly had no right to commence this action until the former one had been regularly discontinued, and that could only be done by a rule for that purpose. As the case now stands, the action is only suspended, and may be yet revived. It has been held at Nisi Prius that even the production of a rule to discontinue was not evidence of a discontinuance, but that it was incumbent on the plaintiff to show that it was entered on the roll.

VIII. Discontinuance of Proceedings in Error.

Plaintiff in error may discontinue on payment of costs.

By C. L. P. Act, 1852, s. 159, "the plaintiff in error, whether in fact or law, shall be at liberty to discontinue his proceedings by giving to the defendant in error a notice, headed in the court and cause, and signed by the plaintiff in error, or his attorney, stating that he discontinues such proceedings; and thereupon the defendant in error may sign judgment for the costs of, and occasioned by the proceedings in error, and may proceed upon the judgment on which the error was brought."

IX. Discontinuance of Estate.[2]

X. Discontinuance of Action against Bankrupt by Proof of Debt.

See Bankruptcy, vol. ii. p. 275, 276.

XI. Discontinuance in Pleading.[3]

DISCOVERY. *See* Documents, Discovery of; Evidence; Interrogatories; and 17 & 18 Vic. c. 125, s. 51.

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[1] If a rule to discontinue be improperly obtained it may be set aside. *Belchier v. Gansell*, 4 Burr. 2502. *Olmius v. Delany*, 2 Stra. 1216.

[2] A plea, alleging a discontinuance of a former action, and acceptance of money in discharge, is not proved by merely showing the payment of the costs. *Power v. Butcher*, 10 B. & C. 329.

[3] The injury of discontinuance happened when he who had an estate-tail made a larger estate than by law he was entitled to do (*see* Finch, L. 190), in which case the estate was good, so far as his power extended who made it, but no further. As, if tenant in tail makes a feoffment in fee simple, or for the life of the feoffee, or in tail, all which were beyond his power to make, for that, by the common law, extends no farther than to make a lease for his own life; in such case the entry of the feoffee is lawful during the life of the feoffor. *See* 3 Bl. Com. 171. But a discontinuance cannot now arise, in consequence of the abolition of fines and recoveries by the stat. 3 & 4 Wm. 4, c. 74, and the abolition of the effect of warranties (which sometimes worked a discontinuance) by s. 14 of that act, and the abolition of the tortious operation of feoffments by stat. 7 & 8 Vict. c. 76, s. 7, and 8 & 9 Vict. c. 136, s. 4, and in consequence of s. 39 of the stat. 3 & 4 Wm. 4, c. 27, which provides that no discontinuance happening after Dec. 31, 1833, shall defeat any right of entry.

[3] Where the plea in its introduction and body is confined to part of the declaration, so that the plea is *pro tanto* correct, the course is to sign judgment as to the unanswered part, if there be no other plea applying thereto; and this is an essential step to prevent what is termed a discontinuance. 1 Saund. 28, n. 3. *Everard v. Paterson*, 6 Taunt. 645, 647; 2 Marsh, 304. *Chitty v. Dendy*, 3 Ad. & E. 319. *Henry v. Earl*, 8 Mee. & W. 228. The principle of this is that the plaintiff, by not taking judgment, as he was entitled to do for the part unanswered, does not follow up his entire demand, and there is, consequently, that sort of chasm or interruption in the proceedings which is called in the technical phrase a discontinuance. *Tippet v. May*, 1 B. & P. 411. This defect is cured by verdict. 32 Hen 8, c. 30.

DISFRANCHISEMENT. *See* Corporations, vol. iii. p. 263.

DISHONOUR. *See* Bills and Notes, vol. ii. p. 474.

DISHONOUR, Notice of. *See* Bills and Notes, vol. ii. p. 474, 476, 477, 478, 480, 481.

DISORDERLY. *See* Vagrant.

DISORDERLY House.[1] *See* Bawdy House, vol. ii. p. 386; Dancing, vol. iii. p. 553; *post*, Gaming; Use and Occupation.

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DISSEISIN.

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(A) *What amounts to.*[2]

[1] A licensed alehouse is a place of public resort for the sale of refreshments, within the Town Police Act, 10 & 11 Vic. c. 89, s. 35, and the keeper of it is liable to penalties under that section for allowing prostitutes to assemble therein; although he may also at the same time be guilty of an offence against the tenor of his license, under the 9 Geo. 4, c. 61. See *Cole v. Coulton* (*Clerk to the Lynn Paving Commissioners*), 29 L. J. M. C. 125.

By a section of a local act for the regulation of a borough, which recited that it was expedient to make regulations for preventing disorderly conduct in houses of public resort, the keeper of any place for refreshment, not being licensed, who should wilfully and knowingly permit drunkenness or other disorderly conduct in such place, or knowingly permit prostitutes or persons of notoriously bad character to meet together and remain therein, was made liable to a penalty. A magistrate dismissed a complaint under this section, and stated, on appeal, that the defendant knowingly permitted twenty prostitutes to meet together and remain in his coffee-shop (being a place within the section), together with a number of men, and that he allowed them to remain after he had been warned, and knew that they were prostitutes; but no disorderly conduct was proved to have taken place in the shop. The question for the court was, Whether the magistrate was bound on the above facts to convict?—*Held*, that proof of disorderly conduct was not necessary to justify a conviction; but that, as it did not appear that the prostitutes were allowed to remain in the shop beyond the time necessary for taking refreshment, the magistrate was not bound to convict. *Greig v. Bendino*, 27 L. J. M. C. 294.

[2] Disseisin is a wrongful putting out of him that is seised of the freehold, *See* Co. Litt. 277. Smith, R. & P. P. 485. Disseisin may be effected, either with reference to corporeal inheritances or incorporeal. Disseisin of things corporeal, as of houses, lands, &c., must be by entry and actual dispossession of the freehold (id. 181); as if a man enters either by force or fraud into the house of another, and turns, or at least keeps, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession, for the subject itself is neither capable of actual bodily possession nor dispossession, but it depends on their respective and various kinds, being, in general, nothing more than a disturbance of the owner in the means of coming at, or enjoying them (*see* 3 Bl. Com. 179): hence, in an assize (now abolished) between two tenants in common, a forbidding by word of mouth to the tenant to pay his rent was adjudged a disseisin. *See* T. Raym. 371. So, if lessee for years, from a day to come, enters before the day, and continues afterwards, he is a disseisor. *See* 1 Sid. 8. And a person entering upon a void grant is a disseisor. *See* 3 Co. 9, b; 10 Mod. 265. So, if a copyholder in reversion enter upon the tenant for life, it is a disseisin. *Kren v. Kirby*, 2 Mod. 33.

Where an office is a freehold, the denial of just fees amounts to a disseisin. *Ballard v. Gerrard*, 1 Salk. 333; S. C. 1 Ld. Raym. 703.

But an entry under a judgment in ejectment cannot be deemed a disseisin. *Taylor v. Atkins*, 1 Burr. 60. Nor was a fine levied by tenant for life who continued in possession a disseisin of the remainder-man. *Williams d. Hughes v. Thomas*, 12 East, 141.

So, a lease and entry by the lessee is not a disseisin in fact, unless the entry be forcible, or with a manifest intention to disseise.

(B) *Of Disseisins at Election.*[1]
(C) *Effect of.*[2]

DISSENTERS, and Dissenting Chapels and Ministers. *See* Marriage; Religion.

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Jerritt v. Weare, 3 Price, 575, abr. vol. iii. Covenant. So, where mortgagee covenants that mortgagor shall quietly enjoy, till default of payment, and then assigns; after such assignment, mortgagor is only tenant at sufferance; but his continuing in possession does not turn the term to a right, nor make a disseisin. So a bare entry on another, without an expulsion, makes only such a seisin, that the law will adjudge him in possession only that has the right, and does not work a disseisin. *Smartle v. Williams*, 1 Salk. 245.

[1] A disseisor may be, or not be, at the election of him to whom the tort is done. *See* Carter, 162. As if tenant at will makes a lease for years, it is a disseisin at the election of him who has a freehold. *See* Lat. 53. So, if lessor enters upon his lessee for years, he is only tenant at will; and, though he let to another for years, he is only a disseisor at election; but if he let to another for life, he is a disseisor. *See* 1 Sid. 349.

[2] If a son purchase in fee and be disseised by his father, who makes a feoffment with warranty, the son is bound for ever. *Mayor of Norwich v. Johnson*, 3 Mod. 91.

Gilbert lays it down that the disseisor has only the naked possession, because the disseisee may enter and evict him; but against all other persons the disseisor has a right, and in this respect only can be said to have the right of possession: for in respect to the disseisee, he has no right at all; but when a descent is cast, the heir of the disseisor has *jus possessionis*, because the disseisee cannot enter upon his possession and evict him, but is put to his real action because the freehold is cast upon the heir. And a disseisin being the wrongful act of a stranger, is not a breach of the covenant for validity of title, that the person under whom the vendor derives title, had leased part of the premises sold to one, who had afterwards entered on the premises demised. *Jerritt v. Weare*, 3 Price, 604. *See* Covenant, vol. iii. p. 443.

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I. Definition and Origin of.[1]

II. For Amercements.

(A) *Difference between an Amercement and a Fine.* See Amercement, vol. i. p. 346.

(B) *By whom to be made.*[2]

(C) *Whose Property may be Seized.*[3]

(D) *Where to be made.*[4]

(E) *When to be Joint and Several.*[5]

[1] The term "distress" is derived from the French word *distresse*. In Latin *districtio*, because the things distrained are put into a strait, which we call a pound. *See* Co. Litt. 96, a. A distress is the taking of a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure satisfaction for a right withheld, as for the non-payment of rent, or for a wrong committed, as injury done by cattle. *See* 3 Bl. Com. 6; Brad. Dist. 1. This remedy appears to be of such remote antiquity, that we have no memorial of its origin; and as this power was anciently used by the lords, it grew as burthensome and grievous to tenants as the feudal forfeiture; there being no difference to the tenant between the lord's seizing the land itself, turning him out of possession, and his stripping him of the whole produce of it at his pleasure; and not only the produce of the farms, but the *inducta* and *illata*, and everything that was brought on the land were liable to the lord's distress. The power thus practised not only oppressed the tenants, but put them entirely under the control of the lords. It consisted in the taking, without legal process, of a personal chattel from the possession of the wrong-doer or defaulter into the hands of the party grieved, to be held as a pledge for the redress, performance, or satisfaction required. These oppressions ended with the distractions of the barons' wars; for, towards the end of the reign of Henry III. there were particular laws made to regulate the manner of distraining, not permitting the lords to extend this mode of proceeding beyond the mischief it was first introduced for, which was no more than to empower the lord, by seizing the chattels, to oblige the tenant to perform the feudal services. *See* Brad. Dist. 3; 2 Inst. 102, 103; Gilb. Dist. 2. The act of taking, and the thing taken, as well as the remedy generally, are called distress.

A distress is of two kinds, either for non-payment of rent or other duties, or for cattle trespassing and doing damage. *See* Brad. Dist. 1.

It is also the means of enforcing the payment of fines imposed, or amerciaments made by court-leets; of amerciaments charged on particular townships, and penalties inflicted by bye-laws; of tolls payable in respect of things sold in fairs and markets within particular franchises or manors; and of port duties due to the owners of certain ports or havens for ships coming into, or otherwise using the same. It has also more recently been adopted by numerous acts of parliament, and applied by them to the exaction and recovery of the duties and penalties which they impose or inflict.

[2] Amercements may be made by a court-baron or leet; but for those made in the former there can be no distress in the absence of a prescriptive right (*see* 11 Co. Rep. 45), unless in the case of the king. Cro. Eliz. 748. 3 Steph. Com. 393.

[3] The property of a stranger cannot be seized for an amercement, it being merely a personal offence. *See* 2 Hawk. P. C. 59.

[4] The Statute of Marlbridge does not apply to a distress for an amercement; and, consequently, it may be made in the highway (*see* 11 Co. Rep. 42), so as it be within the jurisdiction of the court (*see* 1 Roll. Abr. 670); and it may be on the lands of others, provided the offender's goods be there. (Id.) And it has been holden, that if a man belonging to one district of a leet be amerced in the court-leet, his goods may be taken in any part of its jurisdiction, though in a different district. *See* 11 Co. Rep. 44.

[5] No person shall distrain as for an entire sum where there are several amercements due for distinct offences, as each amercement ought to be levied separately. *See* Gilb. Dist. 58. And though where one offence is committed jointly by several persons, the amercement may be joint, yet it must be severally afferred or apportioned, and

(F) *In what cases the Thing may be Sold.*[1]

IV. Damage Feasant.

(A) *Definition of.* *See* Damage Feasant, vol. iii. p. 545.

(B) *What Things may be Distrained as such.*

(*a*) *Things not in Use on Private Soil may be.*[2]

(*b*) Aliter *Things in Use.*[3]

(*c*) *Nor Cattle straying through Default of Distrainor.*

Elmore v. Tucker, 6 Mod. 198.

Cattle cannot be distrained which have escaped by default of the fences, which the party distraining ought to have repaired.[4]

In replevin, the defendant made conusance as bailiff to J. S. for rent on a demise by the said J. S. of the place where, &c., and pleaded in bar, &c. that J. S., whose fee it was, time out mind used and ought to repair and maintain the fences between the place where, &c. and the plaintiff's land next adjoining, and, through want of repair, the plaintiff's cattle escaped into the place where, &c., and were distrained for damage feasant; and on demurrer,—

Holt, C. J. "It is impossible to say when the plaintiff's inheritance is charged with the repairs: he should take advantage of his own wrong in not repairing, by making the escaping cattle a distress for damage feasant."

See 2 Saund. 290, n. 7.

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several distinct distresses must be made for such afferments. But where the commission of the offence is several by each of the defendants, the amercements must be several also. *See* 11 Co. Rep. 42.

[1] The power of selling the distress for an amercement belongs only to a court-leet, and therefore an amercement in a court-baron cannot be sold without a special custom or prescription to warrant such sale. *See* Noy. 17.

[2] Beasts and other chattels not in use may be distrained damage feasant (*Storey v. Robinson*, 6 T. R. 138), but the distress must be confined to the very thing committing the injury; and one beast cannot be taken for damage committed by several, but it may be taken for its own damage, and an action of trespass may be brought for the damage done by the rest. *Vaspor v. Edwards*, 12 Mod. 660. *Ellis v. Rowles*, Willes, 638. And things can be considered as damage feasant only on a private soil, so that corn pitched in a market, or hides brought there for sale, cannot be distrained as damage feasant; for, property cannot be said to be damage feasant in a public market where persons have a right to bring their goods for sale. *See* Cro. Eliz. 75; Noy. 19. *Austin v. Whitbred*, Willes, 623. But where anything is placed improperly on the soil of another, it is not necessary that it should actually do an injury to the soil or its produce; if it incumbers, it will suffice. *See* T. Jones, 193; Brad. Dist. 204. *See* Damage Feasant, vol. iii. p. 545.

[3] If a man rides upon my corn I cannot take the horse damage feasant (9 Vin. Ab. 121; Distress, A. pl. 4); nor a horse and cart from a man driving it; nor any animal or thing under the immediate control of the owner, as this might lead to a breach of the peace. *Field v. Adames*, 12 Ad. & E. 649. But a dog loose is not within such control, though his master is within sight. *Bunch v. Kennington*, 1 Q. B. 680. *See* vol. iii. p. 545.

[4] Where cattle of the plaintiff were being driven along a road in the dark, some of them strayed into a field of the defendant's through a gap in the fence; the driver went on with the rest and put them in a place of safety, and then returned to take those which had strayed, but which the defendant by that time had distrained. The defendant, in an action of trespass for the taking, pleaded that he had distrained the cattle damage feasant, and that he had not distrained until a reasonable time had elapsed to remove them:—*Held* (*dissentiente*, *Bramwell*, *B.*), that a reasonable time meant not merely a reasonable time for the act of removal, but what was reasonable under all the circumstances of the case, and that this was for the jury to determine. *Goodwyn v. Cheveley*, 28 L. J. Ex. 298; 4 H. & N. 631.

Where plaintiff was owner of close A. defendant was owner of closes B. and C. Between A. and B. there was a fence, which, as against the owner of A., the owner of B. was bound to keep in repair, but which he had neglected to do. Between B. and C. there was a sufficient fence. The cattle of plaintiff strayed from A. through a gap into B., and then breaking down the fence between B. and C. were distrained by the defendant, as he alleged, damage feasant in C. It was held in trover to recover the cattle, that defendant had no right to distrain the cattle, as the first wrongful act had been committed by himself in leaving the fence between B. and A. insufficiently repaired, the natural result of which wrongful act was the damage complained of; and that the jury were properly directed that the state of the fence between B. and C., and whether or no the cattle were damage feasant, were immaterial. *Singleton v. Williamson*, 31 L. J. Ex. 17. *See* vol. iii. p. 545.

(C) *Who may Distrain.*

(*a*) *In general, every Occupier of Land.*[1]

(*b*) *Commoners, when.*[2]

(*c*) *Lords of Manors, when.*[3]

(*d*) *Railway Companies.*[4]

(D) *At what Time it must be made.*[5]

VASPOR v. EDWARDS, 12 Mod. 660, 661.

Per Cur. If a man come to distrain, and see beasts on his ground, and the owner chase them out before the distress be taken, though it be for the purpose of preventing the distress, yet the owner of the soil cannot distrain them; and if he does, the owner of the cattle may rescue them, for the beasts must be damage at the time of the distress, and they cannot be taken on fresh pursuit.

The distress must be made whilst the cattle are doing the damage.[6]

(E) *Duty of Distrainor.*

(*a*) *Is bound to provide proper Pound.*[7]

(*b*) *Must not be taken out of the County.*[8]

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[1] In general, every occupier of land has a right to distrain animals and chattels trespassing on his land, and detain them till he is paid compensation for the damage done. *Wormer v. Biggs*, 2 C. & Kir. 31. *Lindon v. Hooper*, Cowp. 416. *Burt v. Moore*, 5 T. R. 329.

[2] A commoner may justify the taking of the cattle of a stranger upon the land damage feasant. And if a man have a right of common for ten cattle, and he put in more, the surplusage above the ten may be distrained damage feasant. Gilbert on Distress, 4th ed. p. 22; Co. Litt. 161, a. By special custom, a commoner may even distrain the cattle of the lord. *Kinrick v. Pargeter*, Yelv. 129; 1 Roll. Abr. 405, 406. And if cattle be agisted by the lord, and improperly put on the common, the commoners may distrain them as the cattle of a stranger. Bull. Dist. 229; see *Hoskins v. Robins*, 2 Saund. 324. If, however, the right of the lord be not absolutely stinted, the commoner cannot distrain for a surcharge. *Hall v. Harding*, 4 Burr. 2426, 2431; 1 Bl. Rep. 674. And a commoner cannot safely resort to this remedy where the owner of the cattle has any colour of right. (Id.) *See* also Common, vol. iii. p. 147.

[3] The lord may distrain for injuries to his soil, hedges, fences, and trees, although he has no interest in the herbage. *Hoskins v. Robins*, 2 Wms. Saund. 327, a.

[4] Railway companies have a common-law right to distrain engines and carriages encumbering their railway, and obstructing the right of passage along the line; and the provisions of the Railway Clauses Consolidation Act with respect to the introduction of engines upon the railway, and the removal of improperly constructed engines, do not control or qualify this right, but give a cumulative remedy. *Ambergate, &c. Railway Co. v. Mid. Railway Co.* 2 E. & B. 793.

[5] *See* also *Clement v. Milner*, 3 Esp 95. *Wormer v. Biggs*, 2 C. & Kir. 33. But if the distrainor enter while the cattle are doing damage, they cannot afterwards be driven off to avoid the distress. *Clement v. Milner, supra.*

So, if cattle be damage feasant yesterday, and again to-day, they can only be distrained for the damage they are doing when they are seized (*see* Bull. N. P. 91); though a distress for rent must be made in the daytime, cattle damage feasant may be distrained in the night, because the beasts may be gone before that time arrives. *See* Inst. 142. But they cannot at any time be distrained in the king's highway, unless at the instance of the king. 52 Hen. 3, c. 51.

[6] And one whose cattle have strayed in his sight is bound to take them away within a reasonable time, in order to prevent their being distrained. *Goodwyn v. Cheveley*, 1 F. & F. 313; 28 L. J. Ex. 298. As to cattle passing along a highway, *see* 28 L. J. Ex. 298; 4 H. & N. 631.

[7] A person who distrains cattle damage feasant is bound, at his peril, to take care that the place in which he impounds them is in a fit and proper state, and is liable for the consequences if it is not. In an action for abusing sheep distrained damage feasant, by putting them into a pound which was in an unfit state, as the defendant well knew, the evidence was that some of the sheep died in consequence of the state of the pound, and that it was in an unfit and improper state:—*Held*, that it was not necessary to leave to the jury explicitly the question whether the defendant knew the unfit state of the pound, for that he was bound to know it, and moreover, as it was obvious, he must be taken to have known it; and a verdict for the plaintiff was supported. *Bignell v. Clarke*, 29 L. J. Ex. 257; 5 H. & N. 485. *Wilder v. Speer*, 3 Nev. & P. 536. *Smith v. Wright*, 30 L. J. Ex. 313. *See* p. 86.

[8] By 1 & 2 Philip & Mary, c. 12, a distress is to be impounded in the same county, and not be driven about three miles from place of taking. But driving to the next pound in another shire does not make the party a trespasser, although it subjects him to the penalty of this statute. *Gimbart v. Pelah*, 2 Stra. 1272. When lands in adjoining counties are let upon one demise, the

(*c*) *Distrainor must not Overdrive Distress.*[1]

(*d*) „ *provide Food and Water.*[2]

Distrainor must provide food and water.

By 12 & 13 Vic. c. 92, s. 5, "every person who shall impound or confine, or cause to be impounded or confined, in any pound or receptacle of the like nature, any animal, shall provide and supply during such confinement a sufficient quantity of fit and wholesome food and water to such animal; and every such person who shall refuse or neglect to provide and supply such animal with such food and water as aforesaid shall for every such offence forfeit and pay a penalty of twenty shillings."

(*e*) *Distrainor not providing Food, any other Person may supply same.*

Distrainor not providing food, any other person may supply same.

By sect. 6, "in case any animal shall at any time be impounded or confined as aforesaid, and shall continue confined without fit and sufficient food and water for more than twelve successive hours, it shall and may be lawful to and for any person whomsoever, from time to time, and as often as may be necessary, to enter into and upon any pound or other receptacle of the like nature in which any animal shall be so confined, and to supply such animal with fit and sufficient food and water during so long a time as such animal shall remain and continue confined as aforesaid, without being liable to any action of trespass or other proceeding by any person whomsoever for or by reason of such entry for the purposes aforesaid, and the reasonable cost of such food and water shall be paid by the owner of such animal, before such animal is removed, to the person who shall supply the same, and the said cost may be recovered in like manner as herein provided for the recovery of penalties under this act."

(F) *As to Distraining the same Cattle twice.*[3]

(G) *Persons with concurrent Possession of the same Land cannot Distrain each other's Cattle.*

Churchill v. Evans, 1 Taunt. 529.

Persons entitled to distinct rights in the same close cannot distrain each other's cattle.

In this case the court held, that if two persons have the concurrent possession of land, for the purpose that each may take profit of a special nature and distinct from, but not inconsistent with the right of the other, the one cannot distrain the cattle of the other damage feasant, the remedy, if any, being by action.

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cattle may all be taken to a pound in either of the counties, but they cannot be driven through an intermediate county if the counties do not adjoin. *Walter v. Rumbal*, 1 Ld. Raym. 53; 1 Salk. 247. In an action for driving the distress out of the county, the venue may be laid in either county. *Pope v. Davis*, 2 Taunt. 252.

In an action for driving into another county the venue is transitory. *Pope v. Davis*, 2 Taunt. 252; 2 Camp. 266. *Fife v. Bousfield*, 6 Q. B. 100. *See* precedent and notes, 2 Chit. Pl. 7th ed. 539. At common law, and by 52 Hen. 3, c. 4, *ante*, 85, it was punishable to convey the distress out of the county. Gilb. 223.

An offence under the 1 Phil. & Mary, c. 12, is satisfied by one forfeiture, although several persons be concerned, and the impounding be in several pounds. *Partridge v. Naylor*, Cro. Eliz. 480. *Rex v. Clark*, Cowp. 610.

[1] It is also the distrainor's duty to use caution in endeavouring to distrain damage feasant; for if he improperly drive and chase them, so as to injure the cattle, he will be liable to an action for damages; or the owner may interfere to prevent the abuse. *Smith v. Wright*, 30 L. J. Ex. 313.

[2] A mare was distrained damage feasant by A., and detained in the pound by the pound-keeper B. for several days. B. supplied the mare with food while in the pound, and A. and B. joined in selling the mare for the keep: — *Held*, in an action of trover by the owner of the mare against A. and B., that if they *bonâ fide* and honestly intended to sell the mare under the provisions of the stat. 5 & 6 Wm. 4, c. 59, s. 4 (the Cruelty to Animals Act), they were entitled to notice of action, and to have the venue laid in the proper county; but on these facts the judge would not nonsuit, but left it to the jury to say, whether the defendants meant *bonâ fide* to act upon the provisions of that statute, and if they did the defendants were entitled to their verdict. *Mason v. Newland*, 9 C. & P. 575.

[3] The same cattle may be twice distrained, if they a second time do damage on the land, although their owner may have replevied them in respect of the first. The distress is a new injury. F. N. B. 71.

(H) *When Distress may be Sold.*

Distress may be sold to pay cost of food in open market after three days' notice.[1]

By 17 & 18 Vic. c. 60, s. 1, "every person who, since the passing of the 12 & 13 Vic. c. 92, has impounded or confined, or hereafter shall impound or confine as in the said act mentioned, any animal, and has provided and supplied, or shall hereafter provide and supply such animal with food and water as therein mentioned, shall and may, and he is hereby authorised to recover of and from the owner or owners of such animal, not exceeding double the value of the food and water so already or hereafter to be supplied to such animal, in like manner as is by the said last-mentioned act provided for the recovery of penalties under the same act; and every person who has supplied or shall hereafter supply such food and water shall be at liberty, if he shall so think fit, instead of proceeding for the recovery of the value thereof as last aforesaid, after the expiration of seven clear days from the time of impounding the same, to sell any such animal openly at any public market (after having given three days' public printed notice thereof, for the most money that can be got for the same, and to apply the produce in discharge of the value of such food and water so supplied as aforesaid, and the expenses of and attending such sale, rendering the overplus (if any) to the owner of such animal."

(I) *Effect of Tender of Amends.*

BROWN v. POWELL, 4 Bing. 230; S. C. 12 Moore, 454.

On a distress damage feasant, a tender to the agent of the distrainor is sufficient; but it is too late after they are impounded.[2]

In replevin, it appeared that sheep distrained damage feasant were put into an out-house, the wife of the party distraining saying that they were going to be sent to a public pound. The owner tendered amends to the wife, who had acted for her husband on similar occasions before.

Per Cur. Two objections have been urged in this case. The one, that the tender was not made to a person duly authorised to receive it; and the other, that it was not made until after the sheep had been impounded. As to the first point, the evidence furnishes an answer to it; for it was proved at the trial, that the wife had acted on similar occasions before for her husband, and she was the only person to be seen on this occasion. As to whether or not the sheep could be considered as legally impounded at the time of the tender it is not necessary to decide, but it would seem that they were not; for, if such an impounding were to be taken, a distress might be impounded in the place where seized, and thus the owner would be deprived of an opportunity of tendering amends. In *Pilkington's case* (5 Rep. 76, a), the whole court resolved that a tender, after the cattle were in the custody *of the law*, was too late.

(K) *Duties of Pound-keepers.*[3]

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[1] The 2 Wm. & M. c. 5, enabling the sale of goods distrained for rent does not extend to a distress damage feasant. They remain mere pledges as at common law, and can only be sold under the above statute. Parties to justify under the 17 & 18 Vic. c. 60, s. 1, must show it was necessary to sell the number they did. The power is measured by the necessity of the case, and if the distrainor is obliged to keep the distress for an indefinite time, he may sell from time to time to cover expenses. *Layton v. Hurry*, 8 Q. B. 819; 15 L. J. Q. B. 244.

[2] A distress cannot be lawfully made after tender of amends before the taking, nor can it be detained if tender be made after the taking and before the impounding. But if the tender be made after the impounding, it is too late to make either the taking or detainer unlawful. *Anscombe v. Shore*, 1 Camp. 285; S. C. 1 Taunt. 261. S. P. *Sheriff v. James*, 1 Bing. 341; S. C. 8 Moore, 334.

A tender need only be made of amends for the damage done at the time of the distress, for the things cannot be detained for any previous distinct trespass. *Vaspor v. Edwards*, 12 Mod. 660; Brad. 204. The sufficiency of the tender rests upon the wrongdoer, whose cattle have trespassed. If, therefore, the distrainor demands an exorbitant sum as compensation, this will not dispense with the necessity for the owner of the cattle to tender the proper amount. *Gulliver v. Cosens*, 1 C. B. 795. The doctrine of a tender being too late after impounding is not applicable to the case of a distress for rent. *Johnson v. Upham and another*, 28 L. J. Q. B. 252; 5 Jur. N. S. 681.

[3] A pound-keeper is bound to receive everything offered to his custody, and is not

V. For Double Rent or Value. *See* Double Rent and Value, p. 128; Rent.

VI. For Fines.[1]

VII. For Penalties to be Recovered before Justices. *See post*, Justices of the Peace.

VIII. For Port Dues. *See post*, Port Dues; Tolls.

IX. For Rates. *See* Churchwardens, vol. iii. p. 114; *post*, Highway; Poor-Rates; Rates.

X. For Rent.

(A) *Definition of.*[2]

(B) *The Rent must be certain.*

Parker v. Harris, 4 Mod. 78; S. C. 1 Salk. 262.

The rent must be certain as to sum and time of payment.[3]

A lease for years reserved rent *after the rate* of 18*l.* per annum. It was contended and resolved by the court not to be a good reservation, because it may be in corn, or in anything satisfactory. Besides, an action may be brought every day, or every hour, there being no time limited when the rent shall be paid.

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answerable whether the thing were legally impounded or not. *Badken v. Powell*, Cowp. 476. *Brandling v. Kent*, 1 T. R. 62. An action of trespass, therefore, will not lie against him for merely receiving a distress, though the original taking be tortious; for the pound being the custody of the law, if the distress be wrongfully taken, the distrainor is answerable, not the pound-keeper.

[1] A fine which is not reasonable and moderate is illegal and not binding; and whether it is reasonable is a question of law. *See* 11 Rep. 45; Brad. Dist. 171. If several persons be guilty of one offence, they should not be jointly, but severally fined; for, as a fine is commonly imposed, not for any general neglect of duty, but for a particular and personal misfeasance, it belongs to the very nature of the offence that its punishment should be confined to the individual who is guilty of it. *See* Brad. Dist. 172.

Fines are generally imposed for acts of contempt and disobedience. *See* Brad. Dist. 160; and *post*, Fine.

Courts of record may impose fines; hence a court-leet, being a court of record, and the steward a judge there, he may impose a reasonable fine. *See* Cro. Eliz. 581; Moore, 470. But for an offence out of court, as not coming to do suit there, the steward cannot fine. Cro. Eliz. 241.

The power of selling a distress for a fine belongs only to a court-leet; and, therefore, if it be imposed by a court-baron, unless there be a custom or prescription to warrant it, the distress cannot be sold. *See* Noy. 17.

[2] Rent may generally be defined as the profit issuing yearly out of lands and tenements corporeal. Co. Litt. 142, a. It may be in money or money's worth, as arms, horses, corn, or other things rendered by way of rent; or it may consist in the personal service of the tenant. *Lanion v. Carne*, 2 Saund. 165. But it cannot be part of the profits demised, as the herbage or vesture of the land, for that would be an exception out of the grant, and not a rent reserved. Co. Litt. 47, a. A reservation is of a thing not in being, but to be newly created or produced out of the lands demised; but an exception is part of the thing itself. It would seem, however, that in the case of mines, a rent may consist of a portion of the ore, which is the substance of the land itself. *Campbell v. Leach*, Amb. 740. *Buckley v. Kenyon*, 10 East, 139. *R. v. Pomfret*, 5 M. & S. 139. *R. v. Inhabitants of St. Austell*, 5 B. & A. 693.

[3] *See* Co. Litt. 96, a. But it is sufficient if there be any express terms in the creation of the rent by which the amount may be reduced to a certainty; for *id certum est quod certum reddi potest. Orby v. Mohun*, 2 Vern. 531, 542; S. C. 2 Freem. 291; 3 Bro. Parl. Cas. 248; Gilb. Eq. Rep. 45; Co. Litt. 96, a; 142, a. On the other hand, where a lease of tithes and land was granted at an entire rent, and was void as to the tithes because not under seal, a distress was held altogether unlawful, because there was no distinct rent due for the land. *Gardiner v. Williamson*, 2 B. & Ad. 337. *Neale v. Mackenzie*, 1 Mee. & W. 747. As to the period of payment, where the terms are general, and time not specified, the law will imply a yearly payment to be intended. *Cole v. Sury*, Latch. 264.

According to the ancient common law, the lord could not distrain upon the tenant in frankalmoigne, because his duty was to perform divers services, uncertain both in time and number. *See* Litt. Sers. 136. But it was, in all cases, sufficient, if the rent could be reduced to a certainty. *See* Co. Litt. 96, a. As, where plaintiff entered a farm under an oral agreement for a lease for ten years, and though the time for paying rent was settled, it did not appear what was the amount to be paid; the lease was never executed; but the plaintiff occupied according to the terms of the proposed lease, and paid a certain rent for two years:—*Held*, that

(C) *There must be an actual Demise.*

HEGAN v. JOHNSON, 2 Taunt. 148.

Replevin. Cognisance. It appeared that the plaintiff held the premises under an agreement for a lease; the plaintiff had been in possession for three-quarters of a year. At the trial, the jury, under the judge's direction, who thought there was no *demise* so as to support the cognisance, found a verdict for the plaintiff. A motion was made to set aside this verdict.

The owner of land possessed by a party under an agreement for a lease cannot distrain.[1]

The court refused the rule, observing that, where a party is in possession of premises under an agreement for a lease, and no other circumstances exist whence an implied tenancy can be raised, since no rent is due for the occupation, but only, if any, a compensation in nature of rent, the owner cannot distrain for non-payment.

See also *Dunk v. Hunter*, 5 B. & A. 322. *Hegan v. Johnson*, 2 Taunt. 148. *Regnart v. Porter*, 7 Bing. 451. *Hamerton v. Stead*, 3 B. & C. 478.

(D) *Must Issue out of Tenements Corporeal.*[2]

(E) *Must be Reserved to the Persons entitled.*

OATES v. FRITH, Hob. 130.

A lease for years was made by a tenant in fee-simple and his son and heir-apparent, to commence after the death of the father, reserving the rent to the son by name, but not reserving it to the heir or heirs of the father.

The rent should be reserved to the persons entitled.[3]

The court held that the son could not take the rent at all, for it was only as heir of his father that he could take it; and neither to the heir nor heirs of the father was it reserved.

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the lessor might distrain. *See* 3 Bing. 361.

[1] The admission by a party holding under an agreement of a charge of half-a-year's in an account between him and his landlord will, however, constitute a tenancy. *Cox v. Bent*, 5 Bing. 182; 2 M. & P. 281. So, on payment of rent, he becomes a tenant from year to year on the terms of the agreement. *Mann v. Lovejoy*, 1 R. & M. 355. *Doe d. Westmorland v. Smith*, 1 M. & R. 137. *See* also *Macdonel v. Weldon*, Stra. 550; 8 Mod. 54. And a parol contract suffices if it amounts to absolute demise. *Daniel v. Gracin*, 6 Q. B. 145; 13 L. J. Q. B. 309. *Anderson v. Midland Railway Co.* 30 id. 94. *See* 36 Bligh, N. S. 449; 27 L. J. C. P. 105; L. J. Q. B. 350. A distress affirms the continuance of the tenancy up to the day when the rent distrained for becomes due. 30 L. J. C. P. 220.

[2] A rent can issue only out of lands or tenements corporeal, upon which the person entitled may distrain. Co. Litt. 47, a; 144, a. It cannot issue out of a fishery or a common, franchise, or other incorporeal hereditament; for the party entitled to the rent cannot go upon it to distrain: nor could it have been put in issue in an assise. Id.; 2 Roll. Abr. 446. Another reason given is, that every incorporeal right originally arose by grant from the Crown for some particular purpose, which would have been neutralised if such incorporeal inheritances had been capable of being let for a rent reserved (Gilb. Rents, 20, 22). Nor can it issue out of a personal chattel. *Spencer's case*, 5 Co. Rep. 17; 1 Platt, 26. This rule once caused it to be doubted whether rent reserved on a lease of land with stock upon it, or on the demise of a ready-furnished house or lodgings, could be distrained for, as the greater proportion of the rent must evidently be paid for the goods. But it is decided that it can, because, in contemplation of law, the whole rent issues out of the land or premises demised. *Newman v. Anderton*, 2 N. R. 224; Brad. 26. *Robinson v. Learoyd*, 7 Mee. & W. 48. *Butt's case*, 7 Co. Rep. 23. But it may be derived out of the vesture or herbage of land, for that is so far of a corporeal nature that the person entitled to the rent may go upon the land and distrain the cattle feeding there. Co. Litt. 47, a. And a rent may be reserved to the queen out of any incorporeal hereditaments, because, by virtue of her prerogative, her remedy is not limited to what the rent is strictly reserved out of; but she may distrain on all the lands of the lessee. *Mountjoy's case*, 5 Co. Rep. 4.

[3] And not to a stranger; and, therefore, it ought to be reserved to the feoffor, donor, lessor, or his heirs, for they only have a privity of estate. *See* Litt. sect. 246; 2 Platt, 96. But this rule does not extend to a lease by two joint-tenants, reserving rent to one of them, for he has a *privity* of contract and estate. (Id.) Nor is it applicable to the queen, who may in general reserve a rent to a stranger. *See* Ld. Raym. 36. But see *Sacheverell v. Frogate*, 1 Vent. 162. And where tenant in tail reserved the rent to his heirs *generally*, the rent was holden to go to his heirs in tail. (Id.) And if there be no special reservation, it will enure according to the nature of the estate. *See* 1 Vent. 162. But if there be a specification of the rent to the lessor, without naming any other

(F) *Necessary Reversion.*

BRAWLEY v. WADE, 1 M'Clel. 664.

A party to distrain must have a reversion.[1]

The landlord had let different parts to the plaintiff and defendant at will, and afterwards agreed by parol that the defendant should become tenants of the whole, but no notice was given to the plaintiff to determine his interest.

The court held that the plaintiff having no title to the reversion (*qua* reversion, which could not pass without deed), had no right to distrain, and the defendant might, therefore, maintain trespass.

(G) *The Deed by which the Rent is reserved must be sufficient in point of Law.*[2]

(H) *As to what Rent a Distress generally attaches.*

(*a*) *Assize.*[3]

(*b*) *Rent-charge.*[4]

(*c*) *Fee-farm.*[5]

(*d*) *Seck.*[6]

(*e*) *Service.*[7]

(*f*) *Issuing out of Furnished Lodgings.*

NEWMAN v. ANDERTON, 2 N. R. 224.

The rent of ready furnished lodgings may be distrained for.

In this case there was an avowry justifying the taking a distress for rent arrear for a ready-furnished lodging. It was urged that no right of distress existed.

Sed per Cur. There seems to be no reason why the remedy by distress should be lost on account of the value of the property being enhanced by the addition of some chattels. Few tenements are let without some chattels. It never has

persons as heirs, executors, &c. to whom it shall be paid, the rent will be confined to the person to whom it is so reserved, and it will cease at his death (*see* Hardw. 95), unless it be reserved payable during the term, which will preserve the rent until the end of the term, and the law will distribute it according to the nature of the estate. *See* 1 Vent. 162.

[1] A tenant from year to year, underletting from year to year, has a sufficient reversion. *Curtis v. Wheeler*, 1 M. & M. 493. But where a party entitled to a lease for lives, with perpetual right of renewal, assigned his whole interest, reserving a rent with power of distress: — *Held*, that there being no reversion, he could not avow under 25 Geo. 2, c. 13 (Irish act, corresponding to 11 id. c. 19), those statutes being confined to cases where there is a reversion or interest vested in the lessor on the expiration of the lease. *Pluck v. Digges*, 1 Dow. & Clark, 180. And where the plaintiff was tenant to the defendants, six in number, who were joint-tenants of the reversion. Four of the defendants executed a conveyance to H.; the other two did not execute it. Afterwards the defendants distrained the plaintiff's goods for rent due to the six before the conveyance: — *Held*, that by the severance of the reversion, the right to distrain for this rent was gone. *Staveley v. Allcock*, 16 Q. B. 636; 15 Jur. 628; 20 L. J. Q. B. 320. *See* also *Threw v. Barton*, Moore, 94. *Webb v. Russell*, 3 T. R. 393. But a party seised in fee by granting a second lease, to take effect after the first, does not lose his right to distrain. *Smith v. Day*, 2 Mee. & W. 684.

[2] The rent must be reserved by a sufficient deed or conveyance to pass the estate. *See* Co. Litt. 96, a.; Bac. Abr. Rent, C. Hence, at common law, it could not be reserved upon a bargain and sale, because only a use was transferred. But now, by 27 Hen. 8, c. 10, the possession being executed to the use of the bargainor, he may distrain for the rent. *See* Co. Litt. 144, a.

[3] Rents of assize are the subjects of a distress. *See* 4 Geo. 2, c. 28; Gilb. Dist. 5; Brad. Dist. 34; and *post*, Rent.

[4] Rent-charge was denominated so, because the lands were expressly charged with distress by force of the deed only, and not of common right. *See* Litt. s. 217. Such a rent is within the 11 Geo. 2, c. 19, as to a distress. *Short v. Hubbard*, 2 Bing. 349; 9 Moore, 667. *Gilbertson v. Richards*, 5 H. & N. 453; 29 L. J. Ex. 213. *See post*, Rent.

[5] In *Bradbury v. Wright*, 2 Dougl. 624, it was holden that a distress was not incident to a fee-farm rent as such, except the case was brought within the 4 Geo. 2, c. 28. *See post*, Rent.

[6] For a rent-seck at common law there was no distress. *See* 3 Bl. Com. 42. But by the 4 Geo. 2, c. 28, that remedy was given. *See post*, Rent.

[7] For rent-service, the right to distrain vested in the lord before the 4 Geo. 2, c. 28. *See* Comyn. L. & T. 91; Gilb. Dist. 4, and *post*, Rent.

been contended hitherto that a landlord was deprived of his remedy because a looking-glass, or some other chattel, was agreed to be taken with the premises demised.

(*g*) *Rents Distrainable of Common Right.*[1]

XI. Who May Distrain.

(A) *Agents.*[2]

(B) *Annuitants.*[3]

(C) *Assignees.*[4]

(D) Cestui que Use.[5]

(E) *Commoners. See ante.*

(F) *Conusee of Fine.*[6]

(G) „ *Statute.*[7]

(H) *Coparceners.*[8]

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[1] These are not rent-services, because fealty is not incident to them; nor rent-seck, because distrainable; nor rent-charges, because independent of any express clause of distress. Thus, where a rent is granted by one co-parcener to another for equality of partition; or to a widow out of land of which she is dowable in lieu of dower; or where a rent is granted in lieu of dower; or where a rent is granted in lieu of lands upon an exchange, it may be distrained for of common right. Litt. s. 252, 253; Co. Litt. 169, a; 153, a, n. So, a rent reserved on tenancy at will, which is not a rent-service, fealty not being incident to such a tenure, is distrainable of common right. Co. Litt. 57, b; 142, a, b; *see* also Litt. s. 231, 232; Co. Litt. 153, a. *Bevil's case*, 4 Co. Rep. 9, b. *Fawkner v. Bellingham*, Sir W. Jon. Rep. 234. *See* also Com. Dig. Rent, C. 5; Bull. Dist. 31.

[2] Whoever distrains as agent for another must do so in the name of the party legally entitled. When a distress is made by a bailiff, he should have an authority in writing. *Buller's case*, 1 Leon. 50. *Leigh v. Shepherd*, 2 B. & B. 465. *Robinson v. Hoffman*, 4 Bing. 562. But this is not absolutely requisite; and if he act with the sanction of the person legally entitled, though given after the distress, it is sufficient. *Lamb v. Mills*, 4 Mod. 378. *Trevillian v. Pine*, 11 Mod. 112. *Potter v. North*, 1 Saund. 347, n. 4. The right of a person to do an act with regard to the property of another, depends upon the authority or right which he really has to do the act, and not upon that which he says he has. Therefore, if a person having authority to distrain for rent due to another, says at the time that he distrains for rent due to himself, he may, nevertheless, justify as bailiff of the other. *Trent v. Hunt*, 9 Ex. 14; 17 Jur. 899; 22 L. J. Ex. 318.

[3] An annuitant may distrain for arrears, though a term be vested in himself to secure the payment. *Fairfox v. Gray*, 2 Black. 1326.

[4] All persons who have vested in them legal estates, though in trust for others, as the trustees of a *feme covert*, or the assignees of a bankrupt or insolvent, may distrain for rent in respect of such legal estates in the same manner as if they were themselves beneficially interested therein. Bullen on Distress, p. 71. And the assignee of a trustee under a power may distrain, notwithstanding the pendency of an action of ejectment by the latter. *Rogers v. Humphreys*, 5 Nev. & M. 511.

[5] The *cestui que* of a rent-charge, since the Statute of Uses, is entitled to distrain. *See* 2 Mod. 138.

[6] The conusee of a fine levied of his own land to his own use may distrain. *See* T. Jones, 2.

[7] The conusee of a statute-merchant or staple may distrain (*see* 2 Vent. 327; 4 Co. Rep. 82); hence, if a lease for years be made, reserving rent, and then the lessor acknowledge a statute which is extended, the conusee, after the extent, may distrain for the rent (*see* 2 Vent. 327); but he cannot distrain for rent incurred previous to the acknowledgment. Id.; Co. Litt. 270.

[8] Coparceners, before partition, are considered in law as one (*see* Litt. 163, b. See *Stedman v. Page*, 4 Mod. 141); but it is otherwise after partition, for they may then distrain severally. *See* Co. Litt. 164, b. And even before partition, no consent from the other coparceners need be previously obtained in order to authorise one coparcener to distrain alone, or alone to appoint a bailiff to distrain, for the whole rent. *Leigh v. Shepherd, supra;* S. C. 5 Moore, 297. And where, upon partition between coparceners, a rent issuing out of the lands descended (Co. Litt. 169), is assigned to one for equality of partition, such rent is distrainable of common right (Litt. s. 252, 253; and Harg. n. 1, on Co. Litt. 153, a), whether in the hands of the coparcener, or of her grantee, for it is annexed to the estate. *Butler and Baker's case*, 3 Co. Rep. 22, b.

(I) *Corporations.*[1]

(J) *Devisees.*[2]

(K) *Executors and Administrators.*

Executors of tenants in fee-simple, &c. may distrain for rent due to their testator in his lifetime.

The 32 Hen. 8, c. 37, enacts, "that forasmuch as by the orders of the common law the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of lives,[3] of rents, services, rent-charges, rent-secks, and fee-farms, have no remedy to recover such arrearages of the said rents or fee-farms as were due unto their testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain, or have any lawful action to levy any such arrearages of rents or fee-farms, due unto him in his life as is aforesaid; by reason whereof the tenants of the demesne of such lands, tenements, or hereditaments, out of which such rents were due and payable, who of right ought to pay their rents and farms at such days and times as they were due, do many times keep, hold, and retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee-farms were due cannot have or come by the said arrearages of the same towards the payment of the debts and performance of the will of the said testators;" for remedy whereof be it enacted, "that the executors and administrators of every such person or persons, unto whom any such rent and fee-farm is or shall be due, and not paid at the time of his death, shall and may have an action of debt for all such arrearages, against the tenant or tenants that ought to have paid the said rent or fee-farms so being behind in the life of their testator, or against the executors and administrators of the said tenants; and also furthermore, it shall be lawful to every such executor or administrator of any such person or persons unto whom such rent or fee-farm is or shall be due, and not paid at the time of his death, as is aforesaid, to distrain for the arrearages of all such rents and fee-farms, upon the lands, tenements, and other hereditaments, which were charged with the payment of such rents or fee-farms, and chargeable to the distress of the said testator, so long as the said lands, tenements, or hereditaments continue, remain, and be in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee-farm so being behind, to the said testator in his life, or in the seisin or possession of any person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant by purchase, gift, or descent, in like manner and form as their said testator might or ought to have done in his lifetime, and the said executors and administrators shall, for the same distress, lawfully make avowry upon their matter aforesaid."[4]

See 2 Williams on *Executors*, 664.

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[1] The 4th Geo. 2, c. 28, has placed corporations on the same footing with regard to distress as other persons. *Wood v. Tute*, 2 N. R. 57. And a corporation aggregate may appoint a bailiff to distrain without a deed. *Church v. Imperial Gas Co.* 6 Ad. & E. 861. *Smith v. Birmingham Gas Co.* 1 id. 526. *Cary v. Mathews*, 1 Salk. 191.

[2] Devisees may distrain in respect of their reversionary interest; for by a devise of the reversion the rent will pass as its incident. 1 Vent. 3 Hen. 8, c. 1; Litt. ss. 585, 586; Brad. Dis. 87. And if a man devises a rent out of his land, and charges the land with a distress, the devisee may distrain, but not unless power to do so is given him by the will. Shep. Touch. 439. A rent without any interest in the land, devised for an estate in fee, in tail, or for life, must be considered to be a rent-seck distrainable under the 4 Geo. 2, c. 28, s. 5. *Long v. Buckeridge*, 1 Stra. 106. *Stafford's case*, Dyer, 253. As regards the power of distress, there is this difference between a devisee and a legatee. As the devise vests absolutely by the will, the devisee may immediately distrain for any rent subsequently accruing; whereas a legatee must await the assent of the executor to the bequest. 2 Wms. on Executors, 843.

[3] This statute is remedial, and extends to all tenants for life. *Hool v. Bell*, 1 Ld. Raym. 172; Co. Litt. 162, a, b.

[4] A creditor by *elegit* of tenant for life of a rent-charge is not within the act (Bull. N. P. 57); nor are the executors of a grantee of a rent-charge for years, if he so long live (id.); nor does the act extend to copyhold rents. *Appleton v. Doily*, Yelv. 135. In the case of *Rennin v. Watkin*, 1 Selw. N. P. 11th ed. 674, the court seemed to be of opinion that this statute gave a remedy by distress for rents of freehold only. This statute was held not to extend to the exe-

By 32 Hen. 8, c. 57, s. 4, "the executors and administrators of tenants *pur autre vie*, as well as such tenants themselves, may distrain for the arrears due at the death of the *cestui que vie*, upon the lands and tenements out of which rents or fee-farms issue, in the same manner as the tenants *pur autre vie* might have done during the life of the *cestui que vie*."

So also executors of tenants *pur autre vie*.[1]

By 3 & 4 Wm. 4, c. 42, s. 37, "it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime."

Executors of lessor, whatever the term, may distrain for arrears in his lifetime.[2]

By 3 & 4 Wm. 4, c. 42, s. 38, "such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined: Provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due: Provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made as aforesaid."

Arrears may be distrained for within six months after determination of term.

See 2 Will. *Executors*, 669.

(L) *Gavelkind, Persons seised in.*

LEIGH v. SHEPHERD, 2 B. & B. 465; S. C. 5 Moore, 297.

In replevin, the question was, Whether the defendant, as being only one of the several claimants, who were co-heirs in gavelkind, could, without the authority of his co-heirs, distrain for the whole, or any part of rent in arrear? The court said, in the case of *Pullen v. Palmer* (5 Mod. 72), *Holt, C. J.*, laid it down, that one joint-tenant may distrain for the whole, but must avow, in his own right and as bailiff, to the rest; and that he may distrain for the whole in point of interest, and needs no authority from the rest to distrain.

One of several co-heirs in gavelkind may distrain for rent due to him and the rest, without an actual authority from them.

(M) *Grantees.*[3]

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cutor of a person who was seised in fee of land, and demised it for years, reserving rent, and that he could not distrain for arrears of rent accrued due in the testator's lifetime. *Prescott v. Boucher*, 3 B. & Adol. 849. *Jones v. Jones*, id. 967. And see *Martin v. Burton*, 3 Moore, 608; 1 B. & B. 279. *Staniford v. Sinclair*, 2 Bing. 193. *Powell v. Hillick*, 1 Selw. N. P. 11th ed. 657. But *see* 3 & 4 Wm. 4, c. 42, ss. 37, 38. If a tenant for years underlet for years and die, it is clear that his executor may at common law distrain for arrearages, for such arrears were never separated from the reversion, and both belong to the executor. *Wade v. Marsh*, Latch. 211. Demesne in this statute means only *occupation: per Burrough, J.*, in *Martin v. Gilbie*, 8 Taunt. 162. It is not necessary in an avowry to aver that the place remains in the seisin of the person who ought to have paid the rent, or of persons claiming under him. The plaintiff, if he is not liable, should show how. *Hool v. Bell*, 1 Ld. Raym. 172; 3 Salk. 136. *See* Williams on Executors, p. 795. Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder and after the expiration of it, a distress may be taken for rent during the whole term. *Braithwaite v. Cooksey*, 1 H. Black. 465. An executor may distrain before probate, and may ratify a distress made by a bailiff in the name of a testator immediately after his death. *Whitehead v. Taylor*, 10 Ad. & E. 210; 2 Per. & D. 367.

[1] This statute is held to extend to executors of all tenants for life, as well tenants for their own lives as tenants *pur autre vie*. *Hool v. Bell, supra.*

[2] In all cases therefore at present, where the testator or intestate was seised of a rent of any kind, either in fee-simple, fee-tail, or for life, his executors or administrators may distrain for the arrears incurred in his lifetime, under the operation of the stat. 32 Hen. 8, c. 37; and for all arrears of rent-service incurred in his lifetime on a lease for years, or at will, they may distrain under the statute of 3 & 4 Wm. 4, c. 42. Bullen on Distress, 64. And where distress was made by command, and in the name of a landlord, but he died before the distress was actually made:—*Held*, that the bailiff might make cognisance as the bailiff of his execution, under 32 Hen. 8, c. 37, who satisfied the distress, although before probate. *Whitehead v. Taylor, supra.*

[3] At common law the grantees of the king may distrain (*see* 1 Roll. Abr. 294); unless the lands be held of the Duchy of Lancaster, and not situate within the county

(*a*) *Of Rent-charge.*[1]

(N) *Ground Landlord.*[2]

(O) *Guardians of Infants.*[3]

(P) *Heirs.*[4]

(Q) *Husband and Wife.*[5]

(R) *Joint-Tenants.*

ROBINSON v. HOFMAN, 4 Bing. 562; 1 M. & P. 474; S. C. 3 Car. & P. 234.

One joint-tenant may distrain for the entire rent without the assent of his co-tenants.[6]

Action of replevin; cognisance by the defendant, as bailiff of Henry Marchant the elder, and Samuel and Stephen Cullum, for 35*l.* for a quarter's rent. Pleas, *Non tenuit*, *riens in arrear*, and that the defendant was not bailiff as in the cognisance alleged. It appeared that Marchant and the Cullums held the premises out of which the rent accrued as surviving trustees under the will of one John Cullum, deceased. The warrant of distress was signed by Marchant alone; and Samuel Cullum, who was called, said that Marchant had requested him to sign the warrant, but that he had declined to do so, understanding that the rent was payable to another person, and that, as to the distress in question, he had not since recognised the act of Marchant. On this it was contended for the plaintiff, that the warrant signed by one alone was not a sufficient authority to constitute the defendant bailiff to the three trustees.

By the Court. One joint-tenant may demand and receive the whole rent

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palatine. *See* Co. Litt. 314, b; Plowd. 221; 4 Inst. 209. By the 22 Car. 2, c. 6, the grantees of the Crown shall have the same remedies as the Crown; and therefore may distrain upon lands under a sequestration. *See* 2 Vern. 713; 1 P. Wms. 306. But that statute only applies to fee-farm rents sold under its authority. *See* Bro. Prerog. pl. 68. And the grantee of rent distrainable of common right may distrain. 3 Co. R. 22, b.

[1] By the 6 & 7 Wm. 4, c. 71, the Tithe Commutation Rent-charge Act, provisions are made for distraining for the rent-charge in arrear under prescribed restrictions. But a rent-charge with a power of distress, cannot be created, except by a grant binding some legal interest in the land, and ceases to exist when the same person who is owner of the rent becomes entitled to the whole legal estate in the land out of which it issues. *Freeman v. Edwards*, 2 Ex. 732; 17 L. J. Ex. 258.

[2] A ground landlord may distrain. *Sapsford v. Fletcher*, 4 T. R. 511.

[3] Guardians of infants may distrain in their own names for any rent forming part of the estate of the infant. *Shopland v. Ryoler*, Cro. Jac. 99. *Bedell v. Constable*, Vaugh. 179; Gilb. Dist. 29.

[4] The heir may distrain, but the distress must be according to the nature of the estate descending; and if the rent be not specifically reserved to him, the law will distribute it (*see* Co. Litt. 214, a); but when he is entitled to the rent, he is also entitled to all its incidents; and therefore, a *nomine pœnæ* to secure the rent will likewise descend to the heir: however, the heir's right of distress does not extend to the arrears of rent accrued in the lifetime of the ancestor, for such arrears belong to the personal representatives of the ancestor, and not to the heir. *See* Brad. Dist. 86.

[5] The husband may distrain alone for all rent due in right of the wife (*Osborne v. Wickenden*, 2 Saund. 195); but the wife may very properly be joined when the wife has an estate of freehold in the lands, for the immediate reversion of such as are in lease is in the husband and wife in right of the wife. Bro. Avow. pl. 70; Rust. 565; Co. Litt. 46, b. The rights of the husband are enlarged by the 32 Hen. 8, c. 37, s. 3, which gives him a remedy by distress (as well as by an action of debt) for the arrears accrued before and during the coverture. *See* on this *Ognel's case*, 4 Co. Rep. 51, a; Co. Litt. 162, b; 351, a. *Yard v. Eland*, Ld. Raym. 369. *Wankford v. Wankford*, 1 Salk. 306. *Pullen v. Palmer*, 3 Salk. 207. But where the wife of the defendant in replevin had, at the time of her marriage, the equity of redemption in the *locus in quo*, which was then settled to her separate use, she was allowed to enjoy the property; and she and the defendant (or he in her name), let it to the plaintiff, she receiving the rents until she died. The defendant then distrained for rent subsequently accruing:— *Held*, that it was not lawful for him to do so, and that he was liable in replevin. *How v. Scarrott*, 28 L. J. Ex. 325; 4 H. & N. 723.

[6] But he must avow jointly with his companions. *Pullen v. Palmer*, 5 Mod. 72; S. C. 3 Salk. 207; and the survivor may distrain for the arrears accrued in the life of his deceased companion. 2 Roll. Abr. 86.

due, and may give a discharge binding on his co-tenants; so he may distrain alone, though, it seems, he must avow for himself, and make cognisance as bailiff of the others.

(S) *The King.*[1]

(T) *Legatees.*[2]

(U) *Lessees.*

——— v. Cooper, 2 Wils. 375.

In replevin, the defendant avowed under a distress for rent, due from the plaintiff to him upon an assignment of a lease of a term for years to the plaintiff, in which assignment there is no clause of distress. The single question was, whether this is such a rent for which a distress can be made, there being no reversion in the defendant?

If a lessee of a term assigns, he cannot distrain for the rent, without a clause for that purpose.[3]

Per Cur. If a man has a term for years, and grants all his estate of the term, rendering certain rent, he cannot distrain for it in the absence of a reservation to that effect.

(V) *Lords of Manors.*[4]

(W) *Lunatics, Committees of.*[5]

(X) *Mortgagees.*[6]

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[1] The king's right to distrain is paramount to that which belongs to his subjects (*see* Co. Litt. 309), for he may distrain not only on the land of his tenant, out of which the rent issues, but also on other lands of the tenant, although held of other lords. *See* Bro. Prerog. pl. 77. But the lands must be in the actual possession of such tenant. *See* 4 Inst. 117; 2 id. 132. The king, by his prerogative, may also distrain in the highway. Id. 131.

By 22 Car. 2, c. 6, for the sale of crown fee-farm rents, the vendors of such rents are entitled to the same remedies as were possessed by the Crown; and it seems that either the king or his vendees could consequently distrain on all the lands of the original grantor, although they be under a sequestration of the Court of Chancery. *Attorney-General v. Mayor of Coventry*, 2 Vern. 713; S. C. 1 P. Wms. 306. This statute, however, does not extend to any other than the particular rents sold under its authority. Bro. Prerog. pl. 68.

[2] As the bequest of a chattel interest does not, like a devise, vest absolutely by the testator's will, but the interest of the legatee must await the executor's consent to the bequest; consequently, before such assent, the interest remains in the executor, and the legatee cannot distrain. *See* Toller's Executors, 239.

[3] A tenant holding over in defiance of his landlord cannot distrain property of the landlord placed upon the land. *Taunton v. Costar*, 7 T. R. 431. *See post*, Tenant for Terms of Years, p. 98, n. 2.

[4] The lord of a manor may distrain of common right for rent payable in respect of his seignory. He may distrain for his copyhold rents (*Laughter v. Humphrey*, Cro. Eliz. 524), and not only on the copyholder, but also on his lessee; but he cannot distrain on a new tenant admitted to the copyhold for rent due by his predecessor. Watk. on Cop. 180. And the lord cannot distrain for arrears of rent after having parted with his manor; and copyhold rents are not within the 32 Hen. 8, c. 37. *Appleton v. Doily*, Gilv. 135; 2 Leon. 142; 1 Scriv. on Cop. 107. They are within the 4 Geo. 2, c. 28, s. 5; id. 103.

[5] As committees of lunatics may, by the 11 Geo. 4 and 1 Wm. 4, grant leases of the lunatic's estate, they are also entitled to distrain.

[6] As a mortgage transfers the legal estate to the mortgagee, he becomes entitled to the right to distrain for subsequent rent, as one of the legal rights of the mortgagor, although the mortgagor be allowed to remain in possession (Bullen on Dist. 73); but the mortgagee's right to distrain does not extend to arrears due before the mortgage. *See* Brad. Dist. 99. A mortgagor in possession can, however, give to a mortgagee in fee power to distrain for rent in arrear. *Chapman v. Beecham*, 3 Gale & D. 71; 4 Q. B. 723. *Dawson v. Johnson*, 1 F. & F. 656.

A mortgage-deed executed by the mortgagor only contained, in addition to the usual clauses, the following:—That "for better securing the interest, the mortgagor does hereby attorn and become tenant of the premises to the mortgagee, at the yearly rent of 40*l.*, payable half-yearly, so long as the principal sum shall remain secured." The mortgagor having continued in possession of the premises, and having made several of these half-yearly payments, which, however, were described in the receipts given by the mortgagee as being for interest:—*Held*, that the relationship of landlord and tenant existed between the parties,

(Y) *Overseers and Churchwardens.*[1]

(Z) *Receivers.*[2]

and that the former had the right to distrain for the amount of a half-year's arrears. *West v. Fritch*, 3 Ex. 216 ; 18 L. J. Ex. 50.

Mortgagee, under a power in a mortgage-deed enabling him to distrain for arrears of interest, "in like manner as for rent," distrained after the date of the demise in the declaration, but for arrears due before such demise, the mortgagor having (without any express provision in the deed enabling him to do so) continued in possession: — *Held*, that such distress did not amount to a recognition of the mortgagor as tenant, so as to disable the mortgagee from bringing ejectment. *Doe d. Williamson v. Goodier*, 10 Q. B. 957.

If a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he, during such permission, is *presumptione juris* authorised, if it should become necessary, to realise the rent by distress, and to distrain for it in the mortgagee's name as his bailiff. *Trent v. Hunt*, 9 Ex. 14 ; 17 Jur. 899 ; 22 L. J. Ex. 318.

Mortgagee and mortgagor of lands in fee-simple, conveyed the fee for the use of certain grantees upon mortgage, with power of sale, and a proviso that, in the event of the grantees, or any person claiming under them, entering under that power, the lands should thenceforth for ever be charged with the payment to the first mortgagee, his heirs and assigns, of an annual sum, to be recovered as rent by distress out of the lands. The deed was not executed by the grantees, the second mortgagees, who in default entered under the power, and sold to A., subject to the rent-charge, and he afterwards sold to the plaintiff, subject to the rent-charge, so far as it might legally affect the lands. The defendant, in whom it had become vested, distrained for arrears: — *Held*, that he was entitled so to do, the intention being that in the event which had happened the first mortgagee should have the rent in fee-simple, and the charge not being open to any legal objection. *Gilbertson v. Richards*, 28 L. J. Ex. 158 ; *see* id. Q. B. 236 ; id. Ch. 547.

The tenant after notice of the mortgage is bound to pay the mortgagee. *Moss v. Gallimore*, 1 Dougl. 266.

By the mortgage all privity of estate between the mortgagor and the tenant is gone, and he can only distrain as the receiver or agent of the mortgagee. (Id.) *Ex-parte Wilson*, 2 Ves. & B. 252. *Trent v. Hunt*, 9 Ex. Rep. 14 ; 22 L. J. Ex. 318.

A lease after mortgage by mortgagor in possession is void, as against the mortgagee (*Keech v. Hall*, 1 Dougl. 21. *Thunder v. Belcher*, 3 East, 449. *Evans v. Elliot*, 1 Per. & D. 256) ; but if it be by deed, and the mortgagee do not interfere, the tenant is estopped from disputing the mortgagor's right of distress. *Alchorne v. Gomme*, 2 Bing. 54. And in such a case mere notice by the mortgagee for the tenant to pay the rent to him will not make such tenant a tenant to the mortgagee. There must also be an attornment or consent on the part of the tenant to that effect. *Evans v. Elliot*, *supra*. *Doe v. Bucknell*, 8 Car. & P. 566. *Partington v. Woodcock*, 5 Nev. & M. 677. And any agreement of that sort merely constitutes a new tenancy from year to year between the mortgagee and tenant, and does not confirm the old demise. *Doe v. Bucknell*, *supra*. *Evans v. Elliot*, *supra*.

Where the mortgagor remains in possession of the premises, the mortgagee cannot distrain for the interest of his mortgage-money, unless the relation of landlord and enant be clearly established between them, and the sum distrained for be reserved as a fixed and certain rent. *Hope v. Booth*, 1 B. & Adol. 498. *Rogers v. Humphreys*, 5 Nev. & M. 511 ; 4 Ad. & E. 299 ; and see *Trent v. Hunt*, 22 L. J. Ex. 18 ; and 28 id. Ex. 306.

[1] The 59 Geo. 3, c. 12, s. 17, enacts, that all buildings, lands, &c., purchased or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for the purposes of that act, shall be conveyed, demised, &c., to the churchwardens and overseers of every such parish and their successors, in trust for the parish ; and such churchwardens and overseers are empowered to take and hold in the nature of a body corporate all buildings, lands, &c. belonging to such parish: — *Held*, that the act made the churchwardens and overseers a corporation of a peculiar kind, differing from ordinary corporations ; the object of it being the care and proper management of the parochial property, and that it was competent for any one of the churchwardens or overseers to authorise a distress for rent in arrear. *Gouldsworth v. Knights*, 11 Mee. & W. 337 ; 12 L. J. Ex. 283.

[2] Receivers appointed by the Court of Chancery must distrain as such, and not in their own names (3 Atk. 750), but they may distrain without any special authority from the court for that purpose. *Bennett v. Robins*, 5 Car. & P. 379.

A private receiver, if intended to be vested with powers of distress, should have an express and specific authority for that purpose ; and an authority to pay rent to a receiver, whose receipt is to be a discharge, does not entitle such receiver to distrain. *Ward v. How*, 9 Bing. 608.

An attornment by a tenant of land to a receiver appointed by a Court of Chancery to collect the rents, and payment of rent to such receiver, create a tenancy by estoppel between the tenant and receiver, but do not enure to enable the person who is found ultimately to have the legal title to the land to treat the tenant as his tenant, and

(A 2) *Tenants in Common.*

WHITLEY v. ROBERTS, 1 M'Clel. & Y. 107.

Tenants in common may distrain separately.[1]

In case for rescue and delay of plaintiff in recovering of rent, which defendant justified under a taking as a distress for poor's rates due from E. J., the tenant in possession of the premises, it appeared that four parties, being tenants in common, had demised them to E. J., under a specific contract to pay the rent to them in four parts, and that whilst the plaintiff, one of the tenants in common, had distrained for his part of the rent, the defendants entered to seize the goods of E. J.

The court held that the plaintiff's separate distress was lawful.

(B 2) *Tenants by the Curtesy.*[2]

(C 2) „ *in Dower.*[3]

(D 2) „ *by Elegit.*[4]

(E 2) „ *in Fee.*[5]

(F 2) „ *by Free Bench.*[6]

(G 2) „ *for Life.*[7]

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to distrain for rent. *Evans v. Mathias*, 26 L. J. Q. B. 309; 3 Jur. N. S. 793; 7 E. & B. 590.

By a receivership-deed executed contemporaneously with a mortgage in fee, which it recited, the mortgagor and mortgagee appointed a receiver, and constituted him their agent and attorney to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver, and there was a proviso that, if default should be made in payment of the mortgage money or interest at the times appointed, the mortgagee might enter and avoid the tenancy created by the attornment. There was also a proviso that nothing therein contained should lessen the rights, powers, or remedies, of the mortgagee. On the mortgagor being found bankrupt: — *Held*, that the relation of landlord and tenant had been created between the receiver and mortgagor by the receivership-deed, and that the receiver was entitled to distrain, and take the goods which had belonged to the mortgagor on the mortgaged premises. *Jolly v. Arbuthnot*, 4 De Gex & J. 224.

[1] But not for more than his own share. *Pullen v. Palmer*, 3 Salk. 207. If the rent be incapable of division, as a horse, they must, however, all join. Co. Litt. 197, a.

Where a person holding of two tenants in common paid his whole rent to one of them, after notice to the contrary: — *Held*, that the party giving such notice could distrain for his share. *Harrison v. Barnby*, 5 T. R. 246. *Powis v. Smith*, 5 B. & Ald. 850. It would seem that the survivor might distrain for the whole, though the reservation be to both according to their interests. Bullen on Dist. 49. *Wallace v. M'Laren*, 1 M. & R. 516.

[2] A tenant by curtesy may distrain at common law, but he is not within the meaning of the 32 Hen. 8, c. 37. *See* Brad. Dist. 68; Co. Litt. 29, a; *ante*, p. 92.

[3] A tenant in dower may distrain of common right (*see* Co. Litt. 169, b), unless the thing be uncertain in its nature. *See* id. 34, b; Brad. Dist. 70. *See* 23 & 24 Vic. c. 126, s. 26.

[4] A tenant by elegit may distrain (*see* Bro. Dist. pl. 72; 2 Sid. 29); but his executors and administrators cannot. *See* 32 Hen. 8, c. 37. And he can do so without attornment. *Lloyd v. Davis*, 2 Ex. 103; 18 L. J. Ex. 80. But *see* 4 Bing. 99.

[5] A person may be tenant in fee-simple of a rent-service, or fee-farm rent, created prior to the statute of *Quia emptores* (18 Edw. 1), and may distrain for it of common right, as such. But a rent-service cannot now be reserved by a tenant in fee of land on the alienation of his whole estate. A rent so reserved at the present day, with a clause of distress by deed, might be recovered as a rent-charge; and if reserved without any specific charge, it would be distrainable as a rent-seck within the statute 4 Geo. 2, c. 28. Harg. n. 5, on Co. Litt. 144, a. *Bradbury v. Wright*, 1 Dougl. 627, and note. Bullen on Dist. 49.

[6] A woman may be entitled to part of a rent as her free bench, by custom out of copyhold tenure; and the power of distress, as for other copyhold rents, is incident to it. *Sachevcrel v. Frogate*, 1 Vent. 161. *Laughter v. Humphrey*, Cro. Eliz. 524; Com. Dig. Rent, b. 5. *See* 3 & 4 Wm. 4, c. 27, s. 36.

[7] Under the 32 Hen. 8, c. 37, s. 4, tenants *pur autre vie*, and their executors and administrators, may distrain for arrears due at the death of the *cestui que vie*, in the same manner as they might do at common law during his life. *Ante*, p. 92.

Tenants for life may distrain, unless they make a lease, which amounts to a disposition of their whole estate; for, in that

(H 2) *Tenants in Tail.*[1]
(I 2) „ *for Terms of Years.*[2]
(J 2) „ *Trustees.*[3]

XII. Persons whose Goods may be Distrained.

(A) *General Rule.*[4]
(B) *Ambassadors.*[5]
(C) *Assignees.*[6]
(D) *Bankrupts.*[7]
(E) *Coparceners.*[8]
(F) *Devisee.*[9]
(G) *Disseisor.*[10]
(H) *Executor.*[11]
(I) *Grantor.*[12]
(J) *Heir.*[13]
(K) *Joint-Tenants.*[14]
(L) *The King's.*[15]

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case, they cannot distrain at common law for want of a reversion; but, by 4 Geo. 2, such rent is now distrainable as a rent-seck. *See* Brad. Dist. 72.

[1] Tenants in tail may distrain under leases made in conformity with the 32 Hen. 8, c. 28. *See* Brad. Dist. 71. And a tenant in tail, as he has a reversion on all leases, whether made in conformity with the above statute or not, may distrain, even at common law, for the rent reserved, it being a rent-service. *Ex-parte Smyth*, 1 Swanst. 346.

[2] A lessee of land for a term of years, who grants an under-lease for any period of time shorter, though only by a day, than his own interest, has a reversion, and consequent power of distress, at common law, for a rent reserved on such under-lease. *Wade v. Marsh*, Latch. 211. And even a tenant from year to year, underletting from year to year, has been considered to have such a reversion as will enable him to distrain of common right. *Curtis v. Wheeler*, Mood. & M. 493. But where a lessee for years transfers his whole interest in the term, reserving a rent, he cannot distrain, whether the instrument purport to be an assignment or an under-lease. —— *v. Cooper*, 2 Wils. 375. *Smith v. Mapleback*, 1 T. R. 445. *Parmenter v. Webber*, 8 Taunt. 593. *Pruce v. Corrie*, 5 Bing. 24. *Pascoe v. Pascoe*, 3 Bing. N. C. 898. *Burne v. Richardson*, 4 Taunt. 720.

[3] Persons who have estates vested in them in trust for others may distrain. Brad. Dist. 71.

[4] As a general rule, a party entitled to rent in arrear may distrain on the premises out of which it issues, in whosesoever possession they may be at the time, or to whomsoever they may belong, whether to the tenant or to any other person. 1 Roll. Abr. 671. *Saffery v. Elgood*, 1 Ad. & E. 191.

[5] By the 7 Anne, c. 12, the goods of all ambassadors, or other public ministers of any foreign province or state, or the domestic servants of such ambassadors or public ministers, are privileged from distress. But where the servant of an ambassador rented a house, and let part of it in lodgings, it was holden that his goods on the premises, not being necessary for the convenience of the ambassador, were clearly distrainable for the poor's rates. *Novello v. Toogood*, 1 B. & C. 554; S. C. 2 D. & R. 833. *See* vol. i. p. 315.

[6] The goods of the assignee or under-tenant may be distrained if on the premises. *Saffery v. Elgood, supra.* 4 Geo. 2, c. 28, s. 6.

[7] *See* Bankruptcy, vol. ii. p. 230.

[8] If coparceners of copyhold lands make partition without notice to the lord, he may distrain upon them jointly. Latch. Rep. 201.

[9] The goods of the devisee may be taken. *Braithwaite v. Cooksey*, 1 H. Black. 465. *Bolton v. Canham*, Pollexf. 120.

[10] So may the goods of a disseisor. *Humphrey v. Damion*, Cro. Jac. 300.

[11] So also of an executor. *Braithwaite v. Cooksey, supra. Bolton v. Canham, supra.*

[12] So of a grantor. 1 Roll. Abr. 671. *Saffery v. Elgood, supra.*

[13] So of an heir. *Braithwaite v. Cooksey, supra. Bolton v. Canham, supra.*

[14] One joint-tenant is not liable to be distrained upon for a rent-charge created by another (*see* Brad. Dist. 110); but if they hold of each other, the distress may be entire. *See* Co. Litt. 186; Bro. Dist. pl. 69. As if one tenant in common grant a rent, and afterwards lease the land for years to his co-tenant, he will hold the land subject to a distress for the rent-charge. *See* id.

[15] No distress can be made upon the land in possession of the Crown. *See* Bro. Dist. pl. 46; Brad. Dist. 107.

(M) *The King's Grantee.*[1]

(N) *Separate Rents.* See *Phillips v. Whitred*, 29 L. J. Q. B. 164; 6 Jur. 727; 2 L. T. (N. S.) 278.

(O) *Strangers.*[2]

(P) *Under-Tenants.*[3]

XIII. Things which may be Distrained.

(A) *In General.*

(*a*) *Must be Valuable.*[4]

(*b*) *Capable of Identification.*[5]

(*c*) *Not Perishable.*[6]

(*d*) *In Use.*

Storey v. Robinson, 6 T. R. 138; S. P. Simpson v. Hartopp, Willes, 512.

A horse on which a man is riding cannot be distrained.[7]

To trespass for seizing and leading away plaintiff's horse upon which he was riding, the defendant pleaded that he distrained him damage feasant. On demurrer,—

Per Cur. The plaintiff must have judgment. If it were permitted to a

[1] In some cases the king's grantee is privileged from distress, as where the land is once absolutely vested in the king; for, although where the king enters without office or record, his patentee may be distrained upon, yet, if he be entitled by office or record, and grant the land, no distress can be made upon his grantee. *See* Bro. Dist. pl. 47. This rule is, however, confined to a distress made in respect of rent issuing out of the land itself, and not of a rent-charge upon it; for, by the office and record, he who was possessed of the land is ousted, and the land vested absolutely in the king, and therefore the lord whose title is destroyed cannot afterwards distrain upon the grantee. But a rent-charge is not destroyed by such office or record, being only suspended by the possession of the king, who cannot hold land subject to a charge (*see* id. 27); but if the rent-charge as well as the land were bound by the office, it seems that the remedy of distress would be absolutely gone. *See* Brad. Dist. 108, 109.

[2] Property belonging to a stranger on the demised premises may be distrained, unless it be there for a temporary purpose; as a horse standing in a blacksmith's shop to be shoed; or cloth at a tailor's to be made into clothes; or corn sent to a mill or market. *See* 3 Bl. Com. 8. And the same rule holds as to cattle, if they be on the premises without their owner's knowledge or default. As where cattle stray into the land through defective fences, which the tenant or his landlord is bound to repair, they cannot be distrained. *See* 1 Roll. Abr. 668; 2 Roll. Rep. 124. But if there be no such neglect, and a stranger's beast be upon the land, by escape or otherwise, though they be not *levant et couchant*, they may be distrained. *See* Co. Litt. 476.

[3] The goods of under-tenants or lodgers are liable to be distrained (*Wilkinson v. Abbott*, 2 F. & F. 300), but not the sheep or beasts of an under-tenant, as the stat. 51 Hen. 3 absolutely exempts them. *Keen v. Priest*, 4 H. & N. 256; 28 L. J. Ex. 157. Previous to the 4 Geo. 2, c. 28, a distress could only be made during the continuance of the original lease, and not upon a renewed lease. *See* Brad. Dist. 114. But now, a renewal of the principal lease shall be completely valid, without a surrender of the under-leases; and the original lessor and his executors, &c. may distrain upon the under-lessees for the rent reserved upon the renewed leases. But the cattle of the purchaser of the herbage of the land cannot be distrained. *Horsford v. Webster*, 1 C., M. & R. 696. *Keen v. Priest, supra.*

[4] The thing distrained must be in legal estimation valuable. *Davis v. Powell*, 2 Mod. 249; S. C. Willes, 47. Thus, animals *feræ naturæ* are not distrainable, unless they are kept in an enclosed place, and become a sort of stock or merchandise. (Id.) Bl. Com. 7.

[5] Things which cannot with certainty be identified are exempt from distress (*see* 1 Roll. Abr. 667); therefore loose money, meal, or the like, not confined in a bag or sack, and consequently bearing no mark by which they could be known, cannot be distrained: but when inclosed in a bag, which might be marked and known, they could; and its identity established, the objection ceases. *See* id. 666.

[6] 'That which is perishable, and cannot be returned to the owner in as good plight as when it was distrained, is not the subject of a distress; as milk, fruit, &c. (*see* 3 Bl. Com. 9; Gilb. Dist. 31); but as to the latter, *see* the 11 Geo. 2, c. 19; or the flesh of animals lately slaughtered. *Morley v. Pincombe*, 2 Ex. 101; 18 L. J. Ex. 272.

[7] *See* Damage Feasant, vol. iii. p. 545. So an ax in a carpenter's hand (*see* Roll. Abr. 167; Sid. 440), or wearing apparel whilst on the person of the owner (*see* 1 Esp. 206; Peake, 36). And although it was formerly considered that a cart and horses,

party to distrain a horse while any person is riding him, it would perpetually lead to a breach of the peace.

(*e*) *For a Special Purpose.*[1]

(*f*) *Nor belonging to the Freehold.*[2]

(B) *In Particular.*

(*a*) *Cattle agisting.*[3]

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when carrying corn or hay, might be distrained for rent-service (*see* 2 Keb. 529 ; 1 Sid. 422), yet it must now be deemed illegal, as being a thing in immediate use.

[1] Things delivered to persons exercising their trades, as cloth to a tailor, cannot be distrained. *Simpson v. Harcourt*, 4 T. R. 568. So yarn delivered to a weaver to be wove (*Wood v. Clarke*, 1 C. & J. 484; S. C. 1 Tyr. 314; and see *Simpson v. Hartopp*, Willes, 512; 4 T. R. 568); corn sent to a mill to be ground; a horse standing at a smithy to be shoed (Co. Litt. 47 ; Dyer, 312; 4 T. R. 569); the carcase of a beast sent to a butcher's shop to be slaughtered (*Brown v. Shevill*, 2 Ad. & E. 138; S. C. 4 Nev. & M. 277); goods delivered to a common carrier for the purpose of conveyance (*Gisbourn v. Hurst*, 1 Salk. 249); goods of a principal in the hands of a factor for sale (*Gilman v. Elton*, 3 B. & B. 75; S. C. 6 Moore, 243); and goods sent to an auctioneer to be sold on his own premises. *Adams v. Grane*, 1 C. & M. 380; S. C. 3 Tyr. 326. In like manner, goods landed at a wharf, and consigned to a broker, as agent of the consignor, for sale, and placed by the broker in the wharfinger's warehouse over the wharf, for safe custody until an opportunity of selling them should occur, have been held not to be distrainable for rent due in respect of the wharf and warehouse (*Thompson v. Mashiter*, 1 Bing. 283; S. C. 8 Moore, 254); and corn sent to a factor for sale and deposited by him in the warehouse of a granary-keeper, he not having any warehouse of his own, is under the same protection against a distress for rent as if it were deposited in a warehouse of the factor himself. *Matthias v. Mesnard*, 2 C. & P. 353. So the cattle and goods of a guest at an inn are in like manner privileged from distress; for they are there necessarily in the way of trade, and an inn being a place *publici juris*, all men have a right to use it without molestation. *Robinson v. Walker*, 3 Bulst. 269. The true principle of this exception seems to be, that where, in order to the exercising of a public trade at a given place, it is necessary that the goods should be delivered into the custody of the person carrying it on there, the law, in consideration of the benefit which the commonwealth derives from the carrying on of the trade, protects from distress the goods so delivered. *Per Alderson, B.: Muspratt v. Gregory*, 1 Mee. & W. 657. But a thrashing-machine let to hire, which was on use on Saturday night and was to have been returned on Monday morning, when it was seized, may be distrained. *Fenton v. Logan*, 9 Bing. 676; S. C. 3 M. & S. 82. So knitting-frames in the possession of a stocking-weaver, belonging to his employer, are not privileged. *Wood v. Clarke*, 1 C. & J. 484; 1 Tyr. 314. And where a thing is privileged from distress by the above rule, that which is employed in carrying or fetching them away is also privileged; as the horse, or carriage, basket, package, &c. 1 Mee. & W. 646; 2 Vent. 50. *Read v. Burley*, Cro. Eliz. 549.

[2] Things affixed to the freehold cannot be distrained (*Simpson v. Harcourt*, 4 T. R. 568); as doors, windows, furnaces, &c., which are, as it were, part of the house. Co. Litt. 47, b. Nor does a temporary severance of such things from the freehold, for a necessary and beneficial purpose, suspend the privilege; and, therefore, a millstone, which is exempt as a fixture to a mill, cannot be distrained, if it be temporarily removed for the purpose of being picked for the use of the mill, though it would be otherwise if it were wholly and permanently separated from the mill. *See* Y. B. 14 Hen. 8, c. 25, b. It is undecided whether machinery fixed by bolts to the floor of a factory can be distrained. *See* 13 Price, 459; S.C. 1 M'Clel. 217; Grady on Fixtures, 1567; Gibb. on Dis. 34.

Fixtures (as kitchen-ranges, stoves, coppers, and grates) which a tenant may sever from the freehold and take away during the term, are not distrainable for rent. *Darby v. Harris*, 1 Q. B. 895; 1 Gale & D. 234; 5 Jur. 988. Those things only can be distrained for rent which the landlord could afterwards restore in the plight in which they were before the distress. (Id.) The defendant distrained fixtures, and some days afterwards severed and removed them for sale:—*Held*, in trover, that though, for the purposes of that action, the plaintiff necessarily treated the fixtures as goods and chattels, the defendant, by whose wrongful act they had been brought into a chattel state, could not say that, as goods and chattels, he had a right to distrain them. *Dalton v. Whittem*, 3 Gale & D. 260; 3 Q. B. 961; 12 L. J. Q. B. 55. Machinery for the purposes of manufacture, *e. g.* "mules" used for spinning cotton fixed by means of screws, some into the wooden floors of a cotton-mill, and some by being sunk into the stone flooring and secured by molten lead, are at law distrainable for rent. *Hellawell v. Eastwood*, 6 Ex. 295; 20 L. J. Ex. 154. *Moore v. Drinkwater*, 1 F. & F. 134. *See* Fixtures.

[3] It has been said that cattle agisting for one night on their way to London may be distrained. *Fowkes v. Joyce*, 3 Lev. 260; 2 Lutw. 472. But where they are on their way to a market, and are turned in for the night for their necessary refreshment, they are privileged for the public benefit (*see*

(*b*) *Corn, Grass, Hay, Hops, &c.*

By 13 & 14 Vic. c. 25, s. 2, "in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by the sheriff or other officer, by virtue of a writ of *fi. fa.* or other writ of execution, such crops, so long as the same remain on the farm or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord, after seizure and sale, and to the remedies by distress for the recovery of such rent, and that notwithstanding any bargain or sale or assignment, which may have been made or executed, of such growing crops by such sheriff or other officer."

Growing crops seized by sheriff are liable to distress for rent.[1]

(*c*) *Implements of Trade.*

SIMPSON v. HARCOURT, 4 T. R. 568; S. C. Willes, 512; S. P. GORTON v. FALKNER, 4 T. R. 565.

Trover for a stocking-loom. Upon a special verdict, it appeared that the plaintiff was possessed of a stocking-loom, which he let to A. at 9*d.* per week. A. was indebted to the defendant in 53*l.* for rent arrear, and no other sufficient distress being on the premises, the defendant distrained the loom, at the time when A.'s apprentice was using it. The questions were, first, Whether a stocking-loom had any privilege at all from being distrained? and, secondly, If it has, whether it may not be distrained when there is no other sufficient distress to be found?

Implements of trade, not in use, may be distrained, if there be no other property; as a stocking-loom.[2]

Per Cur. This loom is certainly an instrument of trade, and we are of opinion, that it may be distrained when no other distress is to be found. But here the loom was privileged by being in actual use, because it could not be restored in the same plight, for the stocking then weaving must necessarily be damnified; besides, when it is in the custody of any person, in actual use, it cannot be taken away without a breach of the peace.

(*d*) *Lime-Kilns.*[3]

(*e*) *Plough, Beasts of.*[4]

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2 Saund. 290, n.; 2 Vent. 50; Lev. 260; Lutw. 1161): however, cattle permanently agisting may be distrained. *See* Roll. Abr. 9; Cro. Eliz. 549.

[1] Before 2 Wm. & M. corn could not be distrained (*Simpson v. Harcourt*, 4 T. R. 548), even though in sheaves (*Wilson v. Duchet*, 2 Mod. 61). However, that statute only authorised the distress of sheaves or shocks of corn, or corn loose, or in the straw. But the 11 Geo. 2, c. 19, provides that the landlord shall seize all sorts of corn whatsoever growing upon any part of the estate, &c.; and the same may cut, gather, and lay up till ripe, in some proper place, &c. And by 2 & 3 Wm. & M. c. 5, hay is distrainable. And by the 11 Geo. 2, c. 19, grass, hops, roots, &c. may be distrained; but by the 56 Geo. 3, c. 50, no sheriff or other officer shall sell or carry off from any lands any straw, chaff, or turnips, in any case; nor any hay or other produce contrary to the covenants between the landlord and tenant. And by s. 6 of the same act, landlords cannot distrain for rent on purchasers of crops severed from the soil. Hay and straw loose or in the stock may be distrained for arrears of a rent-charge under the 2 Wm. & M. sess. 1, c. 5, s. 3; and 4 Geo. 2, c. 28, s. 5. *Johnson v. Faulkner*, 2 Q. B. 925; 2 Gale & D. 184; 6 Jur. 832. Though growing crops seized under a *fi. fa.* are protected from distress at common law, yet, if the execution creditor, by reason of his claiming some things distrainable at common law, is driven to rely on the 56 Geo. 3, c. 50, he is bound to bring himself in his pleading within the provisions of that statute. *Hutt v. Morrell*, 11 Q. B. 425; 11 Jur. 347; 16 L. J. Q. B. 240. Affirmed on error, 11 Q. B. 438; 12 Jur. 352.

[2] But trespass or case lies for taking tools of trade not in use, there being other distrainable goods of sufficient value. *Nargatt v. Neas*, 28 L. J. Q. B. 143; 5 Jur. N. S. 198; E. & E. 439. The same rule applies to implements of husbandry, as cattle, &c. 2 Inst. 1, 2, 3; Roll. Abr. 667. *Davis v. Aston*, 3 D. & L. 188; 1 C. B. 746; 14 L. J. C. P. 228.

[3] A lime-kiln being considered not to be a personal chattel, but belonging to the freehold, is exempt from distress. 4 T. R. 504.

[4] By 51 Hen. 3, s. 4, no man shall be distrained of the beasts of his plough or his sheep, either by the king or any other,

(*f*) *Trees, Shrubs, and Plants.*

CLARK v. GASKARTH, 8 Taunt. 431; S. C. 2 Moore, 491; S. P. CLARK v. CALVERT, 8 Taunt. 742; S. C. 3 Moore, 96.

A distress for rent cannot be levied on trees, shrubs, &c. in a nursery-ground.

The question in this case was, Whether trees, shrubs, and plants, growing in a nursery-ground could be distrained? It was urged that they might, as the statute 11 Geo. 2, c. 19, s. 8, after enumerating certain crops, empowered the landlord to seize, as a distress, any "other product whatsoever, which shall be growing on any part of the estate demised." But the court held, that the word "product," in the eighth section of the statute, did not extend to trees and shrubs growing in a nurseryman's ground; but that it was confined to products of a similar nature with those specified in that section, to all of which the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe, was incidental.

(*g*) *Wearing Apparel.*[1]

XIV. THINGS IN THE HANDS OF THIRD PARTIES.

(A) *Carriers.*[2]

(B) *Executors and Administrators.*[3]

(C) *Factors.*

GILMAN v. ELTON, 3 B. & B. 75; S. C. 6 Moore, 243.

Principal's goods in a factor's possession are exempt from distress.[4]

On the 5th March the plaintiff sent bombasines, marked "J. G.," being the initials of his name, to one A. B., who was a factor and broker, to be sold by him for and on account of the plaintiff. On the 14th of April A. B. died, and the goods remaining unsold in his counting-house and warerooms, the defendant distrained for 93*l.*, arrears of rent. A formal demand of the goods being made, and a refusal to deliver them up on the ground of the right of distress, the plaintiff brought trover.

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while there is another sufficient distress. Other property ought to be distrained before the beasts of the plough; but where on the estimate made at the time of making the distress, there did not appear sufficient without taking beasts of the plough, it was holden that the circumstance of a higher price being obtained at the sale was not evidence of illegality in distraining beasts of the plough. *Jenner v. Yolland*, 6 Price, 3; S. C. 2 Ch. Rep. 167. Cart colts and young steers not broken in or used for harness or the plough are not privileged. *Keen v. Priest*, 4 H. & N. 236; 28 L. J. Ex. 157.

[1] Wearing apparel may be distrained. *Bissett v. Caldwell*, Peake, 37. *Baynes v. Smith*, 1 Esp. 206. This, however, only holds when it is not in use.

[2] Goods whilst in the hands of a common carrier, or even a private person undertaking to carry them for hire, being *pro hac vice* considered as a carrier, are exempt from distress. *Gisbourn v. Hurst*, 1 Salk. 249.

[3] A distress may be made after the decease of the tenant upon the property in the hands of the executors or administrators. *Braithwaite v. Cooksey*, 1 H. Black. 465. The 32 Hen. 8, c. 37, s. 4, enables the landlord to distrain against executors and administrators; the 8 Anne, c. 14, ss. 6, 7, to distrain within six months after the end of the term; and the 11 Geo. 2, c. 19, to avow generally. *See* 1 Roll. Abr. 672; Co. Litt. 47, b. *Braithwaite v. Cooksey*, *supra*; and *ante*, p. 92, 93.

[4] So, corn sent to a factor for sale and deposited by him in the warehouse of a granary-keeper, he not having any warehouse of his own, is under the same protection against a distress for rent as if it were deposited in the warehouse belonging to himself. 2 C. & P. 353. And the protection of goods in the hands of a factor applies to an auctioneer; and, therefore, property sent for sale cannot be distrained. *Adams v. Grane*, 1 C. & M. 380. A carriage sent to a coachmaker and commission agent for the sale of carriages, for the purpose of being sold by him, is not liable to be distrained for the rent of the premises upon which it is so exposed for sale. *Finden v. M'Laren*, 6 Q. B. 891; 9 Jur. 369; 14 L. J. Q. B. 183. Goods sent to an auctioneer to be sold in a room hired by him from one who has no authority to let, are privileged from distress while they are in that room for the purpose of being sold by auction. *Broom v. Arundell*, 10 C. B. 55; 20 L. J. C. P. 30. Goods deposited in an open yard belonging to premises in the occupation of an auctioneer for the purpose of being sold by public auction, are privileged

The Court said, as a general rule, all chattels personal found on the premises are *primâ facie* subject to be distrained; that rule, however, is not without exception. One of the exceptions is in favour of trade and commerce, and as the landlord on the one hand is protected under the general right of distraining, so, on the other, goods of a certain description, and being in particular places, are equally protected in favour of trade and commerce. We must look to the circumstances: the plaintiff's goods were sent to his factor in London, and received by the latter in his character as such, to be either disposed of in the market or exported; and yet, on the ground of public convenience, it has been asked, Why did not the manufacturer sell them in the place where they were made? It is true that he might have done so; but the object for which they were sent was for the extension of trade, and it cannot be supposed for a moment that the commerce of the city of London is to be annihilated or narrowed by persons being obliged to dispose of the different articles manufactured by them on the spot, or that they should be compelled to come personally with them to London, and that if they cannot, their goods will be subject to distress. The general principle is most clearly in favour of trade and commerce, and therefore the landlord's right of distress cannot prevail against public convenience.

(D) *Innkeepers.*[1]

(E) *Stable-keepers.*

ROBINSON v. WALTER, 3 Bulst. 269.

The goods of a guest at an inn are exempt.[2]

It was resolved that the cattle and goods of a guest at a public inn are privileged, because an inn is *publici juris*, and every man has a right to put up at it.

(F) *Wharfingers.*

THOMPSON v. MASHITER, 1 Bing. 283.

Goods deposited by a factor in a warehouse on a public wharf are not distrainable for rent due in respect of the wharf.

In 1817, eleven tons of whalebone were consigned by the plaintiff to one S. C., of London, broker, as a factor or agent for sale; the whalebone, after being landed at a public water-side wharf belonging to one R., was placed in his (R.'s) warehouse, over the wharf, which was stated to be a public warehouse, to be there kept, at a weekly rent, till sold. In 1818, the whalebone was taken by the plaintiff from under the management of S. C., and placed by him at the disposal of D. and L., as his factors and brokers, for sale, and was accordingly transferred from S. C.'s name into theirs by R.

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from distress. *Williams v. Holmes*, 8 Ex. 861; 22 L. J. Ex. 283. Materials in the house of a manufacturer for the purpose of his trade are not distrainable by his landlord for rent. *Gibson v. Ireson*, 3 Q. B. 39. And where, in trover for silk, the defendant justified taking it on the premises of C. as a distress for rent due from C., and the plaintiff replied, that he carried on the business of a silk manufacturer, and that C. carried on the business of a silk weaver on the premises, and that plaintiff "did, in the way of his trade and business, employ C. in the way of his business and calling as his workman, for wages to weave and manufacture into velvet" on the premises, "certain silk of the plaintiff," which silk (the subject of the action) being on the premises for that purpose was wrongfully distrained: — *Held*, on general demurrer, that the silk was sufficiently shown to have been on C.'s premises for the purpose of C.'s trade, and therefore exempt from distress; and that the words "as his workman for wages," taken with the context, did not imply that C. had the silk only as the plaintiff's servant, and for the purposes of plaintiff's trade. (Id.) *Quære*, whether it is necessary to the exemption of goods held for the purposes of trade, that the trade be "public;" and if so, what constitutes a "public trade?" (Id.)

[1] Provided they be within the precincts of the inn (*Crosier v. Tomkinson*, 2 Ken. 439), and the guest's visit only temporary. *Francis v. Wyatt*, 3 Burr. 1498; S. C. 1 Black. 483.

[2] Horses and cariages standing at livery are not exempt from distress for rent. *Parsons v. Gingell*, 4 C. B. 545. S. P. *Lewis v. Gingell*, 11 Jur. 437; 16 L. J. C. P. 227. It seems also, if articles are sent generally to remain at a place, they are distrainable; if sent for a particular purpose, and the remaining at the place be an incident necessary for the completion of such purpose, they are not. (Id.) *Francis v. Wyatt*, *supra*.

Shortly afterwards, R. became insolvent, and being then indebted to the defendants in a large sum for rent in arrear, they made a distress on his warehouse and wharf, and, together with other articles, seized the whalebone of the plaintiff, to recover which the present action was instituted.

Per Cur. We are decidedly of opinion that, for the benefit and convenience of trade and commerce, goods deposited under such circumstances as are disclosed in the present case must be held not liable to be distrained for rent. The cases were all considered in *Gilman v. Elton*, 3 B. & B. 75; and, though the instances put by Lord Coke are illustrative only, the general principle laid down in that decision is cogently applicable to the present.

The judgment of *Lord Holt*, and the facts in *Gisbourn v. Hurst*, 1 Salk. 250, apply closely to this case. He there lays it down, that goods delivered to any person exercising a public trade or appointment, to be carried, wrought, or managed, in the way of his trade or employment, are, for that time under a legal exemption, and privileged from distress for rent; and, even with respect to a private engagement, any man, undertaking to carry for hire the goods of all persons indifferently is, as to this privilege, a common carrier; for the law has given the privilege in respect of the trader, and not in respect of the carrier. The factor, in this case, was agent for the owner of the goods, and, as such, deposited them in R.'s warehouse, so that the case, in fact, stands as if the owner himself had sent them immediately to R.; and, therefore, on the broad principle of convenience and benefit to trade, they ought not to have been distrained. — Rule discharged.

XV. Things in the Custody of the Law.[1]

XVI. Where a Distress may be Made.

(A) *In an Enclosed Place.*[2]

(B) *Not on the Highway.*[3]

(C) *Nor on other Lands than those on which the Rent is charged.*

Rogers v Birkmire, Co. Temp. Hard. 245; S. C. 2 Stra. 1040.

The distress follows the rent; and, consequently, it can only be made on the

In an action of trespass for taking goods, the defendant justified that he demised some tenements to the plaintiff for one term, and others for another term; and there being rent in arrear on both demises, he distrained the goods. On a demurrer it was held ill, for there being separate demises, there ought to have been separate distresses on the several premises, subject to the distinct

[1] Property in the custody of the law cannot be distrained; hence, corn taken under a *fieri facias* in the hands of the sheriff's vendee, is protected from the landlord's distress for rent subsequently accruing, unless such purchaser allow it to remain on the ground for an unreasonable time after it is ripe (*Peacock v. Purvis*, 2 B. & B. 362; S. C. 5 Moore, 79. S. P. *Parslow v. Cripps*, 1 Com. 204); or the execution be fraudulent (*Smith v. Russell*, 3 Taunt. 400); but as soon as the party has waived his execution the landlord's right to distrain revives. *Steven v. Mihill*, 1 Ken. 370. There can be no constructive impounding. 30 L.J.Ex. 313.

The 8 Anne, c. 14, s. 1, makes it unlawful to remove goods taken in execution without paying one year's rent. Goods so taken are *in custodiâ legis*, and cannot be distrained on by the landlord for the year's rent; and they are equally *in custodiâ legis* for this purpose, whether they are in the hands of the sheriff or of his vendee. *Wharton v. Naylor*, 12 Q. B. 673; 6 D. & L. 136; 12 Jur. 894; 17 L. J. Q. B. 278. They, therefore, cannot be distrained for antecedent rent, of which the sheriff and the execution creditor had notice, but which they neglected to pay, the remedy of the landlord being by action on the case against the sheriff, and not by way of distress. (Id.)

Goods seized by a messenger under a fiat in bankruptcy are not, while in his custody, privileged from distress for rent due from the bankrupt to his landlord. *Briggs v. Sowry*, 8 Mee. & W. 729. See *Newton v. Scott*, 9 id. 434.

[2] A distress may be made in a house, or other enclosed place. *See* Brad. Dist. 136.

[3] A distress cannot be made on the highway (4 H. & N. 631; 28 L. J. Ex. 296), unless at the instance of the king. *See* id. 132. And barges attached by ropes to a wharf beyond high and low-water mark cannot be distrained. *Bussard v. Capel*, 8 B. & C. 141; 2 M. & R. 197; 6 Bing. 150; 3 Glyn. & J. 344.

rents; and no distress on one part can be good for both rents, because this would be to make the rent of one issue out of the other: therefore, the plaintiff had judgment.

land out of which the rent issues.

XVII. When a Distress may be Made.

By 3 & 4 Wm. 4, c. 42, it is enacted, "that arrears of rent may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; provided such distress be made within six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to distresses so made."

By 3 & 4 Wm. 4, arrears of rent may be distrained for within six months after end of the term.[1]

XVIII. Mode of Conducting a Distress.

(A) *Of the Demand of and Tender of the Rent.*

Smith v. Goodwin, 1 Nev. & M. 371; S. C. 4 B. & Ad. 413.

The plaintiff was tenant to the defendant Goodwin of certain premises at the rent of 25*l.* per annum. Half a year's rent was due at Midsummer, 1831. On the 31st of August, the defendant authorised the other defendant Richards to distrain, and he accordingly did. On the 2d of September, the plaintiff tendered to the defendant Goodwin twelve sovereigns and a half for the rent, and thirteen shillings for the expenses. The defendant refused to take it, saying he had turned the business over to Richards, and referred the plaintiff to him. The next day the same sum in amount was tendered to the man in possession, the plaintiff demanding a receipt to be signed by Richards. The latter could not be found at the time, and the plaintiff took the money away.

A tender to the landlord after distress is sufficient.[2]

Per Cur. The tender to the landlord was sufficient, as appears by the case of *Moffatt v. Parsons* (5 Taunt. 307), although he had put the business into the hands of his broker. A landlord need not be under any difficulty as to the proper amount of the charges; he may ascertain it himself from his broker.

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[1] This statute is not to be construed strictly. *Nuttall v. Staunton*, 4 B. & C. 51. And a landlord may distrain after the end of the demise if sanctioned by custom. *Knight v. Benett*, 3 Bing. 361; 11 Moore, 227. An outgoing tenant, by leaving some of the stock on the premises, does not so continue the tenancy as to authorise a distress by the landlord. *Taylerson v. Peters*, 7 Ad. & E. 110; 2 Nev. & P. 622.

At common law, the landlord must have distrained for rent in arrear during the continuance of the lease (*see* 3 Co. Rep. 64; Bro. Dist. pl. 74); and, therefore, for rent due on the last day of the term, the lessor could not distrain, because the term was ended (*see* Co. Litt. 47, b), unless the tenant held over. *See* Keilw. 96. But, by the 8 Anne, c. 14, and since by 3 & 4 Wm. 4, *supra*, the distress may be made within six calendar months after the end of the lease, and during the continuance of the landlord's title or interest, and the tenant's possession. The statute of Anne was not confined to a tortious holding. 4 B. & C. 1.

Since 8 Anne, c. 14, where the tenant's corn remained on the premises beyond the six months after the termination of the term, but within the time allowed by custom for the outgoing tenant to dispose of his crop, it was holden distrainable. *Lewis v. Harris*, 1 H. Black. 7, n. *Beavan v. Delahay*, 1 id. 5. But a termor who has underlet cannot, after the expiration of his term, distrain on his under-tenant continuing in possession. *Burne v. Richardson*, 4 Taunt. 720.

A distress for rent before sunrise, or after sunset, is illegal, although there may be daylight. *Tutton v. Darke*, and *Nixon v. Freeman*, 5 H. & N. 647; 6 Jur. N. S. 983; 29 L. J. Ex. 271; 2 L. T. (N. S.) 361. *Quære*, whether for such purpose the time of sunrise is to be reckoned from the first appearance of the beams of the sun above the horizon, or from the time when the entire sun has emerged? (Id.)

[2] The making a distress being considered as a legal demand, no other demand is generally requisite, unless there be a reservation requiring a special demand; hence, a clause in a lease that the lessor might distrain for the rent, "being lawfully demanded," was holden not to require a request previous to the distress. But where the clause was, if the rent were behind, it should be demanded at a particular place not on the land, or be

(B) *By whom.*

(*a*) *By Bailiffs.*[1]

(*b*) *By Landlords.*[2]

(*c*) *At what Time to be made.*[3]

(*d*) *Of the Warrant.*[4]

(*e*) *Of Breaking Open Doors, &c.*

BROWNING v. DAM, Ca. Temp. Hard. 167.

The party making a distress may, if the outer door be open, break the inner doors.[5]

Per Cur. In making a distress, if the outer door of a house is open, a person may break an inner door to make a distress; and so one may on an execution.

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demanded of the person of the tenant, a special demand was deemed essential to support a distress. *See* Bac. Abr. Condition, A. 2; Hob. Rep. 208; Plowd. 69. In these cases, where a demand is necessary, it need not be made the day the rent becomes due, but at any subsequent time. *See* Hob. 207. No landlord can distrain after the tenant has, upon the land, tendered the rent. *See* 8 Co. Rep. 147, a; 2 Inst. 107. And even if the tender be made after the distress, but before impounding, the landlord is, it seems, not justified in detaining the property. *See* id.

Trespass lies when the amount of the rent is tendered after the distress, but before impounding or removal. *Vertue v. Beasley*, M. & Rob. 21.

It was laid down in the *Six Carpenters' case*, 8 Co. Rep. 147, a, that tender upon the land before the distress makes the distress wrongful; tender after the distress, and before the impounding, makes the detainer and not the taking wrongful; but tender after the impounding makes neither the one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law, to be there determined. 2 Inst. 107. *Firth v. Purvis*, 5 T. R. 432. *Pilkington's case*, 5 Co. Rep. 76. *Evans v. Elliot*, 5 Ad. & E. 142. *Vertue v. Beasley*, 1 M. & Rob. 21. But where goods have been seized as a distress for rent, and, before impounding, a tender is made of the rent in arrear and costs, an action will lie for the subsequent detaining the goods. *Loring v. Warburton*, 4 Jur. N. S. 634; 28 L. J. Q. B. 31. And an action is maintainable upon the equity of the statute 2 Wm. & M. stat. 1, c. 5, s. 12, for selling goods seized under a distress for rent where a tender of the rent and expenses has been made before the sale, and within five days of the seizure, although after impounding. *Johnson v. Upham and another*, 28 L. J. Q. B. 252, overruling *Ellis v. Taylor*, 8 Mee. & W. 415. *See* also, on this point, *Glyn v. Thomas*, 11 Ex. Rep. 870. *Hatch v. Hole*, 15 Q. B. 10. As to what is an impounding, see *Johnson v. Upham and another, supra. Brown v. Powell*, 4 Bing. 230. *Tenant v. Field*, 3 Jur. N. S. 1178; 30 L. J. Ex. 113; *post*, Pound.

[1] The bailiff should be authorised in writing from his employer; which authority is called "the warrant of distress" (Brad. Dist. 217), and if required he is bound to shew it; if not, he may distrain generally (*see* 1 Leon. 50), by taking some article of furniture in lieu of the whole. Brad. Dist. 216. But a distress made by a bailiff without authority may be ratified by the subsequent assent of the employer. *Maclean v. Dunn*, 4 Bing. 722. The latter is liable to indemnify the bailiff (6 H. & N. 233; 30 L. J. Ex. 44), and is responsible for the acts of the broker. 5 C. B. (N. S.) 539; 4 Jur. N. S. 1279; 28 L. J. C. P. 103; 1 F. & F. 134; 3 C. B. (N. S.) 59.

[2] The distress may be made by the person to whom the rent is due, who has no particular form to observe; he has merely to take some article in the name of the rest of the goods. Brad. Dist. 216.

[3] A distress cannot be made before the next day after the rent is due (1 Saund. 287; Co. Litt. 47, b), and must be in the daytime; *i. e.* between sunrising and sunset, for a distress cannot be made in the night. Co. Litt. 142, n. But the period at which a distress may be made depends sometimes upon the nature of the contract and the custom of the country; therefore where, by the custom of the country, half-a-year's rent becomes due, upon the tenant's entry on the land, a distress may be made immediately. 2 T. R. 600; Cowp. 784.

Before the 8 Anne, c. 14, s. 6, at common law rent accruing before the expiration of a tenancy could not be distrained for after the expiration. *Williams v. Stiven*, 9 Q. B. 14; 15 L. J. Q. B. 321.

[4] There is no authority to show that the bailiff must have a warrant of distress, although it is certainly the most eligible mode of appointment. *See* Brad. Dist. 217. The warrant need not be stamped or sealed, although the distress be made by a corporation (*see* 1 Salk. 191); but it must be signed by the person entitled to the rent. And in the case of a joint distress, as coparceners, the warrant must be signed by all the persons entitled to distrain. *See* 1 Leon. 50; 3 Taunt. 120; 3 B. & A. 689.

[5] And trespass will not lie against a landlord for entering a divided lower apartment, through his own boarded and unceiled floor, to distrain for rent. *Gould v. Bradstock*, 4 Taunt. 562. So he may enter into a house or building through open windows. 1 Roll. Abr. 671. *Tutton v. Dashe*, 5

(*f*) *Of the Inventory.*[1] (*g*) *Of the Notice.*

GAMBRELL v. EARL OF FALMOUTH, 4 Ad. & E. 73.

An error in the notice as to the time the rent was due, is not material.[2]

In an action on the case for an excessive distress, the defendant pleaded, that the whole sum distrained for was due and in arrear.

The Court held, that he was not precluded from taking into the account arrears antecedent to a prior distress, although the notice under such prior distress stated it to be for rent due up to a certain period, and the notice under the latter distress stated it to be for rent accrued since the former distress.

(*h*) *Of the Appraisement. See* 5 C. & P. 323.

NOTTS v. CURTIS, 2 Tyrw. 449.

An appraisement before

Trespass on the case for taking an excessive distress, with counts for distraining for more rent than was due; for selling under the best price that could be obtained; for selling without having had the goods duly appraised; and a

H. & N. 647; 29 L. J. Ex. 271. But inclosures or fences cannot be broken to take a distress. *See* Co. Litt. 161, a. And where a padlock had been put upon a barn-door it was holden that the landlord could not break it in order to seize the corn in the barn. *See* Vin. 128, pl. 6, Distress.

A forcible re-entry by breaking the outer door is justifiable, under a warrant of distress, where the party has been forcibly turned out of possession; and such justification is admissible under the general issue. *Eagleton v. Gutteridge*, 11 Mee. & W. 465; 2 Dowl. N. S. 1053; 12 L. J. Ex. 359.

A landlord cannot break open the outer door of a stable, though not within the curtilage, to levy an ordinary distress for rent. *Brown v. Glenn*, 16 Q. B. 254; 15 Jur. 189; 20 L. J. Q. B. 205. A landlord, in order to distrain, may open the outer door in the ordinary way in which other persons using the building are accustomed to open it. *Ryan v. Shilcock*, 7 Ex. 72; 15 Jur. 1200; 21 L. J. Ex. 55. Where the outer door of a stable was kept closed by a padlock attached to a movable staple, and the owner and other persons usually opened the door by pulling out the staple: — *Held*, that a distress made upon goods in the stable, after an entry in this mode, was legal. (Id.) *Quære*, whether a distress is void where the outer door is improperly broken? (Id.)

[1] The inventory should describe the articles distrained: as, in the parlour one table, &c. Brad. Dist. 219. Merely making an inventory does not so far implicate the maker as to subject him to an action if the distress be irregular. *Ward v. Haydon*, 2 Esp. 552. If goods are removed which are not included in the inventory, the tenant may maintain trover. *Bishop v. Briant*, 6 C. & P. 484. It suffices to make it up from a list supplied by the tenants, without going into all the rooms. *Termont v. Field*, 8 E. & B. 136; 27 L. J. Q. B. 33.

[2] A notice of distress is required if it be intended to proceed to a sale by 2 Wm. & Mary, c. 5, s. 2, for more rent than is due; if no more goods be distrained than cover the rent, does not vitiate. *Wilkinson v. Terry*, 2 M. & Rob. 377. *Walker v. Rumbold*, 12 Mod. 76. *Moss v. Gallimore*, 1 Dougl. 279. The inventory should be joined to the notice (Brad. Dist. 219), and left at the chief mansion-house, or on the premises charged with the distress.

A distress for rent having been made at some livery-stables, goods belonging to several strangers, and, among others, a pony-phaeton of A. B., were taken under it. A notice of distress was left on the premises, the inventory attached to which, after specifying certain goods, but making no mention of those of A. B., proceeded thus: — "And all other goods, chattels, and effects on the premises, that may be required in order to satisfy the above rent, together with all the expenses:" — *Held*, that this notice was too vague and uncertain to justify a sale of the property of A. B. *Kerby v. Harding*, 6 Ex. 234; 15 Jur. 953; 20 L. J. Ex. 163.

Where a notice of distress for rent stated that the party distraining had seized the goods mentioned in an inventory thereunder written, and the inventory was for one clock, and any other goods and effects that might be found in and about the said premises, to pay the said rent and expenses, and where it was proved that all the goods on the premises were in fact seized: — *Held*, that the notice and inventory together must be taken to mean a notice that all the goods on the premises were seized; and that since all were seized, such a notice, though improperly vague, was a sufficient compliance with the statutes, which require that when a distress is made notice shall be given of it. *Wakeman v. Lindsey*, 14 Q. B. 625; 15 Jur. 79; 19 L. J. Q. B. 166. Under the 2 Wm. & M. c. 5, s. 2, the notice of distress for rent, to be given five days before sale, must be in writing. *Wilson v. Nightingale*, 8 Q. B. 1034; 10 Jur. 917; 15 L. J. Q. B. 309. A want of notice does not render a distress invalid. *Trent v. Hunt*, 9 Ex. 14; 17 Jur. 899; 22 L. J. Ex. 318. Where notice of a distress for rent is given in the name of a wrong party the distress is not vitiated, but the distrainor cannot proceed to sell the distress under the 2 Wm. & M. c. 5, and 11 Geo. 2, c. 19. (Id.)

sale is indispensable, and a sale without is wholly illegal.[1]

count in trover. It appeared that the defendant had distrained for 3*l.* more than was really due; that he had sold by auction goods worth 15*l.* for 6*l.*, which was the best price that could be obtained for them under the circumstances; and that the sale had taken place without any previous appraisement.

Per Cur. The omission to have the goods appraised is not a mere irregularity, but renders the whole proceeding void.

(*i*) *Of the Sale.*

WALLACE v. KING, 1 H. Black. 13.

The five days are inclusive of the day of sale, but exclusive of the *time* of it.[2]

The distress was made on Saturday morning, the 12th of May, and an inventory and notice of sale given. On Thursday, the 17th, the goods were removed and sold. After verdict for the plaintiff, in an action for selling the goods before the five days had expired, a rule was obtained to show cause why a nonsuit should not be entered; it was contended, that the five days given by the statute for the party to replevy ought to be reckoned exclusive both of the day in which the distress was taken, and also of the day when the sale was made.

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[1] See *Biggens v. Goode*, 2 C. & J. 365. *Knight v. Egerton*, *infra*, *contra*. Although the rent for which goods are distrained does not exceed 20*l.*, they must be appraised by two appraisers, under 2 Wm. & M. c. 5, s. 12, notwithstanding the provisions in 57 Geo. 3, c. 93 (*supra*, n. 2), an act to regulate the costs of distresses for rent not exceeding 20*l.* *Allen v. Flicker*, 10 Ad. & E. 640. *Fletcher v. Saunders*, 2 M. & Rob. 375; 6 Car. & P. 747. *Bishop v. Briant*, id. 484. In an action for selling goods without an appraisement, the measure of damages is the real value of the goods sold, *minus* the rent due. *Knight v. Egerton*, 7 Ex. 407.

It seems questionable whether the constable of a different parish can administer the oath. *See* 1 H. Black. 13.

The constable must swear the appraisers before they make the appraisement. *Kenney v. May*, 2 M. & M. 56.

A written stamped appraisement is not necessary where the broker speaks of the value of the goods from recollection. *See* 1 Car. & P. 25.

[2] Distresses for rent being in the nature of pledges, the distrainor had no power to sell them at the common law. But now, by the stat. 2 Wm. & M. c. 5, it is enacted, that where any goods shall be distrained for rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods distrained shall not, within five days next after such distress taken, replevy, the same shall be sold for the best price that can be got for them.

By 2 Wm. & M. c. 5, the charges of the distress, appraisement, and sale, are to be satisfied out of the things sold; and by the 57 Geo. 3, c. 93, s. 1, no person making any distress for rent where the sum shall not exceed 20*l.*, to take other charges than mentioned in the schedule annexed; nor to charge for any act not done. By sect. 2, party aggrieved by such practice may apply to a justice of the peace, who may adjudge treble the amount of the monies unlawfully taken, to be paid with costs, which may be levied by distress. And by sect. 3, such justices may summon witnesses; and, if they neglect to attend, may impose a penalty on them not exceeding 40*s.* By sect. 4, if complaint be unfounded, the justice may give costs to the party complained against; but no judgment to be given against any landlord unless he personally levies the distress. And this act is not to bar parties of other legal remedies. By sect. 5, the signature of the justice is directed to be attached to the judgment; and by sect 6, the brokers are to give copies of their charges to the persons whose goods have been distrained.

The landlord is bound to wait five whole days of twenty-four hours before he sells: hence, if goods be taken on the 1st March, at two o'clock, and sold before that hour on the fifth day, the tenant is entitled to recover, though only nominal damages. *Harper v. Taswell*, 6 C. & P. 166.

And an action is maintainable upon the equity of the 2 Wm. & M. c. 5, s. 2, for selling goods seized under a distress for rent, where a tender of the rent and expenses is made before the sale within the five days, although after impounding. *Johnson v. Upham*, 28 L. J. Q. B. 252. So, for detaining goods after a sufficient tender before impounding. *Loring v. Warburton*, E. & E. 507; 28 L. J. Q. B. 31. A tender of rent without expenses after a warrant is delivered to a broker, but before it is executed, is good. *Bennett v. Baynes*, 29 L. J. Ex. 224; 5 H. & N. 391.

And where a distrainor remained in possession of the goods in plaintiff's hands beyond the five days, and then removed them, it was holden that trespass was the appropriate form of action. *Winderbourne v. Morgan*, 11 East, 395.

But a distrainor is allowed a reasonable time after the expiration of the five days to sell the property. *Pitt v. Shew*, 4 B. & A. 208.

If a landlord who has distrained for rent does not sell within the five days, by arrangement between him and the tenant, that is no proof *per se* of collusion. *See* 7 Price, 690. The request of the tenant will not justify the landlord in detaining the goods of a lodger beyond the five days, if he did not know which were the goods of the lodger, and which those of the tenant. *See* 2 Car. & P. 374.

But the court were of opinion that on Thursday afternoon, five days from the time of the distress had completely expired.

See also *Robinson v. Waddington*, 13 Q. B. 753; 18 L. J. Q. B. 250.

(*j*) *Of the Removal.*[1]
(*k*) „ *Surplus.*[2]
(*l*) „ *Duty of the Distrainor.*

Dod v. Monger, 6 Mod. 215.

In this case it appeared that the distrainor drew beer out of one of the barrels of beer which had been distrained. *Per Holt, C. J.* "He is a trespasser *ab initio* as to that barrel." The thing distrained must not be used.[3]

(*m*) *Of the Charges to be Paid to the Distrainor.*[4]
(*n*) *Where the Goods are already in Execution.*[5]

XIX. Making several Distresses for the same Rent.

Hutchins v. Whitaker, 1 Burr. 478; S. C. 2 Kenyon, 204.

In an action for an excessive distress, the question was, whether a second A second dis-

There is, however, no order required by law to be observed in the sale of goods taken under a distress, as that beasts of the plough should be postponed until the other goods are disposed of. *Jenner v. Yolland*, 6 Price, 3; S. C. 2 Chit. Rep. 167.

Quære, Whether a landlord, who has seized his tenant's hay and straw under a distress for rent, may sell it, subject to a condition that the purchaser shall consume it on the premises according to the custom of the country? *Frusher v. Lee*, 10 Mee. & W. 709; 12 L. J. Ex. 321.

[1] As soon as the five days have expired the goods must be removed (*Griffin v. Scott*, 2 Stra. 717; 2 Ld. Raym. 1424. *Winderbourne v. Morgan*, 11 East, 395), unless it is agreed between the parties that a longer time shall be allowed. Brad. Dist. 223.

[2] Surplus means what is left after payment of the rent and the reasonable charges. *Lyon v. Tompkies*, 1 Mee. & W. 603. Being unable to find the tenant is a sufficient excuse for not paying him the surplus. Notwithstanding the words of the 2 Wm. & M. it is the practice to pay such surplus to the tenant and not the sheriff. *Stubbs v. May*, C. B. M. S. 1822. The proper course to pursue is to leave it with the sheriff. *Evans v. Wright*, 2 H. & N. 527; 27 L. J. Ex. 56. A landlord who has sold his tenant's goods under a distress for rent, is not liable in an action for money had and received, at the suit of the mortgagee of the goods, to recover the overplus money in the landlord's hands, the proper remedy being by an action on the case against him for not paying over the surplus to the sheriff pursuant to 2 Wm. & M. sess. 1, c. 5, s. 2. *Yates v. Eastwood*, 6 Ex. 805; 20 L. J. Ex. 303; and see *Evans v. Wright, supra.*

[3] The 11 Geo. 2, c. 19, has rendered such person liable to an action for the abuse. And it has been held that, even using the thing distrained, so as to make it beneficial to the distress, is also an abuse. *See* Cro. Eliz. 783. Therefore, it has been said, the distrainor has no right to milk a cow, because the owner might come himself; and if the beast sustain an injury thereby, and die, the distrainor is not liable, and he may make another distress. *See* Roll. Abr. 673. *See* 17 & 18 Vic. c. 60, *ante*, p. 87. The owner may interfere and prevent the working of the distress. *Smith v. Wright*, 7 Jur. N. S. 1169; 30 L. J. Ex. 313.

[4] By 2 Wm. & M. the charges of the distress, appraisement, and sale, are to be satisfied out of the things sold. And, by the 57 Geo. 3, c. 93, s. 1, no person, making any distress for rent where the sum shall not exceed 20*l.* to take other charges than mentioned in the schedule annexed; nor to charge for any act not done. By s. 2, party aggrieved by such practice may apply to a justice of the peace, who may adjudge treble the amount of the monies unlawfully taken to be paid, with costs, which may be levied by distress. And, by s. 3, such justices may summon witnesses, and, if they neglect to attend, may impose a penalty on them not exceeding 40*s.* By s. 4, if complaint be unfounded, the justice may give costs to the party complained against. But no judgment to be given against any landlord unless he personally levies the distress. And this act is not to bar parties of other legal remedies. By s. 5, the signature of the justice is directed to be attached to the judgment. And by s. 6, the brokers are to give copies of their charges to the persons whose goods have been distrained.

[5] If the goods of the tenant are already taken under legal process, the landlord must not attempt to distrain them, but must give notice to the party in possession of his claim for rent, under the 8 Anne, c. 14. *See* Brad. Dist. 229. *See* Execution.

The landlord's right to only one year's rent does not apply where the arrest takes place after the distress under the Insolvent Act, 7 Geo. 4 (now repealed). *Wray v. Earl of Egremont*, 4 B. & Ad. 122; S. C. 1 Nev. & M. 188. Rent was satisfied up to the time of growing crops being taken in execution and sold:—*Held*, that they could not be distrained for subsequent rent. *Wright v. Dewes*, 3 Nev. & M. 790; S. C. 1 Ad. & E. 641.

tress cannot be made, if enough might have been taken at first, unless the distrainor mistake the value of the goods.[1]

distress can be justified under the same warrant, when enough might have been taken at first, if the distrainor had then thought proper.

Per Cur. A man who has an entire duty shall not split the entire sum, and distrain for part at one time and part at another, because that would be great oppression; if a man seizes for the whole sum due to him, and only mistakes the value of the goods seized, there is no reason why he should not afterwards complete his execution, by making a further seizure.

See 5 M. & P. 663; S. C. 7 Bing. 651.

XX. Making a Joint-Distress for several Rents.

Rogers v. Birkmire, 2 Stra. 1040; S. C. Ca. Temp. Hard. 145.

A joint distress for distinct rents cannot be made.

In an action of trespass for taking goods, the defendant justified, that he demised some tenements to the plaintiff for one term, and others for another term; and there being rent in arrear on both demises, he distrained the goods. And on a demurrer it was held ill; for there being separate demises, there ought to have been separate distresses on the several premises subject to the distinct rents; and no distress on one part can be good for both rents: therefore the plaintiff had judgment.

XXI. Fraudulent Removal.

(A) *What Cases are within the Statute.*

Rand v. Vaughan, 1 Bing. N. C. 767; S. C. 1 Scott, 670; S. P. Watson v. Main, 3 Esp. N. P. C. 15.

To constitute a fraudulent and clandestine removal the rent must be due;[2]

Trespass for breaking into the plaintiff's house and seizing and taking goods. *Plea*, justifying the entry; and that the goods were removed to avoid a distress. *Replication*, that he the plaintiff, as in the said plea alleged, conveyed and carried off and from the said premises, so held and enjoyed by him as aforesaid, the said goods and chattels in the said declaration mentioned on the 24th day of March, 1834, which day was a day and time before the said rent became due and payable, and before the same was due, in arrear, and unpaid; without this, that the plaintiff conveyed away and carried off or from the said demised premises the said goods and chattels at any time before the said rent became or was due and payable, or when the same was in arrear or unpaid, in manner and form as alleged.

The Court held, that the stat. 11 Geo. 2, c. 19, did not apply to cases where a tenant fraudulently and clandestinely removes his goods before the rent becomes due; and therefore the landlord cannot follow and distrain such goods.

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[1] And if there be not sufficient on the premises a second distress is lawful. 2 Lutw. 1536; Cro. Eliz. 13; 17 Car. 2, c. 7. Leaving the house for a purpose not necessary, but reasonably convenient, for a short time, is not an abandonment; and the party is justified in breaking the outer door for the purpose of re-entering (*Bannister v. Hyde*, 29 L. J. Q. B. 141), but not after a long delay. *Russell v. Ryder*, 6 C. & P. 416. *See* 11 Mee. & W. 465; 20 L. J. Ex. 163; 27 id. 337.

[2] The 11 Geo. 2, c. 19, provides, that if any tenant for life, years, at will, sufferance, or otherwise, of lands or tenements, upon the demise whereof any rents are reserved, shall fraudulently or clandestinely convey away or carry off his goods from such demised premises to prevent a distress, the lessor, or any person empowered by him, may, within thirty days next after such conveying away or carrying off, distrain such goods wherever found, for the rent in arrear, and sell or dispose of the same; provided that before the seizure they have not been sold *bonâ fide*, and for a valuable consideration, to a person not privy to the fraud. And by the 7th section of the same statute it is enacted, that where any goods fraudulently or clandestinely carried away by any tenant or lessee, or their servant, agent, or other person aiding therein, shall be put in any house or other place, locked up or otherwise secured, so as to prevent such goods from being distrained for the rent, the landlord or lessor, or his bailiff, may in the day-time, with the assistance of the constable or other peace-officer of the hundred, parish, or place, where the same shall be suspected to be concealed, and in case of a dwelling-house, oath being also first made before some justice of the peace, of a reasonable ground to suspect that such goods are therein, break open

PARRY v. DUNCAN, 7 Bing. 243; S. C. 5 M. & P. 19; S. C. M. & M. 533.

Upon an issue in replevin upon 11 Geo. 2, c. 19,—

The Court held, that the defendant must establish that the goods were removed fraudulently, and with the view to elude a distress; where the proof was that only some goods had been removed from the premises openly, and the jury negatived that any rent was due, the court refused a new trial on payment of costs: the court, in a doubtful case, would not, by the result of another trial, subject the plaintiff to double costs, and revive the liability of the sureties, especially as the landlord might still have recourse to an action for use and occupation, if rent was really due.

and the removal secret.

BROOKE v. NOAKES, 8 B. & C. 537.

In debt, founded on the stat. 11 Geo. 2, c. 19, s. 3, against a party for aiding and assisting the tenant in the fraudulent removal of his goods, with intent to prevent the landlord from distraining them.

To render a party liable for assisting in a fraudulent removal, it must appear that he assisted to prevent a distress.

The Court held, that it ought to have been proved, not only that the defendant assisted in the removal or concealment of the goods, but that he gave assistance with the intent to prevent the landlord from distraining. Now, here there was no evidence which ought to have satisfied the jury that the defendant assisted in the removal of the cattle; and, therefore, that the defendant ought not to be visited with the penal consequences of this Act of Parliament, unless it be distinctly shown that he was privy to the fraudulent intent with which the tenant's cattle were removed.

(B) *Form of Seizing such Goods.*[1]

and enter into such house or place, and take and seize such goods for the arrears of rent, as he or they might have done by virtue of that or any other former act, if such goods had been put in any open field or place.

The words of this statute are in the disjunctive, "*fraudulently* or *clandestinely*;" and therefore, where a tenant openly and in face of day, and even with notice to his landlord, removed his goods, without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods; it was held, that although the removal might not be *clandestine*, yet if it was *fraudulent*, which was a question for the jury (*John v. Jenkins*, 1 C. & M. 227), the landlord was justified under the statute. *Opperman v. Smith*, 4 D. & R. 33; and see *Bach v. Meats*, 5 M. & S. 200. *Stanley v. Wharton*, 9 Price, 301. *Lyster v. Brown*, 1 Car. & P. 121; 3 D. & R. 501; overruling *Watson v. Main*, 3 Esp. 15. The statute only extends to cases where the landlord would be entitled to his remedy by distress at common law, independently of all covenant or stipulation on the subject. *Pluck v. Digges*, 2 Dougl. P. C. 180. *See* also *Ashmore v. Hardy*, 7 Car. & P. 501.

In order to justify the landlord distraining under this act, it has been held that the removal must have taken place *after* the rent became due. *Watson v. Main*, 3 Esp. 16. *Rand v. Vaughan*, 1 Bing. N. C. 767. *Furneaux v. Fotherby*, 4 Camp. 136. *Poole v. Longueville*, 2 Saund. 284, b. The plea of justification under this section must be special. *Furneaux v. Fotherby*, *supra*. *Spencer v. Harrison*, 2 C. & Kir. 429. *Vaughan v. Davis*, 1 Esp. 257. *Angell v. Harrison*, 17 L. J. Q. B. 25. *Fletcher v. Marillier*, 9 Ad. & E. 457. As to what is a good *primâ facie* justification, see *Williams v. Roberts*, 7 Ex. 618; 22 L. J. Ex. 61.

This statute applies to the goods of the tenant only, and not to those of a stranger; therefore a plea justifying the following goods off the premises, and distraining them for rent arrear, must show that they were the tenant's goods. *Thornton v. Adams*, 5 M. & S. 38. And the statute does not extend to an under-tenant removing to avoid the distress of a landlord or his immediate tenant. *Postman v. Harrell*, 6 Car. & P. 225. *Bennett's case*, 2 Stra. 787. *Fletcher v. Marillier*, 9 Ad. & E. 457. The assignees of a bankrupt adopting a demise to him are tenants within this section. *Welch v. Myers*, 4 Camp. 368.

As to the thirty days, plaintiff was tenant of a house from Michaelmas-day 1852, at a rent payable quarterly. On the morning of Christmas-day he fraudulently removed all his goods from the premises. On the following day defendant followed the goods and distrained them. In trespass against the defendant:—*Held*, that the rent being due and payable on the quarter day, the defendant was justified in following and distraining the goods within thirty-one days after their removal, under the statute: *Crompton, J.* dissenting. *Dibble v. Bowater*, 2 E. & B. 564; 17 Jur. 1054; 22 L. J. Q. B. 396.

[1] It is not necessary that a party seizing such goods should first call to his assist-

(C) *Of the Penalty.*

(*a*) *By whom Incurred, and how Proved.*[1]

By 11 Geo. 2, c. 19, s. 3, "if any person, &c., shall wilfully and knowingly aid or assist in such fraudulent conveying away or carrying off any part of the tenant's goods, &c., or concealing the same, every person so offending shall forfeit double the value of the goods so carried off or concealed."

(*b*) *Remedy for.*

(1) *By Application to Justices.*

Rex v. Rabbits, 6 D. & R. 343.[2]

The order of justices need not specify the goods: stating the value suffices.

By 11 Geo. 2, c. 17, s. 4, if the goods fraudulently removed or concealed exceed not the value of 50*l.*, the landlord may have recourse to two justices, who shall examine, &c., and then adjudge the offender, &c. to pay double the value of the goods; and if the offender refuse, they shall by their warrant levy the same by distress; and, for want of such distress, commit the offender to hard labour for six months. On an order and adjudication, under that statute, for clandestinely and fraudulently removing goods under 50*l.*, to prevent distress for rent:—*Held*, that such goods need not be specified in the order; it was sufficient for the justices to find their value.

(2) *In the Superior Courts.*

Stanley v. Wharton, 10 Price, 138; S. P. Horsefall v. Davey, Holt, N. P. C. 147.

The summary

In an action on the 11 Geo. 2 for a fraudulent removal. It was objected, in

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ance an ordinary peace officer; a person appointed — a special constable — for the occasion, is sufficient. *Cartwright v. Smith*, 1 M. & Rob. 284. But in order to prevent a breach of the peace, the presence of a constable is required in every case where force is resorted to, and if the goods withdrawn be secured in a dwelling-house, a previous application must be made to a magistrate. The landlord has the remedy of pursuing the goods if he fulfils the conditions imposed by the statute; but unless he does so his proceedings are without authority: *per Tindal, C. J., Rich v. Woolley*, 7 Bing. 660.

By 2 & 3 Vic. c. 47 (Metropolitan Police Act), s. 67, any constable may stop and detain, until due inquiry can be made, all carts and carriages which he shall find employed in removing the furniture of any house or lodging between the hours of eight in the evening and six in the following morning, or whenever the constable shall have good grounds for believing that such removal is made for the purpose of evading the payment of rent.

[1] In an action on 11 Geo. 2, it need not be proved that a distress was in contemplation; showing that rent was in arrear at the period of the removal will suffice. *Stanley v. Wharton*, 10 Price, 138. And in an action for such aiding, &c., the acts of the tenant are admissible evidence of the fraud. *Stanley v. Wharton, supra.* But a *bonâ fide* creditor does not, even although aware of his debtor's insolvency, and that he is apprehensive of a distress, incur the penalties imposed by 11 Geo. 2, c. 19, s. 13, by removing with his debtor's assent goods from the premises, for the purpose of satisfying his debt. *Bach v. Meats*, 5 M. & S. 200.

[2] Under this section the relationship between landlord and tenant must appear on face of justice's order (*Rex v. Davis*, 2 Nev. & M. 349; S. C. 5 B. & Adol. 551), but need not specify the value. *Rex v. Rabbitts*, 6 D. & R. 343. On an information for fraudulent removal, the justices may adjudicate under the 11 Geo. 2, though the title to the premises may be in dispute. *Coster v. Wilson*, 3 Mee. & W. 411. A conviction upon the statute for a fraudulent removal must state that the offender "wilfully and knowingly" assisted, &c. *Reg. v. Justices of Radnor*, 9 Dowl. P. C. 90.

A commitment under the 11 Geo. 2, c. 19, s. 4, for fraudulent removal of goods, omitted to state a complaint in writing, by the landlord, his bailiff, agent, or servant. The order of adjudication stated the defendant to have been duly charged in writing before the magistrate. The court held the commitment to be bad. *Ex-parte Fuller*, New. Sess. Cas. 284; 13 L. J. M. C. 142. S. C. nom. *Reg. v. Fuller*, 2 D. & L. 98; 8 Jur. 604, B. C.: *Coleridge*. If an order of justices, by which a party is adjudged, under 11 Geo. 2, c. 19, s. 4, to pay double the value of the goods removed, for the purpose of preventing the landlord from distraining for arrears of rent, does not state that the offender was summoned, that the complaint was adjudged to be true on evidence given upon oath, and that there was proof before the justices that the party wilfully and knowingly assisted in the removal of the goods, it is bad, although it specifies the full proof of the offence on which the justices convicted and adjudicated. *Ex-parte Morgan*, 4 Jur. 916, B. C.

arrest of judgment, that the plaintiff should have applied to two justices of the peace for summary process, the goods being under the value of 50*l.*, and that the fourth section of the statute had the effect of confining the remedy in such cases to the application to magistrates, and had ousted the courts of law of jurisdiction. But the court said, We are of opinion, that under the 11 Geo. 2 the landlord has an option, where the value of the goods removed does not exceed 50*l.*, whether he will proceed by action of debt in either of the courts at Westminster, upon the third section, or by summary application to two or more justices of the peace under the fourth section, as he shall think most proper, according to particular circumstances of his case. This is clearly a proper suit to be carried into a court of law, rather than to be referred to the summary jurisdiction of the magistrates; for if there be a question of difficulty which we are now called upon to determine, what can be a greater proof than that a court of law ought to determine it with the aid of a jury, and not the magistrates in the county, without any assistance?

jurisdiction given to magistrates under the 11 Geo. 2, does not oust the courts of law of their jurisdiction.[1]

(3) *Appeal from Justices of the Peace to Sessions.*[2]

(4) *Of Pleading the Clandestine Removal.*[3]

XXII. Distraining where no Rent is Due.[4]

XXIII. For Port Dues. *See post*, Port Dues.

XXIV. For Services, Suits, and Reliefs.

(A) *Of Fealty.*[5]

(B) „ *Heriots.*[6]

(C) „ *Courts Leet.* *See post*, Manor.

(D) „ *Courts Baron.* *See post*, Manor.

(E) „ *Customary Courts.* *See* Copyhold, vol. iii. pp. 224–242.

(F) „ *Copyhold Services.* *See* Copyhold, vol. iii. p. 242.

(G) „ *Reliefs.*[7]

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[1] In an action in the superior courts the acts and orders of the tenant are admissible evidence of his fraud, and it need not be proved that a distress was in progress or contemplation; it is enough if it be shown that rent was in arrear and the goods were removed subsequently. *Stanley v. Wharton*, 10 Price, 138; S. C. 9 id. 301. And *see Woodgate v. Knatchbull*, 2 T. R. 154.

Where an action is brought on the third section against the tenant himself for fraudulently removing his goods to avoid a distress, it is not necessary to show an actual participation in the removal, if it be proved to have been with his privity. *Lister v. Brown*, 3 D. & R. 501; S. C. 1 Car. & P. 121. The plea of *nil debet*, or, it seems, of not guilty, is still admissible, and it puts in issue all the allegations of fact which are necessary to make out the offence. *Jones v. Williams*, 4 Mee. & W. 375. *See* also *Rex v. Davis*, 5 B. & Adol. 551.

[2] By 11 Geo. 2, c. 19, ss. 5, 6, persons aggrieved by order of such justices may appeal to the next quarter sessions, who may give costs to either party, and whose determination shall be final: provided that, where the party shall enter into a recognisance, with sufficient surety, in double the sum ordered to be paid, with condition to appear at the quarter sessions, such order shall not be entered against him in the meantime.

[3] A party distraining off the premises under 11 Geo. 2, c. 19, s. 1, is not entitled to give the special matter in evidence under the general issue. *Vaughan v. Davis*, 1 Esp. 257. S. P. *Furneaux v. Fotherby*, 4 Camp. N. P. 136. And where there is the general issue, and special pleas stating such clandestine removal, the plaintiff ought to go into the whole of his case in the first instance. *Rees v. Smith*, 2 Stark. 31.

[4] By 2 Wm. & M. sess. 1, c. 5, if any distress and sale shall be made for rent in arrear and due, when none is in truth due, the owner shall recover double value with costs. As to excessive distress, *see* p. 114.

[5] To fealty, a distress is not only incident of common right, but absolutely inseparable from it. *See* Co. Litt. 151, b; id. 153, a. Bull. Dis. 20.

[6] For heriot custom the lord may seize, but cannot distrain; for heriot service the lord may distrain or seize, at his election. *See* 8 Hen. 7; Bro. Heriot, 7; Plowd. 96, a; Cro. Car. 260; Cro. Eliz. 32. But the latter remedy can only be resorted to where the heriot can properly be deemed a service rather than a rent.

[7] If the relief be by the common law, or by special reservation, the remedy by dis-

XXV. For Taxes and Duties. *See post*, Taxes.

XXVI. „ Tolls. *See post*, Tolls.

XXVII. „ Poor-Rates. *See post*, Poor-Rates.

XXVIII. Church-Rates. *See* Church-Rates, vol. iii. pp. 112, 113.

XXIX. Commutated Tithe Rent-Charge. *See post*, Tithes.

XXX. Excessive Distress.

Field v. Mitchell, 6 Esp. 71.

To constitute an excessive distress it must be disproportionate, and is not proved by showing that one article greatly exceeding the amount due has been taken.[1]

To prove an excessive distress, it was shown that 7*l.* only being in arrear, the distress was made, and goods taken which were valued at 30*l.*, but which, in fact, sold for 10*l.* only. It was contended, that it would be extremely hard to subject a party to an action for taking goods where so trifling an excess in value only appeared.

Lord Ellenborough, C. J. "It is not for every trifling excess that action is maintainable. It must be disproportionate to some excess. There is a distinction between cases where one article can only be taken and where several can be taken. If there be but one thing which can be taken, so that it must be distrained or the party must be without his remedy, though it considerably exceeds the sum due, still no action lies. But if there be several things distrained which appear to be much more than sufficient, the party may resort to this action for an excessive distress."

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tress follows of course; but it is said that, for relief by special custom, distress is not warranted without a prescription. *See* Harg. n. 2; Co. Litt. 93, a.

Relief (*relevamen*, but in Domesday, *relevatio relevium*) signifies a certain sum of money which the tenant, holding by knight's service, grand serjeanty, or other tenure (for which homage or legal service is due), and being of full age at the death of his ancestor, paid unto his lord at his entrance. Mag. Chart. cap. 2; and 31 Eliz. 1, stat. 1.

[1] Distresses ought not to be excessive, but in proportion to the duty distrained for. By 51 Hen. 8, stat. 4, it was enacted, that "distresses should be reasonable after the value of the debt or demand, and by the estimation of neighbours and not by strangers, and not outrageous." And by the Statute of Marlbridge, 52 Hen. 3, c. 4, and confirmed by 28 Edw. 1, stat. 3, c. 12, it is provided that "distresses shall be reasonable and not too great; and that he who taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses:" hence, if the lord distrain two or three oxen for 12*d.*, it is unreasonable. So if he distrain a horse or an ox for a small sum, it is excessive, unless there be no other distress on the land (*see* 2 Inst. 107); and the tenant does not, by entering into an agreement with the landlord respecting the sale of the goods seized, waive his action for an excessive distress. 2 B. & C. 821; 4 D. & R. 539.

There can be no remedy on the Statute of Marlbridge where there is a remedy at the common law; nor, if the plaintiff has recovered in replevin, can he afterwards bring an action on that statute: for an action on that statute is founded on there being a cause of distress, of which the recovery in replevin shows there was none: moreover, in replevin, damages were recoverable for the taking; and a man shall not be permitted to say there was a cause of distress, after he has recovered upon the ground of its being unlawful. *See* Gilb. Dist. 68.

Case, and not trespass, lies for an excessive distress. *Hutchins v. Chambers*, 1 Burr. 579; 2 Kenyon, 204. *Lynne v. Moody*, 2 Stra. 851. Distraining for the whole amount of rent instead of a balance, which has been tendered, is in law an excess. *Carter v. Carter*, 5 Bing. 406; 2 M. & P. 723. In an action for making an excessive distress, the question is, as to what sum the goods seized would have sold for at a broker's sale, not the value to an incoming tenant. *Wells v. Moody*, 7 C. & P. 59. In case for an excessive distress, the question is, whether the goods taken are more than sufficient to satisfy the sum really due, although the warrant may be for a larger sum than is actually due (*Crowder v. Self*, 2 M. & Rob. 190), and only nominal, if any, damages can be recovered. *Taylor v. Henicker*, 12 Ad. & E. 488. *Rogers v. Parker*, 25 L. J. C. P. 220; but see *Ashford v. Smith*, 29 L. J. Ex. 259. An action lies for taking growing crops and beasts when the former would have been sufficient to satisfy the arrears. *Piggott v. Birtles*, 1 Mee. & W. 441. An action for an excessive distress may be brought by a lodger or undertenant, whose goods have been taken, as well as by the lessee himself (Sid. 172; 2 Lev. 107. *Scores v. Dodd*, 2 N. R. 405); and if the lessee, after the distress, enters into an agreement with the landlord respecting

XXXI. Irregular Distress.[1]

the sale and disposition of such distress, or authorises him to dispense with some of the usual forms preparatory to a sale, he does not thereby waive or abandon his right of action for the excessive levy. *Willoughby v. Marshall*, 4 D. & R. 539; 2 B. & C. 821. A plaintiff cannot, under the common count for an excessive distress, show that the defendant had distrained for and sold goods exceeding the rent due, and a count for such cause of action will not be allowed to be added at the trial, where it does not appear to have been a matter in dispute between the parties at the commencement of the action. *Lucas v. Tarleton*, 3 H. & N. 116; 27 L. J. Ex. 246.

A tithe-owner seized, under a distress for 39*l.*, a rick valued 62*l.*, there being smaller ricks on the premises. The tenant being bound to consume the straw on the premises, the tithe-owner sold the rick for 42*l.*, subject to the purchaser's leaving the straw:—*Held*, that this was not an excessive distress; that the tithe-owner was not bound to sell the straw; that the whole rick might be taken; and that a party seizing under a distress is bound only not to take what is manifestly in excess. *Roden v. Eyton*, 6 C. B. 427; 12 Jur. 921; 18 L. J. C. P. 1. In an action for an excessive distress for taking the goods of the plaintiff, it appeared that, of the property taken, part belonged to the plaintiff and part to a third party:—*Held*, that the declaration might be amended by stating the legal distress to have taken place with respect to the goods of the plaintiff and of the third party, and that the plaintiff would be entitled to recover some amount of damages, and that the other party whose goods were taken would also be entitled to maintain an action to recover damages. *Bail v. Mellor*, 19 L. J. Ex. 279. Under a count in the common form, on the Statute of Marlbridge, for an excessive distress, the allegation that the defendant took and distrained the plaintiff's goods does not include the sale of them, and, therefore, under such a count, damages cannot be recovered for the sale as well as the seizure. *Thompson v. Wood*, 3 Gale & D. 518; 4 Q. B. 493; 7 Jur. 303; 12 L. J. Q. B. 175. In an action for excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure, the plaintiff is not entitled to recover the full value of the crops beyond the amount for which the distress ought to have been levied. "The true measure of damage is simply a compensation for the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take during the time of possession; and some compensation for the loss of the absolute ownership and power of disposition for the same time; or if the tenant has replevied, then a compensation for the additional expense and inconvenience of replevying to a greater amount." *Piggott v. Birtles*, 1 Mee. & W. 451. *See* 20 L. J. Q. B. 316; 25 L. J. Ex. 125; 29 id. 259.

[1] At common law, the many particulars which attended the taking of a distress rendered it a hazardous mode of proceeding; for, if any one irregularity was committed, it vitiated the whole distress, and the distrainor became a trespasser *ab initio*. But now it is provided by 11 Geo. 2, c. 19, that where any distress shall be made for any kind of rent justly due, and any irregularity, or unlawful act, shall be afterwards done by the party so distraining, or by his agent, the distress itself shall not be therefore deemed unlawful, nor the party making it be deemed a trespasser *ab initio*; but the person aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage thereby sustained, and no more, in an action of trespass, or on the case, at the election of the plaintiff, provided that where the plaintiff shall recover in such action he shall be paid his full costs of suit, and have all the like remedies for the same, as in other cases of costs: provided also that no tenant or lessee shall recover in any action for any such unlawful act or irregularity, if tender of amends hath been made by the party distraining, or his agent, before such action brought; and in actions against persons entitled to rents, the defendant may plead the general issue, and, if successful, shall have double costs.

Case is the appropriate remedy for an irregular distress. *Wallace v. King*, 1 H. Black. 13. The form of declaration for an irregular distress is given by the C. L. P. Act, 1852, and contemplates the following irregularities:—

1st. *The Distraining more Goods than Necessary.*—*See ante*, p. 114, and *Smith v. Ashford*, 29 L. J. Ex. 259.

2d. *For Distraining more Rent than is Due.*—See *Sells v. Hoare*, 1 C. & P. 59; 1 Bing. 401. Merely claiming or condemning the goods for more rent than was due affords no ground of action, unless they were subsequently sold for such excess, or unless the false representation led to some special damage (which should be stated), such as the tenant being thereby prevented from obtaining sureties to join in a replevin bond. *Tancred v. Leyland*, 20 L. J. Q. B. 316.

3d. *Selling a Distress without giving Notice.*—No notice of distress, we have seen, was necessary at common law. Vin. Abr. Dist. 3. And it is only necessary, under the statute 2 Wm. & M. s. 1, c. 8, to authorise the sale. *Per Parke, B.: Tancred v. Leyland*, 20 L. J. Q. B. 317. A parol notice is insufficient (*Wilson v. Nightingale*, 15 L. J. Q. B. 309; S. C. 8 Q. B. 1034); and one enumerating several goods by name, and then adding, "and all other goods on the premises," only authorises a distress for the goods named. *Kerby v. Harding*, 20 L. J. Ex. 163; S. C. 6 Ex. 234. The notice should express the cause of taking, and the amount of rent in arrear (id.); though it need not state when it became so. *Moss v. Gallimore*, 1 Dougl. 279; *see ante*, p. 107.

By 2 & 3 Vic. c. 71, s. 39, summary jurisdiction is given to the metropolitan magis-

XXXII. Effect of Distress.

Panton v. Jones, 3 Camp. 372.

Submitting to a distress is an acknowledgment of the tenancy.[1]

In an action for use and occupation, as evidence of a title, it was proved that the defendant being in possession of the premises she distrained for arrears of rent; that the defendant did not replevy, and the goods were sold. It was contended that the submission to the distress was no acknowledgment of the tenancy.

But *Bayley, J.*, said he entertained a different opinion.

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trates where the rent does not exceed 15*l.* a-year.

4th. *Selling without previous Appraisement.* — *See* 2 Wm. & M. sess. 1, c. 5, s. 2, and 57 Geo. 3, c. 93. *Yates v. Searle*, 6 Q. B. 283. At least two (*Allen v. Flicker*, 10 Ad. & E. 640) appraisers — of whom the broker cannot be one (*Lyon v. Weldon*, 2 Bing. 334) — duly sworn (*Child v. Chamberlain*, 5 B. & Ad. 1049) before the parish constable (*Kenny v. May*, 1 M. & Rob. 56. *Avenell v. Croker*, M. & M. 172), are necessary. *See ante*, 107.

5th. *Not obtaining the Best Price on Sale.* — It lies on plaintiff to show that the appraised was not the best price. *Walter v. Rumball*, 4 Mod. 390. Loss by the goods at the sale being improperly lotted, and allowed to stand in the rain, may be recovered. *Poynter v. Buckley*, 5 C. & P. 512. So, as a tenant under covenant to consume straw on the premises might, by violating the covenant, sell it off the premises, a landlord who does not sell it when distrained free from that condition is liable to the tenant. *Ridgway v. Stafford*, 20 L. J. Ex. 226; S. C. 6 Ex. 404, *sed qu.?* There is no obligation to sell, as there is to distrain, other things before beasts of the plough. *Jenner v. Yolland*, 6 Price, 5; 2 Chit. R. 167. *See* the stat. 2 Wm. & Mary, c. 5, s. 2; Chitty's Statutes.

6th. *Not Leaving the Overplus after Sale with the Sheriff.*—This is the proper remedy for a mortgagee of the goods to recover the overplus; and he cannot maintain money had and received for it against the landlord, since the latter is not bound to seek him out and pay it over to him (*Yates v. Eastwood*, 20 L. J. Ex. 303; S. C. 6 Ex. 805); but *semble*, the tenant, if the owner, might, after demand, maintain money had, &c. *Anon.* Loft. 201. *Simpson v. Routh*, 2 B. & C. 682; *ante*, p. 109.

7th. *Not giving the Tenant a Copy of the Charges.*—*See* 57 Geo. 3, c. 93, s. 6. Unless the landlord personally interfered in the distress, he is not liable on this count (*Hart v. Leach*, 1 Mee. & W. 560), and unless that is the case, as the damages on it would probably be small, it is not expedient to insert it where the action is against both landlord and broker, as the plaintiff might be compelled to elect at the trial to abandon either it or the other counts; indeed a landlord is not liable for the act of a broker even in seizing a fixture, if he was ignorant of it, though the proceeds of its sale were paid over to him. *Freeman v. Rosher*, L. J. 340; S. C. 13 Q. B. 780.

Besides the above irregularities, an action may be maintained for selling the goods after a tender of the rent, &c. within the five days (*Johnson v. Upham*, 28 L. J. Q. B. 252); and for refusing to restore goods distrained on tender of the rent before impounding (*Loring v. Warburton*, 21 L. J. Q. B. 31), or selling fixtures, 29 L. J. C. P. 273.

[1] In an action for use and occupation, it is no answer that the landlord distrained for the rent, and that the goods, if properly sold, would have been sufficient to discharge the rent. The tenant's remedy, if aggrieved by an under-sale, is by action. *Efford v. Burgess*, 2 M. & M. 23.

To an action on a lease, alleging as a breach non-payment of the rent, the defendant pleaded "as to so much as relates to 150*l.*, parcel of the arrears, that after the same became due, and before action the plaintiff distrained certain goods on the premises, subject to the rent, and sold them for a sum greater than the amount of the arrears, and thereby satisfied and discharged the arrears:" — *Held*, no answer. *Aldridge v. Howard*, 5 Scott, N. R. 623; 4 Man. & G. 921. After a distress of goods of sufficient value to satisfy arrears of rent has been made, and abandoned by the landlord without any cause or excuse, a second distress for the same arrears of rent is illegal, and trover will lie for a conversion of the goods seized and sold under such last-mentioned distress. *Dawson v. Cropp*, 1 C. B. 961; 3 D. & L. 225; 9 Jur. 444; 14 L. J. C. P. 281. Half a year's rent being due and in arrear from a tenant who had previously committed an act of bankruptcy, the landlord put in a distress, and was about to proceed with the sale of the goods seized, when, in consequence of a notice from a creditor of the tenant, stating that he was taking proceedings in bankruptcy against the tenant, and that he thereby warned the landlord not to sell, and threatened to hold him accountable if he did, the landlord withdrew the distress without obtaining payment of his rent. At that time no assignee had been appointed, but the tenant was afterwards declared bankrupt, and the creditor who gave notice was made assignee. The landlord subsequently distrained a second time for the same rent, but the goods were sold under the direction of the assignee, and the proceeds of the sale were paid over to him:— *Held*, that as the landlord had abandoned the first distress without any sufficient excuse for so doing, the second distress was illegal, and that he could not maintain an action against the assignee to recover the proceeds of the goods. *Bagge v. Mawby*, 8 Ex. 641; 22 L. J. Ex. 236.

XXXIII. Extinguishment of Distress.

Davis v. Gyde, 4 Nev. & M. 462.

Taking a promissory note does not extinguish the remedy for rent by distress.[1]

To an avowry for rent in arrear the plaintiff pleaded that he gave a promissory note, which at the time when, &c., had to run, &c., which the defendant received "for and on account" of the rent in arrear. On demurrer,—

The Court held, that the plea in bar is insufficient; that rent is in the nature of a specialty (*Gage v. Aston*, Com. Dig. Administration, C. 2), and is in equal degree with a specialty, although reserved by parol. Then, supposing that this is to be considered in the light of a specialty debt, the question is, whether this promissory note, which is in the nature of a simple contract debt, could be given in evidence in answer to an action on bond or other specialty. Com. Dig. Pleader, 2, N. 46. Upon this there can be no doubt; and in *Hayford v. Andrews* (Cro. Eliz. 697), it was held, that to debt on bond conditioned for payment at a certain day, a plea that the plaintiff gave a longer day of payment was bad. *Mease v. Mease*, Cowp. 47, and the cases there cited, all seem to show that if a claim be on a specialty, the time of payment cannot be extended by parol.

See *Palfrey v. Price*, 3 Price, 572. *Skerry v. Preston*, 2 Chit. Rep. 245.

XXXIV. Pleading a Distress.

Wootley v. Gregory, 2 Y. & J. 536.

Under the general issue in trespass, under the 11 Geo. 2, the defendant may show that a third party distrained.[2]

The plaintiff, in trespass for seizing and taking goods, appeared to be the assignee of an under-lease granted by G., one of the defendants, and no rent appeared to have been paid. The original lease to G. had also come by assignment to the other defendant, who had obtained a new lease from the lessors, and cancelled the old one.

The Court held that upon the general issue, under the 11 Geo. 2, c. 19, s. 19, the defendant might justify as for a distress for the rent due in G.'s right, without showing any express recognition of the act by him; and that the notice having been given in the name of the other defendant did not preclude the defendants from availing themselves of the title under G., in their defence to the action.

XXXV. Of Rescous and Pound Breach. *See post*, Rescous; Pound Breach.

XXXVI. Replevying Distress. *See post*, Replevin.

DISTRIBUTION, Statute of. 22 & 23 Car. 2, c. 10.

I. In General, p. 118.

(A) *To what Property applicable*, p. 118.

(B) *When to be made*, p. 118.

[1] Or suspend it; nor the taking a bond (Bull. N. P. 182, 7th ed.); but a judgment for the arrears may, as it ranks before rent or specialties. *See* 1 Ld. Ken. 370; 3 East, 251. The right to distrain may be taken away or suspended by express or implied agreement. 1 C., M. & R. 696; 3 Lev. 260; 2 Chit. R. 245. *Leery v. Goodson*, 4 T. R. 687. A. distrained for rent due from his tenant B., a livery stable-keeper, and took a pony and carriage belonging to one of B.'s customers. While the broker was in possession the owner, who was ignorant of the distress, was allowed to take his pony and carriage out as usual, the broker believing that he would bring them back: — *Held*, that this was not an abandonment of the distress, and that the owner having brought them back, they were still subject to the distress. 6 Ex. Rep. 234; 6 C. & P. 416; 4 B. & Ad. 413.

[2] And not guilty "by statute," puts in issue the tenancy, the ownership in the goods, and the matter of justification. *Williams v. Jones*, 11 Ad. & E. 643. Pleas justifying a taking, as for a distress at different rents, are not inconsistent. *Smith v. Dixon*, 4 Dowl. P. C. 571. In order to be a good answer, the plea must show that the whole cause of action was covered by the distress. *Lees v. Wright*, 1 D. & R. 391.

(C) *Of the Persons Entitled to*, p. 118.
(D) *By what Tribunal to be Enforced*, p. 119.

II. In Particular, p. 119.

(A) *By the Custom of London. See post*, London.
(B) „ *of York*, p. 119.

III. Of Advancement, p. 119.

(A) *In General*, p. 119.
(B) *By the Custom of London. See post*, London.
(C) „ *of York*, p. 120.

I. In General.[1]

(A) *To what Property applicable.*[2]
(B) *When to be made.*[3]
(C) *Of the Persons Entitled to.*[4]

[1] At common law, the intestate's personal property was distributed by the ordinary, according to his conscience, to pious uses. *See* 3 Mod. 58; S. C. 2 Show. 407; S. C. Camp. 14. But now, by the 22 & 23 Car. 2, c. 10, it is enacted, "that all ordinaries and other persons, by this act enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates amongst the deceased's relatives, provided that this act shall not anyways prejudice or hinder the customs observed within the city of London, or within the province of York, or other places having known and received customs peculiar to them."

[2] All personal property of which the deceased has made no testamentary disposition is distributable; but an estate *pur autre vie* is not distributable. *Oldison v. Pickering*, 3 Salk. 137; Carth. 376; 1 Ld. Raym. 96.

[3] By 22 & 23 Car. 2, c. 10, s. 8, it is enacted, "that no such distribution of the goods of any person so dying intestate shall be made till after one year be fully expired after the intestate's death."

[4] By 22 & 23 Car. 2, c. 10, and 29 Car. 2, c. 10, one-third of the intestate's estate shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives; that is, their lineal descendants. If there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree, and their representatives. If no widow, the whole shall go to the children. If neither widow nor children, the whole shall be distributed among the next of kin, in equal degree, and their representatives. The next of kindred here referred to are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration. And, therefore, by this statute the mother, as well as the father, succeeded to all the personal effects of their children who died intestate, and without wife or issue, in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. 2, c. 17, if the father be dead, and any of the children die intestate, without wife or issue, in the lifetime of the mother, she, and each of the remaining children, or their representatives, shall divide his effects in equal portions. *See* 2 Bl. Com. 515.

Brothers and sisters, on the death of their father, take equally. *Palmer v. Allicock*, 3 Mod. 58; 2 Show. 407; Comb. 14. *Blackborough v. Davis*, 12 Mod. 615. And a brother or sister of the half-blood is equally entitled to take. *Tracy v. Smith*, 2 Lev. 173; 1 Mod. 209; 2 Mod. 205; 11 Vin. Ab. 91. And a posthumous child, born within the year after the decease of the intestate, takes equally with one born before. *See* 2 Freem. 230. So the females of the mother's side take along with the males of the father's side, when in the same degree of proximity to the intestate. *See* 1 P. Wms. 53. But the 22 Car. 2 only extends to brothers and sisters, children of the intestate (*Caldicot v. Smith*, 2 Show. 286), and not to grandchildren. *Pett v. Pett*, 1 Salk. 250.

An aunt and grandmother take in equal proportions (*Blackborough v. Davis*, 12 Mod. 619) with uncles, nephews, and nieces (*see* 1 Kenyon, 296); and if there be no other descendant, the grandfather takes one-half with the widow of the deceased. *See* Mascall, 85. So, if there be no other descendant, the great-grandfathers and great-grandmothers take equally with aunts, uncles, nephews, and nieces; and, if there be no other descendants, great-great-grandfathers

(D) *By what Tribunal to be Enforced.*[1]

II. In Particular.

(A) *By the Custom of London.* *See post*, London.

(B) „ *of York.*[2]

III. Of Advancement.

(A) *In General.*[3]

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and mothers take equally with great-great-uncles, aunts, first cousins, great-great-nephews and nieces. *See* Mascall, 88. But grandfathers, though equal in degree of consanguinity, shall have no share with the brother of the deceased. *See* 3 Atk. 762. And a father-in-law and mother-in-law take nothing, for they fall within the principle that affinity or relationship by marriage, except in the case of the wife of the intestate, gives no title to a share of his property. *See* Mascall, 62.

A widow, as such, cannot take under a limitation to the next of kin of her husband according to the Statute of Distribution. *Cholmondeley v. Ashburton (Lord)*, 6 Beav. 86.

Where an intestate leaves a widow, but no next of kin, the widow is not entitled to the whole of his personal estate, but one moiety belongs to her, and the other to the Crown. *Cave v. Roberts*, 8 Sim. 214.

The wife of a felon convict died intestate, leaving personal property, acquired by her subsequently to her husband's conviction: — *Held*, that such property belonged to the Crown, and not to the next of kin of the intestate. *Coombs v. Her Majesty's Proctor*, 2 Rob. Ec. Rep. 547; 19 Jur. 820. *Reg. v. Whitehead*, 2 M. C. C. R. 181.

By a settlement made on the marriage of E. M., the ultimate limitation of 10,000*l.*, which her father thereby covenanted to pay, was "to such person or persons as at the time of her death should be her next of kin." E. M. died, leaving her husband and a child of the marriage, and her own father and mother surviving: — *Held*, that the father, mother, and child of E. M., were equally her next of kin, and were entitled under the limitation to the 10,000*l.* in joint tenancy. *Withy v. Mangles*, 10 Clark & Fin. 215; 8 Jur. 69.

The distribution of an intestate's estate amongst the next of kin before administration granted, is not an act for the benefit of the estate, so that a person who subsequently takes out administration will be entitled to recover the property, although it was distributed with his assent. *Moryan v. Thomas*, 8 Ex. 302; 17 Jur. 283; 22 L.J. Ex. 152.

[1] Where there is a will a distribution was never ordered by the Ecclesiastical Court; but Chancery does sometimes direct it where the will does not. *Anon.* 1 Salk. 566. *Hughes v. Hughes*, 1 Lev. 233; Carter, 125. The Spiritual court could not compel distribution unless the party died intestate. *Petit v. Smith*, 1 Ld. Raym. 86; and 20 & 21 Vic. c. 77, s. 23, disconnects suits for distribution from the probate and administrative jurisdicti o nleaving them to courts of equity.

[2] If a man be an inhabitant or householder within the province of York, and dying there or elsewhere intestate, and at the time of his death hath a wife, and also a child or children, his goods shall be divided into three parts; whereof the wife ought to have one part, the child or children another part, and the third part — which is called the death's or dead man's part — is distributable by the statute; of which dead man's part, by the statute, the wife shall have one-third, and the other two-thirds shall be distributed amongst the children: so that, dividing the whole into nine parts, the wife shall have four, and the children five. But if by settlement a jointure is limited to the wife, in bar of all her demands, out of the personal estate of her husband, by virtue of the custom, in such case it is as if there were no wife with respect to the customary part; so, if it is in bar of all her demands, by virtue of the said custom, or otherwise, she shall be debarred also of any distributive share by the statute. *See* 1 Vern. 15. And as to the children, if the intestate hath a wife, and a child or children, which child is heir to the intestate, or which children were advanced by the father in his lifetime, in this case it is as if he had no child, and therefore his goods shall be divided into two parts, whereof the wife is to have one part to herself, and the other half is distributable by the statute. *See* Swinb. 220; Wills on Executions, 114.

If the intestate hath neither wife nor child at the time of his death, his personal property shall be disposed of in the course of administration, as falling within the Statute of Distribution.

As to the child's being excluded as being heir, he will be totally barred from receiving any part thereof by the custom, if he should have any real estate by descent or otherwise from his father.

In case a freeman of London shall die within the province, the custom of the city for the distribution of his effects shall prevail, and shall control the custom of the province of York; for the custom of the province is only local, and circumscribed to a certain district, but that of London follows the person, although ever so remote from the city. *See* 4 Burn. Ecc. L. 416.

[3] An advancement is a provision made by

(B) *By the Custom of London.* *See post*, London.
(C) „ *of York.*[1]

DISTRINGAS, Writ of. Abolished by C. L. P. Act, 1852, s. 24, and proceedings in lieu thereof are substituted by sect. 17 of the above statute.

DISTURBANCE. *See* Common, vol. iii. p. 148; Decoy, vol. iii. p. 574; Riot; Way.

DIVIDEND. *See* Bankruptcy, vol. ii. pp. 281, 282, 352, 353, 354, 361, 362.

DIVIDEND Warrants. *See post*, Stock.

DIVORCE. *See* Husband and Wife; Marriage.

DOCK Warrant.[2] *See* Bill of Lading, vol. ii. p. 490; Stoppage in Transitu.

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a father in his lifetime, by such an act (*see* 2 P. Wms. 440) as divests the child of all claim to personal property in its father's possession after his death. *See* 2 id. 445. Hence, if a father purchase for a son an advowson, or any other ecclesiastical benefice, or if he buy him any office, civil or military, these are held to be such advancements, either partial or complete, according to the comparative value of the estate to be distributed. *See* 3 id. 317. So, a provision made for a child by a settlement, either voluntary or for a good consideration, as that of marriage, is an advancement *pro tanto*. *See* 2 id. 440; 2 Vern. 638.

It is not necessary that the advancement should take place in the father's lifetime (*see* 2 P. Wms. 440); and were it only contingent, yet, when the contingency has happened, it shall be considered an advancement. *See* id. 442. But the contingency must be so limited as necessarily to arise within a reasonable time, as where the portion was secured for the daughter, on her attaining the age of eighteen, or on her marriage. *See* id. 440. A child advanced in part, shall bring in her advancement only among the other children, for no benefit shall accrue from it to the widow. *See* 3 Bac. Abr. 77. If a child, who has received any advancement from his father, shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share, unless they bring in his advancement, since, as his representatives, they can have no better claim than he would have had if living. *See* 2 P. Wms. 560.

By this statute, although the heir-at-law shall not abate in respect of the land which came to him by descent, or otherwise, from the intestate; yet, if he hath had an advancement from his father in his lifetime out of the personal estate, he shall abate for it in the same manner as the other children. *See* Com. Dig. Advowson, H. And co-heiresses shall also, it seems, bring in such advancement, not being land, as they may have respectively received from their father, before they shall be entitled to their distributive shares. *See* 4 Burn. E. L. 344; 2 P. Wms. 440. But small inconsiderable sums of money given to a child by the father, or mere trivial presents he may make to the child, as of a gold watch, or wedding clothes (*see* 3 id. 317), or money expended by the father for his maintenance, or given to bind him apprentice, or laid out in his education at school, at the university, or on his travels, shall not be deemed an advancement. *See* 3 Bac. Abr. 76.

[1] In the province of York, the heir-at-law who inherits any land, either in fee or in tail, is divested of all claim to any distribution (*see* 4 Burn. E. L. 409); and however small in value the land may be, in comparison with the personal estate, he is nevertheless excluded (*see* id.); and even although the estate he inherits be only a reversion. (Id.) He is also barred, though the land devolved upon him by settlement made on his father's marriage. Id. 410; 2 Vern. 375. Nor, in case lands held by a mortgage in fee descend to him before redemption, shall he be entitled to a filial portion; but on redemption of the mortgage, and payment of the money to the administrator, it seems he shall be entitled to such distributive share, because then he has nothing by inheritance, nor, in fact, has had any preferment. (Id.) The principles established in regard to advancement in the construction of the Statute of Distribution apply, in general, to such as is pursuant to the custom of this district (*see* 1 Ves. 17); but, as here land as well as money constitutes an advancement, the heir-at-law, under the custom, is excluded by his inheritance of land either in fee or in tail. *See* 2 Vern. 375. Whereas, such inheritance is not barred by the statute, but, as well under the custom as under the statute, younger children, in respect to advancement, are on the same footing. It is essential, in order to the custom of York attaching, that the intestate should be resident, at the time of his death, within the province; but for that purpose, it is immaterial where his estate is situated.

[2] Dock warrants have been held nego-

DOCKS. The 10 & 11 Vic. c. 27, is the Docks Consolidation Act.

DOGS. *See* Animals, vol. i. p. 352; Game.

TOWNSEND v. WATHEN, 9 East, 277.

If the dogs of A. are enticed into traps set in the grounds of B. by the bait placed therein, an action lies against B.

It appeared that the defendant had placed dangerous traps, baited with flesh, in his own ground, so near to a highway, and also to the premises of the plaintiff, that dogs belonging to the plaintiff, some of which were passing along the highway, and others kept in his own premises, were attracted by the scent of the flesh, and thereby injured. An action on the case was instituted against the defendant. The plaintiff had a verdict; but, upon the case being subsequently brought before the court, the tenability of the action was doubted.

Sed per Cur. It appears by the evidence reported, that the traps were placed so near to the plaintiff's court-yard, where his dogs were kept, that they might scent the bait, without committing any trespass on the defendant's wood. Every man must be taken to contemplate the probable consequences of the act he does. And, therefore, when the defendant caused traps, scented with the strongest meats, to be placed so near to the plaintiff's house as to influence the instinct of those animals, and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act. *See* 7 & 8 Geo. 4, c. 8; 8 Mee. & W. 787.

Stealing dog.[1]

By 23 & 24 Vic. c. 96, s. 18, "whosoever shall steal any dog shall, on conviction thereof before two justices of the peace, either be committed to the common gaol or house of correction, there to be imprisoned, or to be imprisoned and kept to hard labour for any term not exceeding six months, or shall forfeit and pay, over and above the value of the said dog, such a sum of money, not exceeding twenty pounds, as to the said justices shall seem meet; and whosoever, having been convicted of any such offence, *either* against this *or any former* act of parliament, shall afterwards steal any dog, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour."

Second offence.

Possession of stolen dogs.[2]

By 23 & 24 Vic. c. 96, s. 19, "whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such a dog to have been stolen, or such skin to be the skin of a stolen dog, shall, on conviction thereof before two justices of the peace, be liable to pay such sum of money, not exceeding twenty pounds, as to such justices shall seem meet; and whosoever having been convicted of any such offence, *either* against this *or any former* act of parliament, shall afterwards be guilty of any such offence as in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour."

Second offence.

Taking money to restore dogs.[3]

By 23 & 24 Vic. 96, s. 20, "whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour."

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tiable and transferable, so as to vest the property in goods deposited in the docks in the holders of the warrant (*Zuinger v. Samuda*, 1 Moore, 12); but the contract is not transferred by the indorsement and delivery of the warrant. Dock warrants are "documents of title to goods" within the 24 & 25 Vic. c. 96.

[1] This clause is taken from the 8 & 9 Vic. c. 47, s. 2.

[2] Ibid. s. 3.

[3] Ibid. s. 6, and extended to Ireland.

DOMICILE. *See* Alien; Legacy.

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I. Domicile remains until Abandoned, or a New One Gained.[1]

[1] Domicile is the place where a man has his home. The residence of a party for forty days constitutes a domicile, as to jurisdiction, in Scotland. When there are two houses which appear equally entitled to the appellation of domicile, the person is liable to both jurisdictions; but a person may have no domicile, as a soldier, or travelling merchant, in which case a personal citation renders him subject to the jurisdiction of the judge within whose jurisdiction he is cited. *See* Bell's *Scotch Law Dict.;* Story's *Conflict of Law*, s. 40.

Where a native of Scotland, having lived the greater part of his life in India, on his return from thence took up his temporary residence in England, but without any settled intention where he should fix his abode, and died during a visit to a relation in Scotland, the court held that he had acquired no new domicile, but that his Indian domicile subsisted at his death. There is no difference between an original and an acquired domicile: a domicile can only be lost by an abandonment *animo et facto*, and necessarily remains until a subsequent one is acquired. A domicile in India, therefore, being in legal effect a domicile in the province of Canterbury, the law of England was to be applied in the distribution of his personal estate. *See* 5 Mad. 379.

So a temporary residence in a foreign country for a specific object will not change a party's domicile. *Bruce v. Bruce*, B. & P. 229, n. *Dalhousie v. M'Douall*, 7 Clark & Fin. 817. A domicile once acquired remains until finally abandoned, or a new one gained. To constitute a change of domicile there must be both *animus et factum*. Residence in a country for any length of time is insufficient, without these requisites, to constitute a change of domicile; and where a question between a reverter to the domicile of origin and a domicile in another country is *in equilibrio*, the domicile of origin will prevail. *Craigie v. Lewin*, 7 Jur. 519.

A Scotchman came to England at the age of sixteen, and remained in the English naval service until his death in 1848:—*Held*, that he had not lost his domicile of origin. *Brown v. Smith*, 15 Beav. 444; 21 L. J. Chanc. 356. The mere declaration of intention to change a domicile without an actual change of residence is inoperative to create a new domicile. (Id.) To constitute a new domicile, there must be not only the *factum* of residence in a place, but the *animus manendi*. (Id.)

A. was born and educated in England, and for a time held a commission in the army. In 1835 he sold out, married an Englishwoman, and went to reside abroad. He travelled about to different places, but from 1846 until his death (in 1860) he resided either at Boulogne or St. Germain-en-Laye, in France. He periodically visited his brother in England, and sent his eldest son to be educated in this country. In 1846 he made his will in the English form; but in 1848 he executed a copy of it according to the law of France, and at the same time wrote a memorandum, in which he stated that he did so by reason of some doubts which had lately arisen as to the validity of wills made in the English form by persons residing and dying abroad, and that he had no intention to reside permanently away from England. All his property was in England, except some furniture in his house at St. Germain:—*Held*, that he had not lost his domicile of origin, and that his will made in English form was entitled to probate. *West, In Goods of*, 6 Jur. N. S. 831.

A. was born in England, and at the age of nine accompanied his father to Jersey, where he resided partly with his father, and at times with an uncle, for eleven years. He being still under age, entered the navy, and was borne on the books of some one of her Majesty's ships of war until he died. The father continues to live in the same island:—*Held*, that at

II. New Domicile, how Acquired.[1]

the time A. went to sea, his domicile was that of his father, namely, at Jersey, and that, as he never afterwards acquired a new one, that was his domicile when he died. *Patten, In Goods of*, 6 Jur. N. S. 151. A man can have only one domicile for the purpose of succession. His domicile of origin prevails until he has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile. *Crookenden v. Fuller*, 5 Jur. N. S. 1222; 29 L. J. Prob. 1; 1 L. T. (N. S.) 70. A domicile will not be lost by a constrained residence in a foreign country. *D'Orleans (Duchess), In Goods of*, 1 S. & T. 253; 5 Jur. N. S. 104; 28 L. J. Prob. 129.

[1] In order to acquire a domicile, there must be actual residence in the place chosen, which must be the principal and permanent residence of the party. *Dalhousie v. M'Douall*, 7 Clark & Fin. 817. The mere declaration of intention to change a domicile, without an actual change of residence, is inoperative to create a new domicile. *Brown v. Smith*, 15 Beav. 444; 21 L. J. Ch. 356. To constitute a new domicile, there must be not only the *factum* of residence in a place, but the *animus manendi*. (Id.) In 1819, a Sardinian came to England, and became attached to the Sardinian embassy. In 1821 he was dismissed, but he continued to reside ten years in England. He was then for three years *chargé d'affaires* in London, and for three years minister in Holland. In 1837 he was appointed envoy extraordinary and minister plenipotentiary to England, and retained this office until his death, in 1846: — *Held*, upon the evidence of his declaration and acts, that he was domiciled in England. *Heath v. Samson*, 14 Beav. 441. A testator whose *domicilium originis* was Ireland, where he inherited considerable estates, abandoned such, and, by a long residence in England, acquired an English domicile. In 1836 he sold his house and furniture, and broke up his establishment in England, and went to reside in France, where he bought and furnished a house, in which he resided permanently (cohabiting with a Frenchwoman) to the period of his death, in 1849, with the exception only of occasional visits of short duration in England for purposes of business relating to his estates in Ireland, and his property in the English funds: — *Held*, that the domicile was French, and was not affected by his having expressed an intention to return to England, in an event which never happened, or of his having on one occasion, when in in England, executed a will according to the English form and law, or from the circumstance that the bulk of his property, at his death, was in the English funds. *Anderson v. Laneuville*, 9 Moore, P. C. C. 325.

A man can only have one domicile for the purpose of succession. His domicile of origin prevails until he has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile.

Where issue is joined on the question of domicile, the burthen of proof is on the party setting up the abandonment of the domicile of origin. The fact that a will is made in execution of a power does not exempt it from the general rule that probate cannot be granted of an instrument unless it is duly executed as a will in conformity with the law of the domicile of the testator: —*Semble*, that a will made in a foreign country in conformity with its laws by a Frenchman, or foreigner domiciled in France, is valid by the law of France. *Crookenden v. Fuller*, 29 L. J. 1 Prob. & Matr.; 5 Jur. N. S. 1222.

The circumstances necessary to produce a change of domicile are considered in the case of *Hoskins v. Matthews*, 2 Jur. N. S. 196; 25 L. J. Ch. 689, L. J. Questions of change of domicile depend both upon the acts and the intention of the party, and in considering them, the acts, the motives, the state of the family and fortune, and the health of the party, may all have to be taken into account. *Per Turner, L.J.* id. The state of a person's health may be such as to render a permanent residence in a foreign country so far compulsory that it will not effect a change of domicile; but where the state of his health is such that such residence is not determined by necessity, but merely by choice, founded on the consideration of the foreign residence being more beneficial to his health, a change of domicile will be effected. (Id.)

An English gentleman, long before his death, took up his abode in a house he had purchased in a foreign city, set up his establishment there, centered his fortune, so far as it admitted of locality, there, lived there with such of his children as were not at school or out in the world, and destined that place as their future residence; from thence he went and habitually returned. He died in the country where he had purchased the house, having made a will in the language of that country, but not effectual, for disposing of his property there, and a will in the English form, giving all his other property which was personal: — *Held* (affirming the decision of *Wood, V. C.*, but *Knight Bruce, L. J.*, dissenting), that the domicile was foreign. (Id.)

A testator had a Scotch domicile of origin; in 1807 he sailed from England for the East Indies. The vessel was wrecked, and he was taken prisoner, and confined at Verdun till 1814; in that year he was released. In 1815 he went to India, and set up in business. In 1835 he made his will at Calcutta, describing himself as of that place, and appointing two persons resident at Calcutta his executors. In 1836 he sailed from

India in a vessel bound for an English port, and died *in itinere*: — *Held*, that the domicile at the time of his death was Indian, and, therefore, no legacy duty was payable upon his personal property. *Lyall v. Paton*, 25 L. J. Ch. 746: V. C. K. A testator had an Irish domicile of origin. In 1790 he went to India, and entered into partnership in business there. In 1800 the partnership was dissolved. In 1802 he came to England, and took an assignment of a leasehold house in London, and purchased the furniture of the house. In 1811 he sold the house and furniture, and went to reside at Clifton. In 1812 he went to Madeira for his health; and, in 1814, he there made his will. In 1815 he went to Lisbon, by advice, and died there: — *Held*, that the domicile of the testator at the time of his death was English, and that the Crown was entitled to legacy duty on the bequests in his will. *Attorney-General v. Fitzgerald*, 25 L. J. Ch. 743. An English officer in the navy, upon half-pay, went to India, and remained there as a merchant for ten years, when he died, having acquired a very large fortune there. He always received his half-pay, and, from time to time, applied for and received fresh leave of absence: — *Held*, that he was domiciled in India, and that legacy duty did not attach upon his property there. *Cockerell v. Cockerell*, 2 Jur. N. S. 727; 25 L. J. Ch. 730: V. C. K.

A., a domiciled Englishman, in the military service of the East India Company, came to England from India in 1829, upon furlough. By the rules of the service he was liable at any time to be recalled to India on active service. In 1838 he acquired the brevet rank of major-general in her Majesty's service. While on furlough, and in 1832, he went to France, where he resided with his wife and daughter, and died there in 1855. He occupied lodgings during that time in Paris. He also purchased a burial-place for his wife, who died, and who was buried there; and purposed to be buried there himself. His residence in Paris was not continuous, as he frequently came to England and Scotland upon visits; but he had no permanent abode in either of those countries, nor did he give up his lodgings in Paris during those visits. All his property, except the furniture of the lodgings, was in England: — *Held*, first, that it was not competent to A. to acquire a domicile in a foreign state, as such domicile was incompatible with the obligation and duty of an officer in the military service of the Queen and the East India Company. *Hodgson v. De Buchesne*, 12 Moore, P. C. C. 285. *Held*, secondly, that the presumption of law arising from his profession and *status* was against any intention by A. to abandon his original domicile and acquire a new domicile in a foreign state, as it would be inconsistent to presume an intention contrary to his duty as an officer in the military service of her Majesty and the East India Company. (Id.) *Held*, thirdly, that England being the domicile of origin of A., the *onus probandi* was upon the party who alleged he had abandoned it, and had acquired another domicile, to establish that proposition. *Held*, fourthly, that the presumption raised by A.'s residence in France of his intention to acquire a French domicile, was rebutted by the facts proved in evidence. (Id.) The presumption at law is against the intention to abandon the domicile of origin. (Id.) Length of residence in a foreign country, *per se*, according to time and circumstances, raises a presumption of intention to abandon the domicile of origin, and to acquire a new domicile, but such presumption may be rebutted by facts showing that there was no such intention. (Id.) A change of domicile is not to be inferred from the fact of a lengthened residence in a foreign country. To constitute a change of domicile, it must be *animo et facto*. (Id.) Conversations and declarations, unless accompanying acts, are the lowest species of evidence of a change of domicile; they must not, however, be discarded, but must be duly weighed together with the rest of the evidence. *Crookenden v. Fuller*, 1 S. & T. 441; 5 Jur. N. S. 1222; 29 L. J. Prob. 1. For the purpose of succession, where there is an undoubted domicile of origin continued through many years, such domicile will be held to have been retained, unless there is evidence of an intention to abandon it, accompanied by acts sufficient to found the acquisition of a new domicile. The burden of proof is on the party who impugns the domicile of origin. (Id.) A domiciled Irishman, by enlisting in a regiment in her Majesty's service, the head-quarters of which are in England, does not thereby acquire an English domicile. (Id.) M., a Scotchman, went to Wigan at an early age, where he realised a fortune, and retired from business in 1841. In 1837 he married an Englishwoman. He became a councillor and a magistrate of the borough. In 1842 he purchased a small property in Scotland, with several adjoining pieces of ground. In 1848 his house at Wigan, which was his freehold, was taken by a railway company, and after some unsuccessful endeavours to obtain another residence there, or in the neighbourhood, he repaired one which had been occupied by his father-in-law, and after residing there a few months removed the whole of his establishment to Scotland, to a mansion that he had erected there, leaving a housekeeper in charge of the house at Wigan. He frequently thereafter visited Wigan in company with his wife, and also retained his public offices there. His wife died, and was buried in Scotland, in 1851. An action was brought by the nearest of kin of the wife against M., claiming under a Scotch law at that time existing, one-half of his personal estate, on the ground that he was a domiciled Scotchman at the date of his wife's death: — *Held*, that he had acquired, and retained, a domicile in England. *Maxwell v. M'Clure*, 6 Jur. N. S. 407; 8 W. R. 370; 2 L. T. (N. S.) 65,

III. Domicile of Husband that of his Wife.[1]

H. L. That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home. *Lord v. Colvin*, 4 Drew, 366; 5 Jur. N. S. 351; 28 L. J. Ch. 361; 7 W. R. 250; 32 L. T. 377.

To constitute an acquired domicile, two things must concur — residence, and the intention of making it the home of the party. (Id.) Slighter evidence is required to warrant the conclusion that a man intends to abandon an acquired domicile, and to resume his domicile of origin, than is necessary to justify the conclusion that he means to abandon his domicile of origin, and to acquire a new one. (Id.) It requires stronger and more conclusive evidence to justify the court in deciding that a man has acquired a new domicile in a foreign country than in one where he is not a foreigner. (Id.)

A person born in Scotland, resided many years in India, returned to Scotland, and lived in his paternal house for six years; then resided in France for six years, and died at Boulogne, on his return from a journey to Scotland, where he had been for some weeks. He was said to have preferred France, and to have been annoyed by his neighbours in Scotland. He had apartments at Paris, and furnished them handsomely. He sent for his horses, but not for his furniture or plate, from Scotland. He never let his paternal estate, but attended to the management of it: — *Held*, that he had not abandoned his Scotch domicile. (Id.)

A. was born in Scotland; when a young man he went to the East Indies, where he remained above ten years in the Company's service; he then returned to Scotland, and lived in Edinburgh, where he put his name on the books of the municipality, married, took a house, entered into business as a partner in a banking-house, and became a member of various societies there established. At the end of a few years he left Edinburgh in anger; the banking business had come to an end, and he took off his name from the books of the municipality, and of the various societies, and declared his intention never to return to "Auld Reekie." He lived in London, first in lodgings, and then in houses hired for different periods, lectured on oriental literature, and endeavoured thereby to increase the sale of some books which he had written on the Hindostanee language. At the end of some years he went to Paris, to avoid some annoyances in London, but never made any such declarations with respect to London as he had made with respect to Edinburgh; and he left his works in London, and likewise some ornamental furniture, which he desired a friend to keep for him till his "return." He died in Paris, having just before made a will in the English form: — *Held*, that he had lost his Scotch, and obtained an English domicile. *Whicker v. Hume*, 7 H. L. Cas. 124; 4 Jur. N. S. 933; 28 L. J. Ch. 396.

Officers of the East India Company's service attaining the rank of colonel, being allowed to reside in Europe subject to orders to return, can acquire a domicile of residence there, notwithstanding they are liable to be called upon to return to India. *Attorney-General v. Pottinger*, 30 L. J. Ex. 284.

[1] By marriage, the domicile of the husband becomes that of the wife. *Dalhousie v. M'Donall*, 7 Clark & Fin. 817.

A married woman, whose husband was domiciled in England, had power by any writing under her hand, or by her last will, to appoint, as if she were sole and unmarried, a sum of money. She resided in Paris, apart from her husband, for many years before her death, without having any legal separation or divorce. She disposed of the fund by three several papers, signed by her. They were all unattested: — *Held*, that, as the wife of a domiciled Englishman, she could not obtain a foreign domicile, and that the papers, though valid as a will in France, were invalid in England. *In re Daly*, 27 L. J. Ch. R. 751.

And even where he has been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she cannot on that ground acquire a separate ground of domicile for herself. *Yelverton v. Yelverton*, 1 S. & T. 574; 29 L. J. Mat. Cas. 34. A. intermarried with B., a major in her Majesty's Royal Artillery, at Edinburgh, in April, 1857; and in August, 1857, the marriage was celebrated in Ireland, according to the rites of the Romish Church. In April, 1858, B. deserted A. at Bordeaux, and had since that time been stationed with his regiment in Edinburgh. B.'s domicile of origin was in Ireland, and he had never acquired a domicile in England. A. petitioned for restitution of conjugal rights, and described herself as resident in England: — *Held*, that as there was no proof of B. having acquired an English domicile, and A.'s domicile was that of her husband, the court had no jurisdiction to entertain the suit. (Id.) A wife cannot acquire a domicile separate and distinct from her husband. *Dolphin v. Robins*, 5 Jur. N. S. 1271; 29 L. J. Prob. 11, H. L.

A. & B. were married in England, and resided here for many years; differences then arose between them, and by agreement they lived separate from each other. B. had the power to dispose of certain property by deed or will. In February, 1854, A. went to Scotland, and committed adultery there; he resided there till the middle of June in that year. While he was so residing there,

IV. Personal Property follows *Situs* of the Owner.[1]

V. Legitimacy of a Child determined by Law of Domicile of Parents.[2]

VI. Meanings of word "Domicile."[3]

VII. Effect of Law of Domicile on Will of Married Woman.[4]

VIII. Where Domicile Questioned, burden of Proof lies on Party setting up Abandonment of Origin.[5]

B. instituted a suit against him for a divorce, on the ground of adultery. Pending the suit, she made a will in favour of C. A decree of divorce was pronounced. She married C., and went with him to France, where she lived till her death. In June, 1856, she made a testamentary paper, revoking all former wills: — *Held*, that the divorce was inoperative; that she had no domicile but that of her husband, A., and that, consequently, the French will was void. (Id.) A *feme covert* living apart from her husband has no power to change her domicile. *In re Daly*, 25 Beav. 456; 27 L. J. Ch. 751.

[1] Personal property having no *situs* of its own, follows the domicile of its owner. *Thomson v. Advocate-General*, 12 Clark & Fin. 1. The persons named as trustees and executors in the will of a domiciled Scotchman having declined to act, his next of kin obtained letters of administration of his personal estate in England from the proper ecclesiastical court there, and afterwards consented to the appointment by the Court of Session in Scotland of other persons as trustees and executors in place of those named in the will, with all the powers that had been thereby given to them. These trustees, so appointed, brought an action in the Court of Sessions against the administratrix, calling on her to transfer to them the personal estate possessed by her under the administration, and offering her a full release from liability: — *Held*, by the Lords (reversing the decree of the Court of Session), that the personal estate in England must be administered there by the administratrix by virtue of the letters of administration. *Preston v. Melville (Viscount)*, 8 Clark & Fin. 1. The law of the domicile of a deceased person governs the succession to his personal estate, wherever situated; but the estate itself must be administered in the country in which possession is taken of it under lawful authority. (Id.) The courts of Scotland have no power to appoint persons to administer personal property in England, that power being exclusively vested in the English ecclesiastical courts, and of that the Scotch courts are bound to take notice. (Id.) A *feme covert*, domiciled with her husband in Scotland, was entitled to the produce of a real estate in England, directed to be sold. Upon proof that, by the law of her domicile, her personal estate vested absolutely in the husband, and that she had no equity to a settlement, the estate, being unsold, was directed to be conveyed to the husband in fee. *Hitchcock v. Clendinen*, 12 Beav. 534; 19 L. J. Ch. 238. The ordinary presumption that a wife is legally domiciled where the husband is, fails when there has been a sentence of divorce. *Williams v. Dormer*, 2 Rob. Ec. Rep. 505; 16 Jur. 366, Ar.

[2] The legitimacy of a child is determined by the law of the country where its parents are domiciled at the time of the conception and birth of the child, and not by the law of the country where the child is born. *In re Wright*, 2 Kay & J. 595; 2 Jur. N. S. 465; 25 L. J. Ch. 621. A child who is born illegitimate cannot afterwards be made legitimate by the parents domiciling themselves and intermarrying in a country where, if they had been domiciled there at the time of the birth, such child would have been legitimate. (Id.) Accordingly, where a domiciled Englishman became the father of a child by a Frenchwoman, and afterwards having gained a domicile in France (where the subsequent marriage of the parents, with acknowledgment of their children born previously to the marriage, renders those children legitimate), married the mother, and acknowledged the child: — *Held*, that the child was not legitimate. (Id.)

[3] The word *domicile* has many meanings, according as it is used with reference to succession and other purposes. A person may have retained a foreign domicile for many purposes, and yet may be domiciled in England, so as to give jurisdiction to the court for Divorce and Matrimonial Causes; but if he has never resided in England except temporarily, and is not there at the time of the commencement of the suit, he is not subject to its jurisdiction. *Yelverton v. Yelverton*, 1 S. & T. 574. For observations on the various definitions of domicile, see *Whicker v. Hume*, 4 Jur. N. S. 933.

[4] The testamentary law of the domicile at the time of death does not govern the will of a married woman, made in execution of a power. *Alexander, In Goods of*, 8 W. R. 451, Prob. And the ordinary presumption that a wife is legally domiciled where the husband is, fails where there has been a sentence of divorce. *Williams v. Dormer*, 2 Rob. Ec. Rep. 505; 16 Jur. 366.

[5] Where issue is joined on the question of domicile, the burden of proof is on the party setting up the abandonment of domicile of origin. *Crookenden v. Fuller*, 5 Jur. N. S. 1222; 29 L. J. Prob. 1; 1 L. T. (N. S.) 70. C., between 1844 and 1858, when she died, had no house in this country. By reason of her delicate health she always, during that period, passed the winter months

IX. Public Company may have Two Domiciles.[1]

X. Act to Amend Law of Domicile.

By the 24 & 25 Vic. c. 121, entitled "An Act to Amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident Abroad, and of Foreign Subjects whilst resident within Her Majesty's Dominions." It is enacted by sect. 1, "whenever her Majesty shall, by convention with any foreign state, agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty by any order in council to direct, and it is hereby enacted, that from and after the publication of such order in the *London Gazette* no British subject resident at the time of his or her death in the foreign country named in such order shall be deemed under any circumstances to have acquired a domicile in such country, unless such British subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council) a declaration in writing of his or her intention to become domiciled in such foreign country, but without having so resided and made such declaration as aforesaid shall be deemed, for all purposes of testate or intestate succession as to moveables to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid."

No British subject dying in a foreign country to be deemed to have acquired a domicile, unless resident there for one year immediately preceding his or her death, &c., and for all purposes of testate or intestate succession shall retain the domicile possessed at the time of going to reside in such foreign country.

By sect. 2, "after any such convention as aforesaid shall have been entered into by her Majesty with any foreign state, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the *London Gazette* it shall be and is hereby enacted, that no subject of any such foreign country, who at the time of his or her death shall be resident in any part of Great Britain or Ireland, shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed and deposited with her Majesty's Secretary of State for the Home Department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland, or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession."

No foreign subject dying in Great Britain or Ireland to be deemed to have acquired a domicile, unless resident therein for one year immediately preceding his or her death.

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abroad, returning usually to England for the summer months, which she spent with different friends; sometimes, however, she remained abroad throughout the year. From 1844 to 1855 she had no fixed or permanent residence abroad, but in that year she assisted her son, by a loan of money, to purchase a property at Cannes, in the south of France, and arranged to occupy the upper part of a house built thereon, at a fixed rent. In this house she resided during the two following winters. In February, 1857, she entered into an agreement with her son, by which he undertook to build on his property at Cannes a new house for her use, she paying a large portion of the expense, and advancing to him the rest on loan without interest. This house was not completed when she died. In July, 1857, she came to England for the express purpose of executing a will, in such a manner that her property should not be distributed according to the law of France. In this will she describes herself of two places in England, but makes no mention of France. At the time she executed this will, she destroyed a former will, but carefully preserved a codicil to it, in which she had expressed a desire to be buried in Devonshire. Her declarations were proved by both parties:—*Held*, that the burden of proof of the issue was on the plaintiff, and that he had failed to show, as was necessary, that the deceased had not only acquired a domicile different from that of her origin, but also had manifested, and carried into execution, an intention of abandoning such former domicile, and of taking the new one as her sole domicile. (Id.) Where a domicile has been acquired, the *onus* of proof, to be deduced from all the facts and circumstances of the case, lies on the person who desires to show that that domicile has been changed. *Maxwell v. M'Clure*, 6 Jur. N. S. 407; 8 W. R. 370; 2 L. T. N. S. 65, H. L.

[1] A public company may have two domiciles, and places of business may, for the purpose of founding jurisdiction, be treated as places of domicile, and service there is sufficient. *Carron Co. v. Maclaren*, 5 H. L. Cas. 416.

Who this act shall not apply to.

When subjects of foreign states shall die in her Majesty's dominions, and there shall be no persons to administer to their estates, the consuls of such foreign states may administer.

By sect. 3, "this act shall not apply to any foreigners who may have obtained letters of naturalisation in any part of her Majesty's dominions."

By sect. 4, "whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty, by order in council, to direct, and from and after the publication of such order in the *London Gazette* it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent shall immediately apply for, and shall be entitled to obtain from the proper court, letters of administration of the effects of such deceased person, limited in such manner, and for such time, as to such court shall seem fit."

DONATIO Causâ Mortis.[1]

DONATIVE. *See* Advowson, vol. i. p. 223; Mandamus; *Quare impedit.*

DORMANT Partner. *See* Partnership.

DOUBLE Insurance. *See* Insurance.

DOUBLE Rent and Value.[2]

[1] Is a gift in prospect of death — a death-bed disposition — viz. when a person, in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered, to another the possession of any personal chattel to keep, in case of his decease. *See* Jac. Dict., Donatio Causâ Mortis. To constitute a valid *donatio causâ mortis*, 1st, the subject of the gift must be delivered by the donor; and, 2d, the gift must be conditional, depending on the event of death, and the property is not vested absolutely till after death. *See* 2 Swanst. 97.

A *donatio causâ mortis* must be free from the donor's control (*Hawkins v. Blewitt*, 2 Esp. 663), and cannot be constituted by a mere parol gift without delivery (*Irons v. Smallpiece*, 2 B. & A. 551), which delivery must be actual, and not symbolical; consequently if a donor direct a person to deliver certain things to the donee after his death, and in the meantime to deposit them in a chest, of which the donor keeps the key, the donee is not entitled to the gift (*Bunn v. Markham*, Holt, N. P. 352; S. C. 7 Taunt. 225; S. C. 2 Marsh. 532); and whether, if the donor say to the donee, "Fetch it away, I will make you a present of it," passes a *donatio causâ mortis*, is unsettled. *Speatley v. Wilson*, C. P. Holt, 10. It has been said that the delivery of a mortgage security is a good *donatio causâ mortis*, and the heir or executor is bound to give effect to it. *Duffield v. Hicks*, 1 Dowl. N.P. 1; and 1 Bligh, N. S. 499; *see infra*. Where the obligee a few days before her death indorsed an assignment of a bond, without consideration, and not under seal, and delivered it to the assignee:—*Held*, not to operate as a *donatio causâ mortis*, nor a good gift *inter vivos;* and that the court could not carry it into effect as an imperfect gift. *Edwards v. Jones*, 1 Mylne & C. 226. The mere delivery of a mortgage-deed cannot pass the property *inter vivos;* and the court could not compel the donor to complete his gift by executing a deed:—*Held*, therefore, that the gift not being completed, there was no valid *donatio causâ mortis* of the mortgage, even where accompanied with the gift of the bond: in the latter instance the mortgagor might resist the payment of the bond without a conveyance of the estate, which the donor could not be compelled to execute. *Duffield v. Elwes*, 1 Sim. & Stu. (Ch.) 243. A life policy may be the subject of a *donatio causâ mortis* (*Witt v. Amiss*, 30 L. J. Q. B. 318); and there may be a *donatio causâ mortis* of a bond, bill (27 Bea. 309), or note (id.); and, where given in extremity of sickness and in contemplation of death, it is to be inferred that it should be held as a gift only in the event of death. *See* 3 Mad. 184.

[2] By 11 Geo. 2, c. 19, s. 18, it is enacted, "that in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises, and shall not accordingly

deliver up the possession thereof at the time in such notice contained, the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforth pay to the landlord double the rent or sum which he, she, or they should otherwise have paid, to be levied, sued for, and recovered, in the same manner as single rent." By the effect of which provision landlords are now, in all such cases, entitled to make distress for the double rent so incurred. *See* 1 Black. 533; Brad. Dist. 104; Bull. on Dist. 115.

By the 4 Geo. 2, c. 28, s. 1, it is enacted, "that if any tenant or tenants for life or lives, or years, or persons coming in under or by collusion with them, hold over any lands, tenements, &c., after the determination of their estates, after demand made, and *notice in writing given* for delivering the possession thereof by the *landlord* or the persons having the reversion or remainder therein, or his agent thereunto lawfully authorised, such person or persons so holding over shall pay to the person so kept out of possession at the rate of double the yearly value of the lands, tenements, &c. so detained, for so long a time as the same are detained, to be recovered by action of debt, whereunto the defendant afterwards shall be obliged to give special bail."

The chief difference between the statutes is, that by the 4 Geo. 2 the notice (which must be in writing) proceeds from the landlord; and by the 11 Geo. 2, it is the act of the tenant (where the notice may be by parol). And the former imposes double value by way of penalty, and not as rent; and the latter still treats the party as tenant and recognises him by that name, which the other statute does not.

As to Double Rent.—The 11 Geo. 2, as to double rent, extends to a parol demise; and a verbal notice to quit, by the tenant, is sufficient to make him liable for double rent. *Timmins v. Rowlison*, 3 Burr. 1603; S. C. 1 Black. 533. The notice must fix a time; therefore, a notice to quit *as soon as he can get another situation*, is too vague. *Farrance v. Elkington*, 2 Camp. 591. But a second notice, given after the expiration of the first, is no waiver of the first. *Messenger v. Armstrong*, 1 T. R. 53. The demand of possession to entitle the landlord to double rent need not be made before, or within any fixed time after, the ending of the tenancy. *Cobb v. Stokes*, 8 East, 358. Accepting single rent after the notice is a waiver of the right to double rent. *Doe d. Cheney v. Batten*, Cowp. 248. But the landlord cannot recover his single rent for the time he recovers the double. *Cobb v. Stokes, supra.* Though this statute merely gives double rent where the notice proceeds from the tenant, it seems that the same rule holds when it is given by the landlord. *Messenger v. Armstrong*, 1 T. R. 53. Double rent only attaches whilst the tenant is in possession, and he is not bound to give a notice to quit. *Booth v. Macfarlane*, 1 B. & Adol. 904. A notice to quit on a certain day, "or at such time as the holding shall expire," is sufficient. *Hirst v. Horn*, 6 Mee. & W. 393.

As to Double Value.—The 4 Geo. 2, as to double value, does not apply to weekly tenants. *Lloyd v. Rosbee*, 2 Camp. 453. Nor to those who hold over under a fair claim of right. *Wright v. Smith*, 5 Esp. 203. The 4 Geo. 2 is a remedial law (*Wilkinson v. Colley*, 5 Burr. 2694), and stands in the place of, but is more beneficial than ejectment. *Cutting v. Derby*, 2 Black. 1077. The notice to quit may be given before or after the expiration of the term. Id. 1076. If the notice to quit be in writing, it is of itself a sufficient demand, within the words of the statute, "after demand made and notice in writing given." *See* 5 Burr. 2694. And a person appointed by the Court of Chancery to receive rents, &c. is an agent *lawfully authorised* within the meaning of the act; and, therefore, a notice given by him is good. *Wilkinson v. Colley, supra.* So, where notice to quit is given to the tenant, a *feme sole*, and she afterwards marries, the landlord may maintain debt for double value against the husband, without serving another notice upon him. *Lake v. Smith*, 1 N. R. 174. One tenant in common may sue for his moiety of double value. *Cutting v. Derby*, 2 Black. 1075. The landlord does not waive his right to double value by bringing an ejectment. *Soulsby v. Neving*, 9 East, 310. And where there was a declaration — first, for double value; secondly, for use and occupation, and the plaintiff received certain rent paid into court upon the second count, the court held he did not thereby waive his title to the double value. *Ryall v. Rich*, 10 East, 48. An authority to a receiver as such, and to bring ejectments, &c., authorises him to sue for double value. *Poole v. Warren*, 3 Nev. & P. 693. To enable a party to distrain for double value, a regular notice to quit must have been given. *Johnstone v. Huddlestone*, 4 B. & C. 922; S. C. D. & R. 392. In an action for double value, the plea *nil debet* puts all the facts in issue. *Jones v. Williams*, 4 Mee. & W. 375; S. C. 7 Dowl. P. C. 207. An action for double value under 4 Geo. 2, c. 28, s. 1, for holding over after notice to quit, is not supported by a notice that the landlord requires the tenant to give up possession *at twelve at noon on, &c.* (the day when the tenancy was determinable), *at which time* the landlord will attend to receive the keys and rent; and that in the event of the tenant not *so surrendering*, the landlord will demand 7*s.* daily rent (a rate more than double the original rate of rent), until he can obtain legal possession. For the requisition to deliver up the premises at noon is premature, and insufficient as a notice to determine the tenancy (*Page v. More*, 15 Q. B. 684), although a notice to quit, when regular, operates also as a demand of possession under the statute, without a more specific demand. *Semble*, that a notice to the above defect is not equivalent to a demand. (Id.)

DOWER.

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In an action for double value under the 4 Geo. 2, c. 28, the declaration stated that the plaintiffs were seised in their demesne as of freehold in right of the plaintiff, Caroline, during her life, of a messuage held by the defendant as tenant to the plaintiffs for a year, terminable on the 11th of October, 1844, the reversion thereof belonging to the plaintiffs, in right of Caroline; that the plaintiffs, on the 1st of September, gave notice in writing, and demanded of the defendant to deliver up possession of the premises to the plaintiffs on the 11th of October, which the defendant refused to do. *Plea, Nil debet* by statute. The defendant became tenant to Mr. H., one of the plaintiffs, for one year, from the 11th of October, 1843, to the 11th of October, 1844, of a house, farm, &c., at a certain rent, and occupied the same as tenant to him for that year. The contract for this tenancy was by parol, and was made by the defendant expressly with Mr. H. alone, in his own right, and Mrs. H. was no party thereto. A demand and notice in writing for delivering up of the possession of the premises: —*Held*, that the two plaintiffs were not entitled to recover in this joint form of action, the defendant not being the tenant of the two plaintiffs, and the reversion not being in the two plaintiffs, but in the husband alone, and that neither the averment of the tenancy, nor the words "to the plaintiffs," in the allegation of the tenancy, could be rejected. *Harcourt v. Wyman*, 3 Ex. 817; 18 L. J. Ex. 453.

An action for double value against a tenant holding over after notice from his landlord, under 4 Geo. 2, c. 28, may be brought in the county court by virtue of sect. 58 of 9 & 10 Vic. c. 95. *Wickham v. Lee*, 12 Q. B. 521; 12 Jur. 628; 18 L. J. Q. B. 21.

Arrears of rent and double value, recoverable under sect. 1 of Geo. 2 c. 28, are not "a cause of action" within the meaning of sect. 63 of 9 & 10 Vic. c. 95; and, therefore, may be made the subject of two suits in the county court. (Id.)

The remedy for double value, given by the 4 Geo. 2, c. 28, s. 1, against a tenant wilfully holding over after the determination of the term, and after demand and notice in writing is given only to the lessor or landlord, or the person entitled to the reversion, and not to one to whom the landlord has granted a fresh lease, to commence from the expiration of the former term, such new lessee having no estate, but a mere *interesse termini*. *Blatchford v. Cole*, 5 C. B. (N. S.) 514; 5 Jur. N. S. 412; 28 L. J. C. P. 140. Where, therefore, A., who had let premises to B., under a letting which expired on the 25th of March, 1858, and had required B., by notice in writing, to deliver up possession on that day afterwards, but before the end of such tenancy demised the premises to C. from such 25th of March, 1858, and B. held over without paying rent to, or otherwise recognising C. as landlord: —*Held*, that C. was not the proper person to sue B. for double value under the 4 Geo. 2, c. 28, s. 1. (Id.)

An action under 4 Geo. 2, c. 28, s. 1, against a party for holding over land, is maintainable only where the holding over is wilful and contumacious, and not where the party has any fair and *bonâ fide* ground of defence to the landlord's claim. *Swinfen v. Bacon*, 6 Jur. N. S. 1257; 9 W. R. 105; 3 L. T. (N. S.) 440, Ex. Ch.; 6 H. & N. 184; 30 L. J. Ex. 33.

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I. Definition and Origin of.[1]

[1] Dower in cases not within 3 & 4 Wm. 4, c. 105, *post*, p. 135, is, where the husband of a woman is seised of an estate of inheritance, and dies, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life. *See* Litt. s. 36; 2 Bl. Com. 129.

Dower is called in Latin by the foreign jurists *doarium;* but by Bracton and English writers, *dos*, which, among the Romans, signified the marriage portion which the wife brought to her husband: but, with us, is applied to signify that kind of estate to which the civil law had nothing that bore a resemblance; nor, indeed, is there anything, in general, more different than the regulations of landed property, according to the English and Roman laws. Dower out of the lands seems also to have been unknown in the earlier part of our Saxon constitution; for, in the laws of King Edmond, the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one-half of the lands, with a proviso that she remained chaste and unmarried. *See* Somner. Gavelkind, 51; Co. Litt. 33; Bro. Dower, 70; as is usual also in copyhold dowers, or free bench. Yet writers (*see* Wright, 192) have ascribed the introduction of dower to the Normans, as a branch of their local tenures, though we cannot expect any feodal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system by the Emperor Frederick II., who was contemporary with our King Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom; since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals. However this be, the reason which our law gives for adopting it is a very plain and sen-

II. Different Kinds of Dower.[1]

III. General Requisites of.

(A) *Marriage.*[2]

(B) *Seisin of the Husband.*[3]

(C) *Death of the Husband.*[4]

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sible one — for the sustenance of the wife and the nurture and education of the younger children. *See* Bract. 1, 2, s. 39; Co. Litt. 30; 2 Bl. Com. 129.

[1] Formerly there were five kinds of dower, but now the first and second are only in use.

1st. *Dower by the common law*, which is a third part of such lands or tenements whereof the husband was to be seised in fee-simple, or fee-tail, during the coverture; and this the widow is to enjoy during her life.

2nd. *Dower by the custom*, which is that part of the husband's estate to which the widow is entitled, after the death of her husband, by the custom of any manor or place, so long as she lives sole and chaste; and this is more than one third part; for, in some places, she shall have half the land, as by the custom of gavelkind; and, in divers manors, the widow shall have the whole during her life, which is called her free bench; but, as custom may enlarge, so it may abridge dower to a fourth part. Co. Litt. 33.

3d. *Dower ad ostium ecclesiæ;* at the church door, made by the husband himself immediately after the marriage, who named such particular lands of which his wife should be endowed; and, in ancient times, it was taken, that a man could not, by this dower, endow his wife more than a third part, though of less he might; and, as the certainty of the land was openly declared by the husband, the wife, after his death, might enter into the land of which she was endowed, without any other assignment. Co. Litt. 34; Litt. s. 39. This is abolished by 3 & 4 Wm. 4, c. 105, s. 13.

4th. *Dower ex assensu patris*, which is only a species of the dower *ad ostium ecclesiæ*, which, likewise, was of certain lands named by a son, who was the husband, without the consent of his father then living, and always put in writing as soon as the son was married; and, if a woman thus endowed, or *ad ostium ecclesiæ*, after the death of her husband, entered into the land allotted her in dower, and agreed thereto, she was concluded to claim any dower by the common law. *See* Litt. ss. 40, 41. This is also abolished by 3 & 4 Wm. 4, c. 105, s. 13.

And, lastly, *Dower de la pluis belle*, which was where the wife was endowed with the fairest part of her husband's estate.

[2] One of the circumstances necessary to dower is marriage, which marriage must be between persons capable of contracting together, and duly celebrated; for it is a maxim of the law, *ubi nullum matrimonium ibi nulla dos* (*see* 1 Inst. 32, a); and, although the marriage be had before the parties are of sufficient age to consent, yet, if the wife be past the age of nine years at the time of her husband's death, she shall be endowed, of what age soever her husband be, although he were but four years old. And *Lord Coke* observes, that although *consensus non concubitus facit matrimonium*, and that a woman cannot consent before twelve years, nor a man before fourteen; yet this inchoate and imperfect marriage, from which either of the parties may at the age of consent disagree, shall entitle the wife to dower: therefore it is accounted in law, after the death of the husband, *legitimum matrimonium quoad dotem*. *See* 1 Inst. 33, a; 1 Cru. Dig. 164. It has been stated, that though a marriage be voidable, yet if it be not avoided in the lifetime of the parties, it cannot be annulled after; and if a marriage *de facto* be voidable by divorce, whereby the marriage might have been dissolved, and the parties freed *a vinculo matrimonii*, yet, if the husband die before any divorce, then (for that it cannot after be annulled) the wife *de facto* will be endowed. *See* 1 Inst. 336; 1 Cru. Dig. 164.

It has been said, that the fact of marriage cannot be tried by a jury, but only by a bishop's certificate, upon the plea of *ne unques accouple in loyal matrimony;* because the direct jurisdiction in questions concerning the legality of marriage belongs to the ecclesiastical courts, and the sentences of those courts on this head are in general conclusive to the temporal courts. *See* Bract. 302, a; Dyer, 368, b.

A woman married in Scotland, not in evasion of the laws of England, is dowable of lands in England, and the validity of such marriage is triable by a jury. *Ilderton v. Ilderton*, 2 H. Black. 145.

[3] Formerly it was essential to the existence of dower that the husband during coverture should be seised in fee-simple, fee-tail general, or as heir in special tail, the wife being more than nine years old. 2 Saund. 45; O. N. 5. But now, by 3 & 4 Wm. 4, c. 105, s. 3, this is no longer necessary.

[4] The death of the husband is, of course, essential to the existence of dower. 1 Inst. 33, b. It seems to have been the old law that, where it could not be made to appear positively that the husband was dead, as, where he was absent beyond seas, and no intelligence of him could be obtained, the wife might recover dower conditionally that, if he did return from beyond seas, she should render back her dower to the feoffee of the husband without suit, and receive the

IV. Parties entitled to.[1]

V. What Subjects of.

Moody v. King, 2 Bing. 447; S. C. 10 Moore, 233.

Under a devise to A. B., and if no issue, then to the heir at law:— *Held*, that A. B.'s wife was entitled to dower.[2]

On a devise to W. F. and his heirs for ever, charged with an annuity to testator's wife, and, if W. F. should have no child or issue, the lands to become the property of the heir-at-law, subject to such legacies as W. F. might leave by will to any of the younger branches of the family. In a case sent by the Vice-Chancellor —

The Court held, that the widow of W. F. was entitled to dower out of the devised premises; with a *cesset executio* during the existing terms to which they were subject.

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profits in the meantime. *See* Hughes, Writs, 159; Bract. 302, pl. 2. This question of death, when brought in issue on a writ of dower, is not triable by jury, but by the court *per testes*. *See* Moore, 14. It is said in the old books, the wife of a man who is banished by abjuration, or by act of parliament, shall recover her dower in his lifetime, for this is a civil death. *See* Jenk. Cent. 1, c. 4; Co. Litt. 133, a; 3 Bulst. 188; Moore, 851.

[1] All women who are natural born subjects, and have attained the age of nine years, are entitled to dower, although their husbands be but four years old. And *Lord Coke* says, if a man marries a woman only seven years old, and afterwards aliens his land, and the wife attains the age of nine, and then her husband dies, she shall be endowed. *See* 1 Inst. 33, a.

Alien women, generally, are not capable of acquiring dower, and this, though married to Englishmen. *Wall's (Countess of) case*, 6 M. P. C. C. 216; 12 Jur. 145. By the 8 Hen. 5, all alien women, married to Englishmen by license from the king, are entitled to have dower in the same manner as Englishwomen.

The disqualification of alienage may also be removed, either by denization or naturalisation: but as to the effect of these two modes there is an important distinction; for, in the former case, if the husband aliens the land before the wife is denizened, she will not be entitled to dower; "because," says *Lord Coke*, "her capacity and possibility to be endowed came by the denization." *See* Co. Litt. 33, a; 13 Co. 23; Jenk. Cent. 1, c. 2.

It seems that a queen consort, though an alien, is entitled to dower by the law of the crown. *See* Co. Litt. 31, b.

The profession of Judaism by the wife is a disqualification to her enjoyment of dower. *See* Co. Litt. 31, b; Jenk. Cent. 1, c. 2; 3 Hen. 6, 55.

By 6 Rich. 2, st. 1, c. 6, it is enacted, that whenever any woman is ravished that is stolen, and afterwards consents to live with such ravisher, she shall be *ipso facto* disabled from having dower.

So adultery amounts to a forfeiture of dower. *Hetherington v. Graham*, 6 Bing. 139; 3 M. & P. 399.

The wives of particular persons are also entitled to dower; as the wife of an abator, or disseisor, or discontinuee (*see* Park. 37); or tenants in common, or coparceners; for, a seisin of the freehold and inheritance, in any particular share, is sufficient to confer a title of dower to the extent of the share of each tenant. *See* Co. Litt. 371; Litt. s. 45; 1 Roll. Abr. 676; 3 Lev. 84. But the wife of a joint-tenant is not dowable. *See* Park. 38.

It has been said, the wife of an idiot shall be endowed. *See* Co. Litt. 30, b. But *Sir W. Blackstone*, in 2 Com. 130, is of opinion that the law would be otherwise now, on the ground of the decision in *Morrison's case* there cited, that an idiot, being incapable of consent, cannot contract marriage. *See post*, Marriage. It was, however, doubted, in 1 V. & B. 140, whether it was not essential to have a sentence of the Ecclesiastical Court, declaring such marriage void.

The wife of an alien, we have seen, is not entitled to dower, unless married by the king's special license (*see* 2 Saund. 46, a); for, although he has a capacity to purchase lands, he can only hold them for the benefit of the Crown. *See* Jenk. Cent. 1, b. 2; Co. Litt. 31, a. So the wife of a feoffee to uses executed under the stat. of Hen. 8, is not dowable. *See* 2 Saund. 46, n. p.

[2] The wife is entitled to dower of all real hereditaments, whether corporeal or incorporeal, unless there be some special custom to the contrary. Hence, a widow is endowable of an advowson in gross or appendant. *See* 1 Cro. Jac. 621; F. N. B. 148; Co. Litt. 332, a. So, of common in gross or appurtenant. *See* W. Jones, 315. So, of an equity in redemption in fee. *See* 2 Saund. 46, n. p. So, of tithes, since the 32 Hen. 8. *See* id. b. n. p. So, of an use, since the 27 Hen. 8. *See* 2 And. 75. And the same rule applies to manors. *See* Godb. 135; Gouldsb. 37; rent-services, *see* Perk. s. 345; rent-charges or secks, *see* Co. Litt. 32, a; Perk. 347; franchises of an honour, *see* Cro. Jac. 622. So, of all liberties and profits savouring of the realty (*see* F. N. B. 18), wherein the husband is seised of an estate of inheritance, as a fishery. *See* Co.

VI. What not Subjects of.[1]

Litt. 32, a; offices; Style. Pre. Reg. 122; Thel. Dig. 67; F. N. B. 18; as bailiff, or parker, *see* 12 Edw. 3; Dow. 90; Co. Litt. 32, a; F. N. B. 8. *See* 21 Edw. 3, 57; Co. Litt. 32, a; F. N. B. 8. Custody of the gaol of Westminster Abbey. *See* Co. Litt. 32, a. So, of a fair. *See* 15 Edw. 3; Dow. 81; Co. Litt. 32, a; market, *see* Edw. 2; Dow. 157; Gilb. Uses, 371; F. N. B, 8; dovehouse, *see* Co. Litt. 32, a; fines, heriots, *see* id.; profits of courts, *see* id.; shares in the navigation of the river Avon, *see* 1 Ves. jun. 652. So also the widow is entitled to dower out of all estates in fee-simple whereof her husband is seised, or in tail general or special, if her issue be capable of inheriting them. *See* Litt. s. 53; 1 Inst. 40, a. And dower is an incident so inseparably annexed to an estate tail, that it cannot be restrained by any proviso or condition whatsoever; and though the estate tail should determine by the death of the husband without issue capable of inheriting it, yet the wife shall be endowed, because dower is a condition *tacitè* annexed to the gift of every estate tail. *See* Litt. s. 53; 1 Inst. 224, a; Cro. Eliz. 280. So the wife is dowable of a qualified fee as long as it continues (*see* 1 Saund. 260); therefore, in the case of a limitation to A. and his heirs, tenants of the manor of Dale, the widow of A. would be entitled to dower. And the same rule is applicable to a base fee; so that, if a tenant in tail conveys his estate by fine to A. and his heirs, by which he acquires an estate to him and his heirs as long as the tenant in tail has heirs of the body, the wife of A. will be entitled to dower against her husband's heirs. *See* Plowd. 557; 1 Saund. 260. So, the widow is entitled to dower out of trust estates. *See* 2 Saund. 46, n. p.

The widow is dowable of a mill. *Gilpin v. Cookson*, 1 Lev. 182. And mines wrought at any time during coverture, whether or not the succeeding owner continues to work them; *secus* of mines not opened. *Stoughton v. Leigh*, 1 Taunt. 402. So of the capital messuage or mansion to baronies, unless it be a barony by tenure, the wife is entitled to dower. *Gerard v. Gerard*, 1 Salk. 253; S. C. 1 Ld. Raym. 72; S. C. 5 Mod. 64. And the wife of a tenant for life, with remainder for years, and remainder to A. in tail, shall be endowed. *Bate's case*, 1 Salk. 254; S. C. Lutw. 277; S. C. 1 Ld. Raym. 326. So if an estate be conveyed to A. B., to such uses as he shall appoint, and in default of appointment, to his own use, the wife's title to dower attaching, but may be subsequently defeated by the exercise of such power. *Ray v. Pung*, 5 B. & A. 561.

A widow concurred in a partition of her husband's estate, and released a moiety allotted to the other tenant in common from her dower; the other moiety was conveyed to the trustees of her husband's will: — *Held*, that she was entitled to dower out of the entirety of the latter moiety. *Reynard v. Spence*, 4 Beav. 103.

Powers of, or trusts for sale, created by will over real estate, are not — as leasing powers have been held — inconsistent with a widow's right to dower. *Bending v. Bending*, 3 Kay & J. 57; 3 Jur. N. S. 535; 26 L. J. Ch. 469. Nor is her claim affected by any direction as to the distribution of the proceeds. (Id.)

There is no rule as that, where a testator's widow is entitled under his will to what would exceed her dower, she is thereby put to her election.

Where a testator, by his will, directed his trustees to sell "all his freehold and copyhold estates, wheresoever situate," and gave his widow half of the proceeds, and also half of all his personal property, except articles specifically bequeathed to her: — *Held*, that she was not bound to elect between her dower and the benefits given her by the will. (Id.)

[1] Having seen what property is chargeable with dower, it becomes essential to consider what is not subject to dower. The widow is not dowable of copyhold estates (see *Chapman v. Sharpe*, 2 Show. 186), unless by custom. *See* 2 Saund. 46, n. So, estates held with other persons in joint-tenancy are not subject to dower. *See* 1 Cru. Dig. 173. And an estate in dower, being a continuation of the husband's estate, is, therefore, only incident to estates of inheritance, not to estates which the husband holds for his life. And it is not only necessary that the husband should have an estate of inheritance to entitle the wife to dower, but the estate must also be *simul et semel* in him. *See* 1 Salk. 254; Ca. Temp. Hard. 13. So, a widow is not dowable of a wrongful estate (*see* 1 Inst. 31, b; F. N. B. 149); as where a man, having title to lands, enters, and disseises the tenant, and dies seised, and his heir enters, by which he is remitted to the ancient right, the widow of the disseisor is not entitled to dower, because her husband's estate was wrongful. (Id.) So, a widow is not dowable of lands assigned to another woman in dower. *See* 1 Inst. 31, a; 4 Co. Rep. 121. And the widow was never allowed dower of a use; nor is she now entitled to dower where an estate is conveyed to a man by way of mortgage. *See* 1 Cru. Dig. 174.

An estate for life to W., remainder to J. S. and his heirs, for the life of W., remainder to the heirs male of the body of W., the wife of W. shall not be endowed. *Duncomb v. Duncomb*, 3 Lev. 437. So there is no dower of a tenement. *Kent v. Kerry*, 1 Stra. 625.

The legal estate of a property being vested in A., for the benefit of himself and B., in equal moieties, he mortgaged it unknown to B. B. afterwards paid off the mortgage, and had the legal estate conveyed to him,

VII. Act for Amendment of Law of Dower, 3 & 4 Wm. 4, c. 105.

(A) *Meaning of Words in Act.*

By sect. 1 it is enacted, "that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall, in this act, except where the nature of the provision, or the context of the act, shall exclude such construction, be interpreted as follows; (that is to say,) the word 'land' shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing."

(B) *Widows entitled to Dower out of Equitable Estate.*

By sect. 2 it is enacted, "that where a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, other than an estate in joint tenancy, then his widow shall be entitled in equity to dower out of the same land."[1]

(C) *Seisin not necessary to give Title to Dower.*

By sect. 3 it is enacted, "that when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to

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subject to such equity of redemption as the lands were subject to:—*Held*, that there was not such a perfect union of the legal and equitable estate in B.'s moiety of the estate as to give his widow a title to the dower. *Knight v. Frampton*, 4 Beav. 10.

A party died in 1830, having vested in him a mortgage in fee, and the lapse of time and circumstances were such as to render it very improbable that any party could now establish any right to the equity in redemption:—*Held*, nevertheless, that the widow was not entitled to dower. *Fluck v. Longmate*, 8 Beav. 420.

Where a testator, by will, made a provision for his wife, who was married to him before 1834, but did not declare that the provision was to be in bar of dower:—*Held*, that the wife was not dowable out of freeholds which the testator had devised to trustees, with a discretionary power of sale, and power to let from year to year in the meantime. *Taylor v. Linley*, 5 Jur. N. S. 701.

[1] And this act is applicable to gavelkind lands. *Farley v. Bonham*, 30 L. J. Ch. 239.

The equitable right of dower entitles a widow to costs, if it is disputed by the party to whom the estate has been sold by the heir-at-law. *Fry v. Noble*, 20 Beav. 598; 24 L. J. Ch. 591; 25 id. 144.

H. devised to trustees her freehold premises, situate at B., in trust to receive the rents, and after providing for repairs, &c., and applying part of them towards the maintenance of F. S., to let the residue accumulate until F. S. should attain twenty-one, and then to pay such accumulation to him: but if he should die under such age, without issue living at his decease, &c., "then such accumulations" should be applied for the benefit of the person to whom, and in like manner and form as, the premises were limited; and when F. S. should have attained twenty-one, then the trustees were to stand possessed of the premises in trust for him in fee, but if he should not leave any issue living at his decease, &c., then the premises were to be held in trust for A. S. in fee; and if she should not leave any issue, &c., then over. F. S. attained twenty-one, intermarried with E. S., and died intestate, and without ever having had issue:—*Held*, that upon the death of F. S. without issue, A. S. took an equitable estate in fee, determinable in the event of her dying without issue, and that E. S., the widow of F. S., was entitled to dower, notwithstanding that the executory devise overtook effect. *Smith v. Spencer*, 2 Jur. N. S. 778.

A husband was seised in fee, subject to a trust term to secure life annuities and to pay him half the surplus rent:—*Held*, that his widow was entitled to have her dower set out at once. *Sheaf v. Cave*, 24 Beav. 259.

Under the 3 & 4 Wm. 4, c. 105, a widow has no right, as against the heir-at-law of her deceased husband, to be indemnified in respect of a mortgage created by the deceased. *Jones v. Jones*, 4 Kay & J. 361.

dower out of the same, although her husband shall not have recovered possession thereof, provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced."

(D) *No Dower out of Estates disposed of.*

By sect. 4 it is enacted, "that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will."[1]

(E) *Priority to Partial Estates, Charges, &c.*

By sect. 5 it is enacted, "that all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower."[2]

[1] Mr. Hayes, in his introduction to Conveyancing, vol. i. p. 302, 5th ed. observes:— "The essential alteration effected by this act consists in conferring upon the husband the power of disappointing his wife of her dower by any disposition to be made either *inter vivos* or by will, his disposition to the extent of the estate, interest or charge conveyed or created, being declared effectual against the right of dower, or by his express declaration negativing the right of dower, to be inserted either in the *deed* of conveyance of the land to him, or in any other *deed* to be executed by him, or in his will (ss. 6, 7), or impliedly, by devising to the wife *any* land, or *any* estate or interest in any land out of which she would be dowable (see *Marston v. Roe*, 8 Ad. & E. 14; 2 Nev. & P. 504); and it is observable that such a devise would exclude her from dower out of *all* the lands of which he may die seised in tail or in fee (s. 14). As the clause rendering a declaration by will effectual seems to contemplate lands *devisable* by the husband (s. 7), a question may be raised whether it extends to entailed lands or not?" "The operation of the act is so far limited by the concluding section (s. 9) as to leave wholly unaffected the dower (*i.e.* the rights of all claimants in respect of the dower) of every *widow* married on or before the 1st of January, 1834 (*i.e.* every woman married on or before that day, and being or becoming a widow). In short, women married on or before that day are remitted, for all purposes connected with the dower, to the old law (2 Sug. V. & P. 11th ed. 545; and *see* 2 Sug. P. 7th ed. 33). This saving clause, which continues to a large class of wives the old provision, and to conveyancers their old devices for evading it, will have the effect of prolonging the practice of inserting limitations to prevent dower in purchase deeds and in wills devising estates in fee; or where the purchaser or devisee has a wife living, to whom he was married on or before the given day, are still requisite." "Indeed, to prevent the necessity of inquiring for the purposes of title into the fact and time of marriage, it will be advisable in most cases to insert the uses, commonly introduced before the passing of the act, until time may be presumed to have worn out the class of wives within the saving; even then it may be proper to retain the power, which enables the owner to convey by appointment simply. The power had also, till lately, the more questionable merit, of enabling him on a sale or mortgage to confer a title paramount to the claims of his judgment creditors (*Doe d. Wigan v. Jones*, 10 B. & C. 459; 5 M. & R. 563. *Turnstall v. Trappes*, 3 Sim. 300), notwithstanding that the purchaser or mortgagee had actual notice of the judgment, and whether the judgment was obtained *in invitum* or not. *Eaton v. Sangster*, 6 Sim. 517; *Skeeles v. Shealy*, 8 id. 153. The 1 & 2 Vic. c. 110, ss. 11, 13, has extended the remedies of the judgment creditor to lands over which the debtor shall, at the time of entering up the judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit; and though this enactment has been modified in favour of purchasers by the 2 Vic. c. 11, s. 5, and 3 & 4 Vic. c. 85, yet such modification places the protection to be derived for an appointment upon an equality with that ordinarily afforded on general principles of equity, by a prior legal estate acquired without notice. *See* 2 Sug. Vend. & P. 541." The same learned author then proceeds to notice (p. 306) two of the principal doubts which have been raised as to the effect of the above statute, viz. 1st. Whether a title to the dower is within the Fines and Recoveries Act; 2d. Whether the husband's declaration will exclude the wife's dower out of lands acquired after the 1st January, 1834, where the marriage took place on or before that day; showing very satisfactorily that these doubts are without foundation, and that the words of the 3 & 4 Wm. 4, c. 74, s. 77, are sufficient to comprehend the former case, while the language of the 14th section of the above statute, though not free from obscurity, is sufficiently clear to confine the operation of the husband's declaration, in the latter case, to women married *after* the 1st January, 1834.

[2] By the 3 & 4 Wm. 4, c. 104, freeholds and copyholds of a deceased are assets for the payment of debts:— *Held*, that notwith-

(F) *Dower may be Barred by Declaration in Deed.*

By sect. 6 it is enacted, "that a widow shall not be entitled to dower out of any land of her husband, where, in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land."[1]

(G) *So by Declaration in Husband's Will.*

By sect. 7 it is enacted, "that a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when, by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to a dower out of such land, or out of any of his land."[2]

(H) *Shall be subject to Restrictions.*

By sect. 8 it is enacted, "that the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid."

(I) *Devise to Widow bars Dower.*

By sect. 9 it is enacted, "that where a husband shall devise any land out of

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standing the above section the widow's right to dower or free bench has still priority over mere creditors of a deceased. *Spyer v. Hyatt*, 20 Beav. 621; 1 Jur. N. S. 315.

[1] In a purchase of earlier date than the 4 & 5 Wm. 4, c. 105, the usual limitations to bar dower were expressed to be to the intent that the then present, or any future wife of the purchaser, might not be entitled to dower:—*Held* by *Knight Bruce, L. J., dubitante Turner, L. J.*, that this was a sufficient declaration to exclude the dower of a widow who was married to the purchaser after the passing of the act. *Fry v. Noble*, 7 De Gex, M. & G. 687; 2 Jur. N. S. 128. Dower of a woman whose marriage was since 1st January, 1834:—*Held*, following the above case, not excluded by the ordinary limitations to uses to bar dower in a conveyance before the 4 & 5 Wm. 4, c. 105, *Clarke v. Franklin*, 4 Kay & J. 266. And in order to prevent a woman having dower out of lands purchased by her husband, a declaration contained in the deed of conveyance that she shall not be dowable is sufficient under the above statute, and the deed need not be executed by the husband. *Fairley v. Tuck*, 3 Jur. N. S. 1089; 27 L. J. Ch. 28.

Dower of a woman married after the Dower Act, 3 & 4 Wm. 4, c. 105, out of an estate made subject to dower by that statute:—*Held*, not to be excluded by a declaration against dower contained in a conveyance prior to the act. *Fry v. Noble*, 20 Beav. 598; 1 Jur. N. S. 767; 24 L. J. Ch. 591. Affirmed on appeal, 2 Jur. N. S. 128; 25 L. J. Ch. 144. In 1827, freeholds were conveyed to A. B., a married man, to the usual uses to bar dower, "to the intent that his then present, or any future wife, might not be entitled to dower." In 1834 the Dower Act passed, giving dower out of estates thus limited (s. 2), but allowing the right to be defeated by a declaration against dower in the conveyance (s. 6), and providing that the act should not extend to any widow married before 1834, or give to any deed previously executed the effect of defeating any right of dower. A. B. contracted a second marriage in 1838, and died seised:—*Held*, that the declaration in the conveyance did not defeat the second wife's right to dower out of the estate. (Id.)

But where by a settlement made on the marriage of an adult female it was declared that, in consideration of the intended marriage, and "for providing a competent jointure and provision of maintenance for" the wife and issue of the marriage, the father of the husband had paid him 3000*l.*; and that the husband had given a bond for the payment of 2000*l.* six months after the marriage, to be settled on trusts for the benefit of himself, his wife, and the issue of the marriage. During the coverture the husband bought certain lands, which he subsequently sold to a purchaser, from whose devisees the defendant purchased with notice of the settlement. The husband died without satisfying the bond. On a bill by the wife for dower out of the lands so sold:—*Held*, that her right was barred by the settlement, and that she had no lien on, or right to resort to, the lands for the satisfaction of the amount due on the bond. *Dyke v. Rendall*, 2 De Gex, M. & G. 209; 21 L. J. Ch. 905.

[2] Where a testator by will made a provision for his wife, who was married to him before 1834, but did not declare that the provision was to be in bar of dower:—*Held*, that the wife was not dowable out of freeholds which the testator had devised to trustees, with a discretionary power of sale, and power to let from year to year in the mean time. *Taylor v. Linley*, 5 Jur. N. S. 701.

which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will."[1]

(J) Aliter *Gift or Bequest of Personal Estate.*

By sect. 10 it is enacted, "that no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will."

(K) *Agreement not to Bar may be Enforced.*

By sect. 11 it is provided always, "that nothing in this act contained shall prevent any courts of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands or any of them."

(L) *Legacies in Bar of entitled to Preference.*

By sect. 12 it is enacted, "that nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies."[2]

(M) *Dower* ad Ostium Ecclesiæ *and* ex Assensu Patris *abolished.*

By sect. 13 it is enacted, "that no widow shall hereafter be entitled to dower *ad ostium ecclesiæ*, or dower *ex assensu patris.*"

(N) *Act not to extend to Widows Married before the* 1*st of January*, 1834.

By sect. 14 it is enacted, "that this act shall not extend to the dower of any widow who shall have been or shall be married on or before the 1st of January, 1834; and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said 1st of January, 1834, the effect of defeating or prejudicing any right to dower."

VIII. Assignment of.

Doe v. Nutt, 2 C. & P. 430.

Before assignment, ejectment does not lie for dower.[3]

An action of ejectment was brought by the lessor of the plaintiff, who was the widow of a person who had been seised in fee of the premises in question.

Garrow, B. "I am clearly of opinion that an ejectment does not lie for dower before it is assigned."—Nonsuit.

See 23 & 24 Vic. c. 126, s. 26, *post*, p. 141.

[1] So that a gift out of lands of which she would be dowable would bar her right in all the lands. Sug. V. & P. 548, 11th ed. Formerly the effect of such a gift, with an intention to bar dower (*Ayres v. Willis*, 1 Ves. sen. 230. *Strahan v. Sutton*, 3 id. 249), would have been to put the widow to her election. *Reynard v. Spence*, 4 Beav. 103. See *Harrison v. Harrison*, 1 Keen, 765; 1 Powell on Dev. by Jar. 447; 1 Roper's Husb. & W. 577, 2d. ed. See *Marston v. Roe*, 8 Ad. & E. 28, where it was mooted whether a will made in contemplation of marriage by the then intended husband could, under this section, bar the wife's dower, he not being then her husband.

[2] In equity, such legacies are considered as the price of the widow's dower, and she is entitled to a preference to other legatees. *Blower v. Morrett*, 2 Ves. sen. 421. *Burridge v. Braddyl*, 1 P. Wms. 127. *Heath v. Dendy*, 1 Russ. 543. But where the testator leaves no real estate she has no such priority. *Acey v. Simpson*, 5 Beav. 35.

[3] The widow has no estate in the lands of her husband until assignment. *See* 2 Bl. Com. 132; Gilb. Ten. 26. Formerly she could not obtain an assignment of her dower without paying a fine to the lord; nor could she marry a second husband without his license. It was even usual for the lords to force widows to marry, merely for the pur-

IX. Interest and Power of Tenant in Dower.[1]

X. Election as Applicable to Dower.[2]

pose of obtaining a fine. It was therefore provided by the charter of Henry I., and also by Magna Charta, that widows should not be forced to marry, or be obliged to pay a fine for the assignment of their dower. *See* 2 Inst. 16.

No person can regularly assign dower who has not a freehold estate in the land. *See* 1 Inst. 35, a. It will, accordingly, be found in the books that an assignment of dower by a guardian in socage, a tenant by elegit, statute staple, or statute merchant, or a lessee for years, is not good. *See* Co. Litt. 35, a; 6 Co. 58; 19 Ass. 68; 1 Roll. Abr. 682. An exception to this doctrine formerly prevailed in the case of a guardian in chivalry, founded upon reasons which it is no longer of practical importance to inquire into. *See* Co. Litt. 38, b; 9 Co. 17; 6 Co. 58. But an assignment made by a disseisor, abator, intruder, or other person having the freehold by wrong, may, and in most cases will, be good and binding upon the persons having right. *See* Co. Litt. 35, a; 6 Co. 58; 12 Ass. 20.

If the heir, being of full age, assign excessive dower, he has no remedy at law. *Stoughton v. Leigh*, 1 Taunt. 40. And where the sheriff makes an improper assignment, it will be set aside. 1 Keb. 743; 1 Vern. 218.

With respect to the manner in which dower ought to be assigned, the rule is that where the property is capable of being severed, it must be by metes and bounds; and if the sheriff does not return seisin by metes and bounds, it is ill. But where no division can be made, the widow must be endowed in a special and certain manner, either of the third, or the entirety for a certain time. *See* 1 Inst. 32, b. The right to have an assignment of dower by metes and bounds may be waived by the widow; and in that case, an assignment in common will be good (*see* 2 N. R. 1); but an assignment by the sheriff must be by metes and bounds, if it can be done (*see* Vin. Abr. 296). However, an assignment by metes and bounds can only take place where the husband is seised in severalty; for, where he is seised in common with others, his widow cannot be endowed by metes and bounds, for she, being in *pro tanto* of her husband's estate, must take it in the manner in which he held it. *See* 1 Inst. 32, b.

In dower, a mill cannot be assigned by metes and bounds. *Gilpin v. Cookson*, 1 Lev. 182.

Dower may be assigned of mines, either collectively with other lands, or separately of themselves. It must be assigned by metes and bounds, if practicable, otherwise either by a proportion of the profits or separate alternate enjoyment of the whole for short proportionate periods. *Stoughton v. Leigh*, 1 Taunt. 410. Neither livery of seisin nor writing is necessary to an assignment of dower. *Rowe v. Power*, 2 N. R. 1.

The widow acquires an estate of freehold by the assignment, without livery of seisin, because dower is due of common right. *See* 1 Inst. 35, a. As soon as dower is assigned, the widow holds by the institution of the law, and is invested of the estate of her husband; so that, after assignment, she is considered as holding by an infeudation immediately from the death of her husband. *See* Litt. 393; Gilb. Uses, 356.

[1] Dower is generally an estate for life, unless otherwise stipulated at the time of the marriage. Tenants in dower cannot alien (*see* 6 Edw. 1, c. 7), or levy a fine (*see* 11 Hen. 7, c. 20; 32 Hen. 8, c. 35), and are prohibited from committing waste. The dowress is entitled to emblements (*see* 2 Inst. 80), and holds her dower discharged from all her husband's incumbrances. *See* 1 id. 46; 4 Co. Rep. 65, a. And tenant in dower may work an open mine in the land assigned, though not specifically mentioned in the assignment. *See* 1 Taunt. 402.

A widow of an intestate whose estate was being administered in Chancery, being entitled to dower out of his estate, joined with her infant daughter, who was the intestate's heiress-at-law, in granting a lease of unopened coal-mines, all the covenants and reservations being entered into between the infant and the lessee. The widow, who was appointed guardian of her daughter, received the rents and royalties from the coal-mines, and paid them into court on her daughter's account. Some time afterwards she claimed dower out of the coal-rents and royalties: — *Held*, that the widow stood in the same position as a tenant for life of the property as to one-third; and although she had no power to open mines herself, she had power to prevent the remainderman from opening them: but that the effect of the lease and the transactions between the parties were such as to prevent the widow from supporting her claim to dower. *Dicken v. Hamer*, 29 L. J. Ch. 778.

[2] No collateral satisfaction can, at law, be pleaded in bar of a suit for the recovery of dower. But in equity, any indirect satisfaction, though not consisting of a strict legal jointure, may constitute a sufficient answer to the claim of dower. *See* Co. Litt. 36, b. If a testator makes a provision for his wife by will, and disposes of his freehold estates, out of which she is dowable, in such a manner as to disclose an intention that she should not take the provision and her dower, but should have the former in lieu of the latter, a court of equity will compel the wife to elect between the two interests, and not to enjoy both; and a wife is put to her election on the same principle as a stranger. *See* 4 Mad. 125. The difficulty appears to have consisted in ascertaining the intention of the testator. *See*

XI. What amounts to a Bar of Dower.[1]

XII. Proceedings for Recovery of.[2]

(A) *Writ of Dower abolished, and Summons substituted.*

By 23 & 24 Vic. c. 126, s. 26, "no writ of right of dower *unde nihil habet*, and no plaint for free bench or dower in the nature of any such writ, shall be brought after the 10th of October, 1860, in any court whatsoever, but where any such writ or plaint would now lie, either in a superior court or any other court, an action may be commenced by writ of summons, issuing out of the Court of Common Pleas, in the same manner and form as the writ of summons in an ordinary action, and upon such writ shall be indorsed a notice that the plaintiff intends to declare in dower, or for free bench, as the case may be."

Amb. 732. The true way of ascertaining it is to look into the will, and see whether it is plain, clear, and manifest that he could not possibly give what he had given consistently with his wife's claim to dower. *See* 2 Ves. jun. 577. And inequality in point of value between dower and the subject of collateral satisfaction will not preclude a case of election; therefore, though the benefits be much inferior in point of value of dower, yet that circumstance will not of itself preclude the existence of a case of election. Although a court of equity will not permit a widow, taking beneficial interests under her husband's will, to have her dower also out of his estates; yet, if her taking dower would not operate to overturn the will *in toto*, and the gift to her is not said to be in recompense or satisfaction of dower, she may enjoy as well the interests communicated by the will as her dower. The intention that the wife shall not claim both her dower and also a benefit under her husband's will, arises from necessary implication, or express declaration. If, therefore, no such intention results from the will, or if no such declaration appears, she will be entitled as well to such benefit as to her dower. As, where a husband gave a bond in the penalty of 1000*l.* for securing 500*l.* to his wife in case she survived, the same was held to be no bar of her dower; and though parol evidence was tendered of her acknowledgment that it should be so, yet the same was not permitted to be read, being within the Statute of Frauds. *See* 3 Atk. 8. So, where a testator devised an annuity of 50*l.* to his wife for life, payable out of his freehold and copyhold estates, with a clause of entry and distress, and, subject thereto, devised the same to his three children, *Lord Hardwicke* held the wife to be entitled both to her dower and annuity. *See* 1 Bro. C. C. 292, n. And the bequest of the residue of personalty to the wife will not create a case of election between that interest and dower. 1 Ves. sen. 230. It seems that the intention of the widow, as capable of being collected from certain acts done, or things acquiesced in by her, must constitute the intention upon questions whether an election between conflicting interests has, or has not, been made. Mere length of time cannot of itself form the governing principle, since we find that election may be kept open for fifty years, or rather, that it may last until the whole of the testator's affairs are wound up, and the trusts of his will executed. *See* 3 Bro. C. C. 90; 1 Ves. jun. 172. But possession taken by a widow of benefits offered to her by her husband's will in lieu of dower, affords the most obvious evidence demonstrative of an election. *See* Bro. C. C. 88; 1 Ves. jun. 171. However, the widow is not concluded by election made in ignorance. *See* 12 Ves. 136; but *see* 4 & 5 Wm. 4, c. 105, ss. 9, 10, *ante*, pp. 137, 138; 1 Ves. jun. 172; 1 Russ. 129; and Mr. Stalman's able and elaborate Treatise on the Law and Doctrine of Election, where the author has reduced to system a class of cases that had hitherto been thought to consist merely of a few detached and insulated points.

[1] A widow may be barred of her dower by her husband's attainder of high or petit-treason (*see* 5 & 6 Edw. 6, c. 11); but not in cases of misprision of treason or felony. *See* 1 Edw. 6, c. 12. So, a divorce *à vinculo matrimonii* is a bar, but not *à mensâ et thoro*. 2 Saund. 46. So, alienage, or detaining the title-deeds of the estate from the heir, is a bar. *See* Co. Litt. 39. So, a woman may be barred of her dower by levying a fine or suffering a recovery during her coverture (*see* 2 Saund. 42, n.; or, by the custom of London, she may bar herself of dower by deed of bargain and sale, acknowledged before the lord mayor, or the recorder and one alderman. *See* 1 Cru. Dig. 187. So, adultery amounts to a forfeiture of dower (*Hetherington v. Graham*, 6 Bing. 139; 3 M. & P. 399); and so is elopement. *Coot v. Berty*, 12 Mod. 232. But a bequest of the residue of personal estate will not be deemed a bar of dower (*see* 1 Cru. Dig. 196); and, as to what devise shall be considered as bar or satisfaction, *see ante*, Devise, p. 71.

The most usual way of barring dowers was by jointures, regulated by the 27 Hen. 8, c. 10. But now 4 & 5 Wm. 4, c. 105, ss. 4, 5, 6, 7, 9, 10, *ante*, p. 136.

[2] The land being described in the writ as a freehold, may be shown to be a leasehold. *Gaunt v. Wainman*, 3 Bing. N. C. 69; 3 Scott, 413.

(B) *Proceedings to be as in Ordinary Actions.*

By sect. 27, "the service of the writ, appearance of the defendant, proceedings in default of appearance, and all other proceedings and costs upon such writ, shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons, and the provisions of the Common Law Procedure Acts, 1852 and 1854, shall apply to the writ and pleadings, and proceedings thereupon."

(C) *Declaration.*[1]

(D) *Pleas and Replications.*[2]

(E) *Evidence.*[3]

(F) *Verdict and Writ of Inquiry.*[4]

(G) *Damages.*[5]

(H) *Judgment.*[6]

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[1] *Form of Declaration under* 23 *&* 24 *Vic. c.* 126.

In the C. P. the day of 18

(*Venue.*) A. B. by her attorney [*or* in person] claims against C. D. the third part of ten messuages, with the appurtenances, in the parish of in the county of as the dower of the said plaintiff, of the endowment of E. B., deceased, heretofore her husband, whereof she hath nothing.

See *Garrard v. Tuck*, 8 C. B. 230.

Dower lies against no one but the tenant of the freehold (*see* 2 Saund. 43); therefore it cannot be brought against the guardian in socage (*see* 29 Ass. 68; Bro. Dow. Pl. 63), or any person who has but a chattel interest, as a tenant by elegit, tenant for years, &c. (*see* 9 Co. 17); and it seems that, although judgment and execution should be had against such a tenant, yet he may afterwards enter upon the demandant. *See* 1 Leon. 92. So, the reversioner may be received to save his title, where the suit is brought against a tenant for life. *See* Goldsb. 126.

The declaration should demand a third of the whole premises (*Whelpdale v. Whelpdale*, 3 Lev. 169), and not use the word tenement. *Kent v. Kerry*, 8 Mod. 355.

[2] In dower the tenant may plead that the husband of the demandant made a lease, still existing, of the estate, before any title to dower accrued, and conveyed the reversion. *Anon.* 2 Mod. 18; 2 Saund. 44. But the tenant in dower cannot plead *ne unques seise*, and also *ne unques accouple*. *Anderson v. Anderson*, 2 Black. 1157. And the plea of lessee for years ought not to be received after plea and judgment for the demandant. *Green v. Roe*, 2 Car. 581. The marriage was celebrated in Scotland to a plea of *ne unques accouple*; the replication need not state by way of venue that the marriage was consummated in any place in England. *Ilderton v. Ilderton*, 2 H. Black. 145. *See* Forms, Steph. Com. Law Procedure, 1860, p. 63.

[3] The wife should produce witnesses to prove the death of her husband, or other evidence.

In dower, a remitter to defeat the estate of the husband cannot be given in evidence under *ne unque seise que dower*, but must be specially pleaded. *See* Dy. 41, pl. 1. So, a recovery in dower will stop the tenant, and all claiming under him, from giving a prior term in a stranger in evidence. *See* 2 Ld. Raym. 1293.

A demandant in dower is not entitled to inspection of the deed under which the property out of which she claims to be endowed was conveyed away by her husband, as against a *bonâ fide* purchaser for value, without notice of the marriage, the balance of authorities being assumed to be in favour of the position that a bill for discovery in equity could not be sustained in such a case. *Gomm dem. Parrott, ten.*, 3 C. B. (N. S.) 47; 3 Jur. N. S. 1150; 26 L. J. C. P. 279.

[4] The verdict should state, first, the death of the husband seised, and his estate, and time of decease; secondly, the annual value of the land; thirdly, damages for detention: and, lastly, the costs. *See* 2 Saund. 331, 44, e. If the jury do not find a proper verdict, the omission may be supplied by a writ of inquiry. *See* 1 Leon. 92. *Qu.* since 23 & 24 Vic. c. 126?

[5] If the defendant in dower appear and plead *tout temps prist*, the demandant shall have damage from the teste of the original to the writ of inquiry. *Roe v Roe*, 7 Mod. 333. So, damages from the death of the husband till the widow have seisin, will be given against tenant in a writ of dower *unde nihil habet*, unless he plead no demand of dower made. *Dobson v. Dobson*, Ca. Temp. Hard. 19; S. C. Barnard, 180.

[6] In dower, there shall be judgment to recover the value and damages; that is, to recover seisin of a third in severalty, by metes, and bounds, and the mesne profits and damages. *See* 2 Saund. 44. *Spiller v. Adams*, 8 Mod. 25. But a judgment in dower is complete without damages. *Aleworth v. Roberts*, 1 Lev. 38.

(I) *Amendment.*[1]

XIII. Forfeiture.[2]

DRAINAGE.

I. Acts relating thereto, p. 142.
II. Drainage of Public Lands, p. 142.
III. „ of Private Lands, p. 142.
IV. Rights as to Drains, p. 143.
V. Liability for Non-repair, and Fouling Drains, p. 144.

I. The Acts relating to this Subject are—

3 & 4 Vic. c. 55, entitled, "An Act to enable the Owners of Settled Estates to Defray the Expenses of Draining the same by way of Mortgage."

8 & 9 Vic. c. 56, entitled, "An Act to Alter and Amend" the preceding Act.

9 & 10 Vic. c. 101, entitled, "An Act to Authorise the Advance of Public Money, to a Limited Amount, to Promote the Improvement of Land in Great Britain and Ireland, by Works of Drainage."

10 Vic. c. 11, entitled, "An Act to Explain and Amend the Act Authorising the Advance of Money for the Improvement of Land by Drainage in Great Britain."

10 & 11 Vic. c. 38, entitled, "An Act to Facilitate the Drainage of Lands in England and Wales."

11 & 12 Vic. c. 119, entitled, "An Act to Simplify the Form of Certificates," &c.

12 & 13 Vic. c. 100, entitled, "An Act to Promote the Advance of Private Money for Drainage of Lands in Great Britain and Ireland."

13 Vic. c. 31, entitled, "An Act to Authorise further Advances of Money for Drainage and Improvement of Landed Property in the United Kingdom, and to Amend the Acts relating to such Advances."

19 & 20 Vic. c. 9, entitled, "An Act to Amend the Acts relating to the Advance of Public Money to Promote the Improvement of Land."

II. Drainage of Public Lands. *See* Health, Board of; Metropolis; Nuisance; Sewers.[3]

III. Drainage of Private Lands.[4]

[1] Even before the recent statutes amendments of the writ were allowed. *Whelpdale v. Whelpdale, supra. Wood v. Braudford,* 7 Mod. 124. *Frances Lady Cobham* (*demandant*) *v. Matthew Tomlinson,* in dower, T. Jones, 6. And it would seem that the general and extensive powers of amendment conferred by the recent statutes relating thereto, will apply to proceedings in dower. 23 & 24 Vic. c. 126, s. 27. *See* Amendment, vol. i. p. 324.

[2] The forfeiture of a dower may arise from the wife's own misconduct or crime (*see* 5 & 6 Edw. 6, c. 11), as if she be attainted of treason or felony (*see* 1 Inst. 33, a; 13 Rep. 23), and not pardoned (id.) or if she aliens the land assigned her for her dower, she forfeits it *ipso facto*, and the heir may recover it by action. *See* 6 Edw. 1, c. 7.

The adultery of the wife is a ground of forfeiture.

[3] A statute incorporating a waterworks company, provided that all disputes respecting compensation, works, matter, or thing done or performed under the provisions of the statute, should be determined by arbitration under the Lands Clauses Consolidation Act, 1845:—*Held,* that the provision did not apply to a claim for compensation in respect of damages sustained by the interruption of a drain by reason of the works of the company. *Blagrave v. Bristol Waterworks Co.* 1 H. & N. 369; 26 L. J. Ex. 57.

[4] The local act, for draining the lands of Holderness, in the East Riding of the county of York, contains no prohibition against a retrospective rate. The commissioner under that act borrowed money—

IV. Rights as to Drains.[1]

on which interest became due — for the purposes of the works directed by the act: — *Held*, that a rate made to pay off the debt thus incurred was, under the provision of the act, a valid rate. *Harrison v. Stickney*, 2 H. L. Ca. 108.

By an act for the drainage of lands in Lincolnshire, it was provided that the lords or ladies of three manors, for the time being — or in their absence their agents, appointed in writing — should be commissioners for executing the act; that no person should act as commissioner, or agent of a commissioner, until he had made and subscribed a declaration in the form given by the act; that if the commissioners required lands for the purposes of the act, they were to give a notice of their intention to the landowner, stating the particulars of the land required, and if the amount of compensation were disputed, the commissioners were to issue their warrant to the sheriff to summon a jury to assess compensation, and the sheriff was to give compensation for the sum so assessed. The three lords of the manors never made or subscribed the declaration, and a few days after the statute passed. Being all then in England, but absent from Lincolnshire, they, by separate instruments, in the form of appointment given by the act, appointed the three defendants their agents. The defendants made and subscribed the declaration before they did any act as commissioners: — *Held*, that the defendants, being agents appointed by the lords, were themselves commissioners, and therefore it was unnecessary for them to make the declaration; that when the commissioners required lands under the act, and had given the landowner notice that the lands were required, and had stated in it the particulars of the lands, it was not necessary that either the warrant issued to the sheriff to summon a jury to assess compensation, or the inquisition assessing it, should refer to the notice, or state particulars of the land, in order to give the sheriff and jury jurisdiction to inquire into the question of compensation. *Ostler v. Cooke* (in error), 17 Jur. 370; 22 L. J. Q. B. 71. Affirming judgment of Q. B., 13 Jur. 584; 18 L. J. Q. B. 185.

By a local act of parliament, trustees were appointed for the purpose of the more effectual drainage, by means of a steam-engine, of a fen district in Lincolnshire, called the Bourn North Fen and the Dyke Fen; and every engine, machine, building, and work, to be erected and made by the trustees under the powers of the act, and all engines, machinery, buildings, &c., sewers, drains, watercourses, &c., and other works already made, or then existing, or provided for the drainage of Bourn North Fen and Dyke Fen, and which should be thereafter made and provided for such purpose, and the right to and property in them, should be vested in the trustees; a proviso that nothing in the act contained should extend to or affect any engines, machinery, &c., sewers, drains, watercourses, &c., and other works already made or existing, or provided for the drainage of the fens, and then vested in and under the control of commissioners, appointed under a former inclosure and drainage act, called the Black Sluice Commissioners. It also enacted that it should be lawful for the trustees, upon any land in Bourn North Fen and Dyke Fen, not vested in the Black Sluice Commissioners, to make and erect a steam-engine, with all proper machinery, with proper and convenient buildings, sluices, pits, and other necessary works; and to make, and from time to time maintain, repair, and improve, as occasion might require, the sluices, bridges, cuts, sewers, and other works, already or thereafter to be made in, upon, and through, the fens, for effectually draining the same, out of the funds to be raised under the authority of the act, and making compensation for damages: — *Held*, that trustees had no power, under this act, to widen a drain under the control of the Black Sluice Commissioners, from the width of eighteen to forty feet, for the purpose of a reservoir, to bring a sufficient supply of water to their steam-engine, thereby cutting away upwards of three acres of the land vested in the commissioners, although such widening was itself an improvement of the drainage; and that they had no power to make any reservoir on the land vested in the commissioners, although the making of the reservoir was necessary to the proper working of the engine for the purpose of the drainage, and none could be made without cutting into some of the banks or drains vested in the commissioners. *Smith v. Bell*, 2 Railw. Cas. 877; 10 Mee. & W. 378.

Under the Lands Improvement Company's Acts of 1853 and 1855, if part of the land charged with the money advanced for improvement be subject to a mortgage or other incumbrance, the charge has priority over the mortgage or other incumbrance in respect of the whole amount, until apportionment is made by the Inclosure Commissioners, under the 70th sect. of the act of 1853, when the priority applies only in respect of the amount apportioned. *Lands Improvement Co. v. Richmond*, 17 C. B. 145; 25 L. J. C. P. 73.

Omissions in a subsequent drainage act may be supplied by a prior statute. *Syson v. Johnson*, 8 B. & C. 795.

[1] All lands are burdened with the servitude of receiving and discharging all waters which naturally flow down to them from lands of a higher level; and if the occupier or owner interposes artificial impediments in the way of such natural flow he is responsible for any damage thereby done to the owner of the higher lands. *Shury v. Piggott*, 3 Buls. 340. *Chasemore v. Richards*,

V. Liability for Non-repair, and Fouling Drains.[1]

DRAMA. *See* Copyright, vol. iii. p. 251; Theatre.

DRUNKENNESS.

I. Its Effect on Crime.[2]

II. ,, on Contracts.[3]

III. Punishment for.

Person found drunk and disorderly may be fined 40s. or imprisoned for seven days.

By 23 Vic. c. 27, s. 40, "every person found drunk in any street or public thoroughfare, and who while drunk is guilty of any riotous or indecent behaviour, shall, upon summary conviction of such offence before two justices, be liable to a penalty of not more than forty shillings for every such offence, or may be committed, if the justices or magistrate before whom he is convicted think fit, instead of inflicting on him any pecuniary penalty, to the House of Correction for any time not more than seven days."[4]

11 & 12 Vic. c. 43, to apply to this act.

By s. 42, "the provisions contained in the 11 & 12 Vic. c. 43, relating to

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H. L. 5 Jur. N. S. 877; Dig. lib. 39, tit. 3. So if, by so doing, he damage the lower lands, he will be also responsible. *Sharpe v. Hancock*, 8 Scott, N. R. 46. But an owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of the mere surface water, the supply of such water being casual, and its flow following no regular or definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water as would otherwise have come to his land. *Rawston v. Taylor*, 11 Ex. 369; 25 L. J. Ex. 33. When the owner of two or more adjoining houses sells one of them, the purchaser of such house is, without any express reservation or grant, entitled to the benefit of all drains from his house, and is, on the other hand, subject to all the drains necessary for the enjoyment of the other house. *Pyer v. Carter*, 1 H. & N. 916; 26 L. J. Ex. 258.

A right of passage of waste water through an artificial drain or watercourse in another man's land, where the party claiming it has no interest in the land through which the water flows, or ought to flow, is by an incorporeal right lying in *grant*, and is claimable only by deed or by prescription. *Hewlins v. Shippam*, 5 B. & C. 229. Therefore, a mere parol permission to cut a drain and use it may be revoked. *Cocker v. Cowper*, 1 C., M. & R. 421. *Fentiman v. Smith*, 4 East, 108. *Wood v. Leadbitter*, 13 Mee. & W. 845. *Lee v. Stevenson*, 27 L. J. Q. B. 263: but see *Pyer v. Carter*, *supra*.

[1] Every occupier is bound of common right to prevent the filth from his drains or cesspools from filtering through the ground into the land or house of his neighbour. *Tenant v. Golding*, 1 Salk. 21. And every grantee of an artificial drain is bound to repair it, and is responsible for the damage done by not doing so. *Lord Egremont v. Pulman*, M. & M. 404. And he may not foul such drain. *Cawkwell v. Russell*, 26 L. J. Ex. 35. *See* Nuisance.

[2] The vice of drunkenness, which produces a perfect though temporary frenzy or insanity, usually denominated *dementia affectata*, or acquired madness, will not excuse the commission of any crime; and an offender under the influence of intoxication can derive no privilege from a madness voluntarily contracted, but is answerable to the law equally as if he had been in the full possession of his faculties at the time (1 Hale, 32; Co. Litt. 247; 1 Hawk. c. 1, s. 6); although it has been said, that upon an indictment for murder the intoxication of the defendant may be taken into consideration, as a circumstance to show that the act was not premeditated. *R. v. Grindley*, 1 Russ. 8. *R. v. Thomas*, 7 C. & P. 817. *R. v. Meakin*, id. 297. *R. v. Gamber*, 1 F. & F. 90: but see *R. v. Carroll*, 7 C. & P. 145. But if the primary cause of the frenzy be involuntary, or it have become habitual or confirmed, this species of insanity will excuse the offender equally as other descriptions of insanity. 1 Hale, 32.

[3] A bill of exchange or promissory note indorsed or accepted by a person in a *complete* state of intoxication cannot be enforced as against the drunkard, even by a *bonâ fide* holder for value (*Sentence v. Poole*, 3 C. & P. 1); *sed qu.?* see vol. ii. p. 423, n. 3: but it is otherwise if the intoxication was only partial. *Shaw v. Thackray*, 17 Jur. 1045. The defence must be specially pleaded. *Gort v. Gibson*, 13 Mee. & W. 623. *See* id. 268; and *see* Deed, *ante*, p. 10.

[4] As drunkenness is a punishable offence, a publican cannot recover for beer sold to an intoxicated person. *Brandon v. Old*, 3 C. & P. 440.

A person was summoned before justices on a charge of being drunk, and guilty of riotous behaviour, under 10 & 11 Vic. c. 89, s. 29 (Town Police Clauses Act), and the justices convicted him of drunkenness under 21 Jac. 1, c. 7:—*Held*, that the conviction was bad. *Martin v. Pridgeon*, 5 Jur. N. S. 894; 28 L. J. M. C. 179, Q. B.

proceedings for the recovery of penalties by summary conviction, and to appeals against such convictions, and the levying and enforcing of penalties, and the costs of such proceedings, shall be applied and put in force in relation to the penalties imposed by the act."

DRY ROT. *See* Ship and Shipping; Warranty.

DUCES tecum. *See* Subpœna; Witness.

DUEL.

Bromwich's Case, 1 Lev. 180.

A person who kills another in a duel,[1] if he be master of his temper at the time, is, if death ensues, guilty of murder.

On an indictment against A. B., as second, for being present at the killing of C. D., it was proved that, when the quarrel took place between C. D. and E. F., which was at a tavern, E. F. said, "If we fight at this time, I shall have the disadvantage from the height of the heels of my shoes," and that presently afterwards they went out into the fields, and C. D. was there killed; E. F., the principal, being a peer, he was tried by his peers, and found guilty of man-

[1] Killing by fighting may be either murder, manslaughter, or homicide, according to circumstances: first, murder, where two persons deliberately fight a duel, and one is killed (*see* 1 Hale, P. C. 442); secondly, manslaughter, where the parties fight in the heat of passion (*see* 3 Inst. 51); and, lastly, if two men fight upon a sudden quarrel, and one of them after a while endeavours to avoid any struggle, and retreats, as far as he can, until at length no means of escaping his assailant remain to him, and he then turns round and kills his assailant, in order to avoid destruction, this homicide is excusable, as being committed in self-defence. *See* Fost. 277. But if the person assaulted do not fall upon the aggressor until the affray is over, or when he is running away, this is revenge, and not defence. *See* 4 Bl. Com. 185. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder; for, if A. and B. agree to fight a duel, and A. give the first onset, and B. retreat as far as he safely can, and then kill A., this is murder, because of the previous malice and concerted design. *See* 1 Hale, P. C. 479.

Therefore, if two persons deliberately fight a duel, and one of them be killed, the other, and his second, are guilty of murder (1 Hale, 442, 452; 1 Hawk. c. 31, s. 81. *R. v. Oneby*, 2 Stra. 766; and *see* 24 & 25 Vic. c. 94, s. 2), no matter how grievous the provocation, or by which party it was given. 3 East, 581. The second of the deceased, also, is deemed guilty of murder, as being present, aiding and abetting; although Lord Hale seems to think the rule of law, as to principals in the second degree, too far strained in that case. 1 Hale, 442, 452. See *R. v. Murphy*, 6 C. & P. 103. *Reg. v. Young*, 8 id. 645. *Reg. v. Cuddy*, 1 C. & Kir. 210. And in the case of a sudden quarrel, when the parties immediately fight, the case may be attended with circumstances which amount to murder. *Mawgridge's case*, cited Fost. 295. So if the parties are upon equal footing when the combat begins, malice may be implied from the violent conduct which the party killing pursued in the first instance; especially where there is time for reflection, and such expressions are used as manifest deliberation. *Rex v. Oneby*, 2 Stra. 766; 2 Ld. Raym. 1489. But if the parties at the commencement attack each other upon equal terms, and afterwards in the course of the fight one of them in his passion snatch up a deadly weapon and kill the other with it, this would be manslaughter only. 1 East, P. C. 242. *R. v. Taylor*, 5 Burr. 2793. *R. v. Anderson*, 1 Russ. 531. *R. v. Kessal*, 1 C. & P. 437. But where, after mutual blows between the defendant and the deceased, the defendant knocked the deceased down, and after he was upon the ground stamped upon his stomach and belly with great force, and thereby killed him; this was held to be only manslaughter. *R. v. Ayes*, R. & R. 166. See *R. v. Rankin*, id. 43.

If there be any other circumstances in the case indicative of malice in the party killing, it will be murder. As, for instance, if two persons fight upon a sudden quarrel, and be separated, and one of them afterwards, having provided himself with a deadly weapon, lies in wait for the other, to have an opportunity, thus armed, to renew the quarrel, and they accordingly meet, quarrel, and fight, and the man who is armed kills the other, this is murder. *R. v. Snow*, 1 Leach, 151; 1 East, P. C. 245. So, if two persons fight from malice, and pretend or feign a reconciliation, and they afterwards meet and suddenly fight upon the score of the old malice, and one of them be killed, this is murder, and not merely manslaughter. 1 Hale, 451. So, if B. challenge A., and A. refuse to meet him, but tell him that he shall be on his way to such a place upon business at such a time, and B. meet him on his way and assault him, and they fight, and A. kills B.; if it appear that A. made this communication for the purpose of evading the law, by giving the fight the appearance of a sudden quarrel, the killing would be murder; but if the communication were made undesignedly, it would be manslaughter only. 1 Hawk. c. 31, s. 25.

slaughter. On this trial against A. B., the court said, the evidence was clear of their intention to fight when they went out of the tavern, and the quarrel being only touching words, and they fighting within a little time afterwards, it was held murder, because there need not be the time of night between the quarrel and the fight to make it murder, but such time only as it may appear not to have been done in the first passion; for E. F. had considered the disadvantage of his shoes. The Court directed the jury to find A. B. guilty of murder, but they found him guilty of manslaughter only.

DUKES. *See* Honour, Title of; Precedence.

DUM fuit infra Ætatem. *See* Infant.

DUM non Compos. *See* Lunatic.

DUPLICITY. *See* Pleading.

DURESS.

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I. What is.[1]

II. In Duress of Imprisonment, the Imprisonment must be Unlawful.

Anon. 1 Salk. 68.

To constitute duress of imprisonment, the imprisonment must be unlawful.[2]

A. having no good cause of action, caused B. to be arrested, and to be detained in prison until he made a release, with menaces that he should be there and rot if he would not seal a release; upon which a release was executed, and the man was discharged.

Bridgman, C. J., held at N. P. that the release was good, because he was in custody in the course of law by the king's writ when he signed it; and being arrested without cause, he might have had an action for it.

[1] Constraint; compulsion. The state of compulsion or necessity in which a person is induced, by the restraint of his liberty, or menace of bodily harm, to execute a deed, will, or do any other legal act, or to commit a misdemeanor. 1 Bl. Com. 130; 2 id. 292; 4 id. 30; 1 Steph. Com. 130, 442; 2 Kent's Com. 543. It is either of imprisonment or *per minas*. To give validity to a contract, the law requires the *free* assent of the party who is to become chargeable thereon; and it therefore avoids any promise extorted from him by terror or violence, whether on the part of the person to whom the promise or obligation is made, or on that of his agent. 1 Roll. Abr. 688.

[2] Because, if the imprisonment be lawful, and either to procure his discharge, or on any other fair account, a party seals a bond or deed, it is not duress of imprisonment. *See* 2 Inst. 482. So, if one imprisoned make an obligation by duress, and, after he is at large take a defeasance upon it, this will estop him to say it was made *per duress*. *See* 3 Hen. 6. But if a man, taken by virtue of a process issuing out of a court that hath not power to grant it, or in custody on a false charge of felony, and for his discharge gives a bond, &c., this may be avoided as taken by duress. *See* Cro. Eliz. 646; 4 Inst. 97; Aleyn, 92. And if the confinement be lawful, but undue force be used; or if the party be made to endure unnecessary privation, such as want of food or the like; and, to obtain his liberty, or to avoid such legal illegal hardship or privation, he is induced to make the contract. 2 Inst. 482; Bull, N. P. 172; 1 Bl. Com. 136, 137. *Williams v. Brown*, 3 B. & P. 69. *The King v. Southerton*, 6 East, 140. *Pole v. Harrobin*, 9 id. 417. But *executio juris non habet injuriam;* and therefore, the fact of imprisonment is not deemed sufficient to avoid an agreement obtained through the medium thereof, if the party were in proper custody under the regular process of a court of competent jurisdiction. *Stepney v. Lloyd*, Cro. Eliz. 647; 4 Inst. 47; 1 Roll. Abr. 687; *see* also 1 Lev. 68. *Quære* as to relief in equity? *Cossart v. Sothan*, 2 Vern. 497; Sto. Eq. s. 239.

Where, however, a bond was given without consideration, under the alarm and restraint of an actual imprisonment upon a

III. Duress *per Minas*[1] must be to the Person, not to the Goods.

Rex v. Southerton, 6 East, 140.

Per Lord Ellenborough, C. J. Where A. and B., having another man in their actual custody at the time, threatened to carry him to gaol upon a charge of perjury, and obtained money from him to permit his release: was not that an actual duress, such as would have avoided a bond given under the same circumstances? To effect a duress *per minas*, it must be to the person and not his goods.[2]

IV. Money obtained by can be Recovered back.

DURHAM. *See* Palatine Courts of.

DUTIES. *See* Customs, Excise, vol. iii. p. 542.

DWELLING-HOUSE. *See* Burglary; Robbery; Trespass.

DYING Declarations.

Rex v. Scaife, 1 M. & Rob. 551.

On an indictment for manslaughter, it appeared that a quarrel took place, On an indict-

justice's warrant for stealing goods, and upon the promise of the accuser to discharge the prisoner, it was held not to be binding on the ground of duress, it appearing that the charge was utterly false and vexatious. *Anon.* Aleyn, R. 92. *Semble*, however, that the bond was void on another ground, namely, that it was given upon an agreement to stifle a prosecution for a felony. And, probably, the true rule in such cases is, that where the imprisonment is lawful, an instrument executed for the purpose of effecting the object of such imprisonment is not void (Bac. Abr. Duress, A.); but that if a legal imprisonment be made the means of exacting a deed or other instrument which is foreign to that object, such instrument will be void on the ground of duress. Vin. Abr. Duress (B.) pl. 1.

[1] Duress by threats. It would seem that a contract obtained by menace of trespass of lands or goods (*Skeate v. Beale*, 11 Ad. & E. 983, 990. *Atlee v. Backhouse*, 3 Mee. & W. 633, 642; 2 Smith, L. C. 240, a, *in notis*. *Wakefield v. Newbon*, 6 Q. B. 276, 280. *Sumner v. Ferryman*, 11 Mood. 201. *Astley v. Reynolds*, 5 Stra. 912; Bull. N. P. 173; but *see* 1 Roll. Abr. 687, pl. 6); or to institute a prosecution for penalties, &c. (*The King v. Southerton*, 6 East, 140); or a threat, that if the goods were not given up, the holder would have to pay the expenses of a fiat in bankruptcy (*Powell v. Hoyland*, 6 Ex. 67, 71), is binding (Bac. Abr. Duress): the law considering that such a threat is not of a nature to overcome a firm and prudent man, because sufficient and adequate redress may be obtained, if either of such injuries be inflicted. Whereas for actual personal violence, no amount of damages can be an adequate compensation; and, therefore, even a man of ordinary firmness may be unable to withstand the threat, and immediate danger, of such personal mischief.

[2] Where a man has been obliged involuntarily, and by wrongful duress, to pay money, it may be recovered in an action for money had and received; as where he has paid an exorbitant sum to redeem his goods from pawn, or wrongful detention. *Astley v. Reynolds*, 2 Stra. 915. *Ashmole v. Wainwright*, 2 Q. B. 837. Or where the party to a reference has been obliged to pay an unreasonable charge of the arbitrator in order to take up the award: *Per Cur. in Re Coombs*, 4 Ex. 839. *Fernley v. Branson*, 20 L. J. Q. B. 178. So, where goods not liable to seizure are seized by a revenue-officer, who extorts money to release them (*Irving v. Wilson*, 4 T. R. 485); or a public officer demands and exacts an excessive fee (*Steele v. Williams*, 8 Ex. 625); or a corporation officer extorts a fee for granting a license (*Morgan v. Palmer*, 2 B. & C. 729); or a sheriff claims and receives a larger fee than he is entitled to (*Dew v. Parsons*, 2 B. & A. 562); or a tollkeeper exacts an illegal toll (*Parsons v. Blandy*, Wightw. 22); or a railway company, bound by their special act to charge rates equally to all, detains the parcels of a particular person until he pays an unreasonable charge; in which last case the action lies for the excess (*Parker v. Great Western Railway Co.* 7 Man. & G. 253. *Edwards v. the same Co.* 11 C. B. 588; S. C. 21 L. J. C. P. 72); and this, although part of the money was received by the defendants as agents of another company, and for their use (*Parker v. the same Co.* 6 Ex. 702); or a mortgagee, with power of sale, refuses to stop a sale unless the mortgagor pays expenses not duly chargeable upon him (*Close v. Phipps*, 7 Man. & G. 586); or a sheriff obtains payment under a *fi. fa.* by a wrongful seizure (or, as it seems, a threat of seizure) of goods not liable to execution (*Valpy v. Manley*, 1 C. B. 594); or an attorney illegally detains deeds till an undue claim is satisfied (*Wakefield v. Newbon*, 6 Q. B. 276. *Turner v. Deane*, 3 Ex. 836); even though he detains them as attorney of a third person, who had no right to payment, and though he has paid over the money to his client. *Oates v. Hudson*, 4 Ex. 346. *See* also *Gibbon v. Gibbon*, 22 L. J. C. P. 131; S. C., C. B. 205. In these cases it makes no difference that the defendant, who has obtained the money as an agent, has handed it over to his principal. *Steele v. Williams*, 8 Ex. 625; and cases cited, id. 629. *Oates v. Hudson*, *supra*.

ment, dying declarations in favour of the prisoner are admissible.[1]

and the prisoner knocked the deceased down, and kicked him, which caused his death. A surgeon was called to give evidence as to the cause of death, and stated, that he found the deceased in a state from which he could not by possibility recover, and that he told him so; and that the deceased seemed perfectly sensible of the dangerous state he was in, and said he knew he could not get better. That the deceased afterwards said to the witness: "I don't think he would have struck me if I had not provoked him."

Coleridge, J., received the evidence, observing, that it might have an influence on the amount of punishment. — Verdict, Guilty.

DYING without Issue; or, "Die without Issue;" at common law means an indefinite failure of issue, and not a dying without issue living at the time of the death of the first taker. And it is now provided by stat. 7 Wm. 4, and 1 Vic. c. 26, s. 29, that the words "die without issue," or other words which may import a want or failure of issue, shall be construed to mean dying without issue living at the time of the death of the person, and not an indefinite failure of issue, unless a contrary intention appears by the will. *See post*, Will.

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[1] Dying declarations. This is one of the exceptions to the rule rejecting hearsay evidence. A declaration of the deceased, made on the day he was wounded, and when he believed he should not recover: — *Held* admissible, although he did not die until eleven days afterwards, and although the surgeon did not consider his case hopeless, and told the deceased so. *Rex v. Mosley*, 1 M. C. C. 97.

If a person whose death is the subject of a charge of manslaughter express an opinion that she shall not recover, and make a declaration, and, at a subsequent part of the same day, ask a person whether he thinks she will "rise again:" — *Held*, that this showed such a hope of recovery as rendered the previous declaration inadmissible. It is no objection against a declaration *in articulo mortis*, that it was made in answer to questions put to the deceased by the surgeon, and not a continuous statement made by the deceased. *Rex v. Fagent*, 7 C. & P. 238.

On the question whether a declaration of a deceased person be admissible as a declaration *in articulo mortis*, the judge will consider whether the conduct of the deceased was that of a dying person, such as whether he gave directions respecting his funeral, his will, &c., and not merely the expressions he used as to whether he thought he should or should not recover. *Rex v. Spilsbury*, id. 187.

Where the deceased, at the time of making a statement as to the cause of her death to the medical person, stated that she hoped he would do what he could for her, for the sake of her family: — *Held*, that the expression of such a hope excluded the declaration; to render it admissible it must be made under the impression of an almost immediate dissolution. *Rex v. Crockett*, 4 id. 544. Although, where any hope of recovery exists, however slight, the dying declarations are inadmissible; yet, where the party, after being assured that he must die, and the magistrate previous to receiving them desired him, as a dying man, to speak the truth, to which the deceased replied that he would, the judge (*Tindal, J. C.*) held them to be admissible. *Rex v. Bonner*, 6 id. 386.

If a declaration *in articulo mortis* be taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of the declaration. *Rex v. Gay*, 7 id. 230.

And a statement made by a deceased person, inculpating one who was on his trial for the murder of the deceased, if made under circumstances and after expressions which indicated a sense of impending danger of death, is admissible as a dying declaration. *Reg. v. Whitworth*, 1 F. & F. 382: *Watson. Reg. v. Howell*, 1 Den. C. C. R. 1; 1 C. & Kir. 689.

Dying declarations are admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the declaration. *R. v. Hind*, 8 Cox, C. C. 300; 6 Jur. N. S. 514; 29 L. J. M. C. 147; 8 W. R. 421. So, where A. was indicted for procuring abortion: — *Held*, that the dying declaration of the woman was inadmissible. (Id.) A dying declaration is admissible if the declarant conceives himself to be past recovery, although the surgeon attending him may be of a different opinion. *R. v. Peel*, 2 F. & F. 21.

Sir David Evans, in 2 Pothier, p. 293, has justly observed, that "much consideration should be given as to the state of the mind of the party whose declarations are received. Strongly as his situation is calculated to induce the sense of obligation, it must also be recollected that it has often a tendency to obliterate the distinctness of his memory and perceptions; and, therefore, whenever the accounts received from him are introduced, the degree of his observation and recollection is a circumstance which it is of the highest importance to ascertain. Sometimes the declaration is a matter of judgment, of inference, and conclusion, which, however sincere, may be fatally erro-

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EA QUÆ comendandi causâ in venditionibus dicuntur si palam appareant venditorem non obligant. Dig. 18, 43. *Things said upon a contract of sale in commendation of the commodity are not binding upon the vendor if they relate to apparent qualities.* *See* Caveat Emptor, vol. iii. p. 52; *post*, Warranty.

EARNEST to bind a Bargain. *See post*, Frauds, Statute of; Goods, Sale of.

EASEMENTS.[1] *See also* Limitation, Statute of; Prescription; Watercourse.

I. Of the Nature, Qualities, and Incidents of Easements, p. 150.
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(*a*) *By uninterrupted User as of Right for Twenty Years*, p. 154.
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(A) *Plea claiming Right by Prescription ought to follow the words of the Statute*, 2 & 3 *Wm.* 4, *c.* 71, p. 159.
(B) *Plea of Lost Grant*, p. 160.

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neous. Finally, it has never been received, except in cases of murder, where, if the dying person were certain as to the author of the violence, yet in the case of a quarrel and conflict, he might be under a strong temptation to give a partial account of the transaction, although all motives of personal hostility had ceased. In other cases it is far from improbable that he would attribute the fact to some person whom he suspected to be his enemy, when, if his grounds for supposing so could have been investigated, they might have turned out to be very unsatisfactory."

Whether such evidence be admissible is a question for the court, and not for the jury, under all the circumstances of the case. *John's case*, East, P. C. 357.

[1] *See* Gale on Easements; Add. on Torts; Hil. on Torts.

IV. Of Particular Easements.

(A) *Rights of Common.* *See* Common, vol. iii. p. 143.
(B) „ *Light and Air.* *See post*, Light and Air.
(C) „ *Way.* *See post*, Ways.
(D) „ *Watercourses.* *See post*, Watercourses.
(E) „ *to Pews.* *See post*, Pews.

I. Of the Nature, Qualities, and Incidents of Easements.

(A) *Definition.*[1]
(B) *Different Kinds of.*[2]

[1] Easement, from *aise*, Fr.; i.e. *commoditas*. An easement is defined to be a privilege without profit which the owner of one neighbouring tenement has of another existing in respect of their several tenements, by which the servient owner is obliged "to suffer or not to do" something on his own land for the advantage of the dominant owner. The essential qualities of easements are thus distinguished:— 1. They are incorporeal. 2. They are imposed upon corporeal property. 3. They confer no right to a participation in the profits arising from it. 4. They must be imposed for the benefit of corporeal property. 5. There must be two distinct tenements — the dominant, to which the right belongs: and the servient, upon which the obligation is imposed. Gale on Easements, p. 5, 3d ed.

[2] Easements are negative or affirmative. Negative where the right, as against the neighbour, is that he shall not do upon his own land certain acts which, but for the existence of the easement, he might have done: such as the acquired right to light and air, the effect of the acquisition of which is a right to prevent the adjoining landowner erecting anything on his own land to obstruct the light or air to the extent to which it has been acquired. So, the right of support from the adjoining soil, and to receive the flow of water of a natural stream, have been referred to the same category; but according to the better opinion, these are natural rights existing as an ordinary incident to property, and cannot properly be considered to be of the nature of easements. See *Bonomi v. Backhouse*, E. B. & E. 655. *Rowbotham v. Wilson*, 8 E. & B. 123. *Solomon v. Vintners' Co.* 4 H. & N. 585. But a right to the increased support rendered necessary by the land being incumbered with buildings is an easement. *Hansell v. Pollard*, Selw. N. P. 435. *Hide v. Thornborough*, 2 C. & Kir. 250.

Affirmative easements are such rights in the nature of easements as are acquired in, upon, or over the land of another. These are of various kinds: such as rights of way; right to discharge water or other matter on a neighbour's land; right to discharge rainwater by a spout or projecting eaves; the right to conduct water across a neighbour's land by an artificial watercourse, and to go upon that land for the purpose of turning the water into the same (*Beeston v. Weate*, 5 E. & B. 986); right to use or to affect water of natural stream in a manner not justified by the natural right; right to make spoil-banks upon surface in course of working minerals (*Rogers v. Taylor*, 1 H. & N. 706); right to make surface uneven by working mines in such a manner as to cause it to sink (*Rowbotham v. Wilson*, 8 H. L. C. 362); right to go on land of another to clear a mill-stream, and repair its banks (*Beeston v. Weate*, 5 E. & B. 996. *Per Lord Campbell, C.J.: Peter v. Daniel*, 5 C.B. 568); right to go on a neighbour's close and draw water from a spring there (*Race v. Ward*, 4 E. & B. 702); right to hang clothes on lines passing over the neighbouring land (*Drewell v. Towler*, 3 B. & Adol. 735); right to support from a neighbouring wall; right to carry on an offensive trade; the right of landing nets on another man's ground. *Gray v. Bond*, 2 B. & B. 667. A right in the occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for domestic purposes, for the more convenient use of his messuage, is a mere easement, and not a profit *à prendre* in the soil of another. *Manning v. Wasdale*, 5 Ad. & E. 758.

The undertakers of a navigation in whom the soil of the river is not vested, have a mere easement in the land through which it passes. 9 B. & C. 109. *Hollis v. Goldfinch*, 1 id. 205.

The license to make a vault in a parish church, and to have the sole and exclusive use of it, is an easement which cannot be effectually granted without a deed or a faculty. See *Bryan v. Whistler*, 8 B. & C. 288. The right to a pew in a church seems to be an easement. 5 B. & A. 361.

"It appears now to be well settled, that the right of one man's land to support from the adjoining land is not an easement, or in the nature of an easement at all; but a natural right, like the right to the flow of water in a natural river. But the right to support for one building from an adjoining building is certainly not a natural right. It may arise in different ways. In *Partridge v. Scott*, 3 Mee. & W. 220, *Alderson, B.*, in delivering

(C) *Qualities of.*[1]

II. Of the Acquisition of Easements.[2]

the judgment of the court with regard to a right very analogous, says that 'rights of this sort, if they can be established at all, must have their origin in grant.' In *Peyton v. the Mayor of London*, 9 B. & C. 736, *Lord Tenterden* intimated that if it appeared that both houses were originally built by the same owner, the right to support might exist. In *Richards v. Rose*, 9 Ex. 218, the Court of Exchequer held that in the latter case such a right or easement did exist, and the right was thus recognised by the civil law." *Per Pollock, C. B.: Solomon v. Vintners' Co.* 4 H. & N. 598. See *Hunt v. Peake*, 29 L. J. Ch. 785, and 6 Jur. N. S. 817.

[1] Where a person builds a house on his own lands, which has been previously excavated to its extremity for mining purposes, it has been held that he does not thereby acquire a right of support for the house from the adjoining land of another: at least, such right will not be acquired until twenty years have elapsed since the house first stood on excavated land, and was in part supported by the adjoining land, in which case a grant from the owner of the adjoining land of such right to support may be inferred; and this case is an authority to show that a man by building a house on the extremity of his own land does not thereby acquire any right of easement for support or otherwise over the adjoining land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. *Partridge v. Scott*, 3 Mee. & W. 220. *Gayford v. Nicholls*, 9 Ex. 707. *Jeffries v. Williams*, 5 id. 792.

It has been doubted whether a right to support is acquired in a case where a house has fallen out of the perpendicular, and has leant upon an adjoining one for more than twenty years. "It seems contrary to justice and reason," said *Pollock, C. B.*, "that a man by building a weak house adjoining the house of his neighbour can, if the weak house juts out of the perpendicular, and leans upon the adjoining house, thereby compel his neighbour either to pull down his own house within twenty years, or to bring some action at law, the precise nature of which is not very clear; otherwise, it is said, an adverse right would be acquired against him." *Solomon v. Vintners' Co.* 4 H. & N 599.

There is not any obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it repaired in a lasting and substantial manner: the only duty is to keep it in such a state that his neighbour may not be injured by its fall. The house may, therefore, be in a ruinous state, provided it be shored sufficiently, or the house may be demolished altogether. *Chauntler v. Robinson*, 4 Ex. 170. And although if a man, by negligence and carelessness in pulling down his house, occasion damage to or accelerate the fall of his neighbour's, he will be clearly liable (*Bradbee v. Mayor of London*, 5 Scott, N. R. 120. *Dodd v. Holme*, 1 Ad. & E. 505), yet the mere circumstance of juxtaposition does not (in the absence of any right of easement) render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall; nor is such person, if he be ignorant of the existence of the adjoining wall, bound to use extraordinary caution in pulling down his own. *Chadwick v. Trower*, 6 Bing. N. C. 1. *Grocers' Co. v. Donne*, 3 id. 34. *Davis v. London & Blackwall Railway Co.* 2 Scott, N. R. 74.

No easement can be acquired, either by prescription or by presumption, of a grant arising from twenty years' enjoyment to the free and uninterrupted passage of currents of wind and air to a windmill. *Webb v. Bird*, 10 C. B. (N. S.) 268.

[2] A person may prescribe for an easement in the freehold of another, as belonging to some ancient house, or to land, &c. And a way over the land of another, a gateway, watercourse, or washing-place in another's ground, may be claimed by prescription as an easement. Cro. Jac. 170; 3 Leon. 254; 3 Mod. 294. *See* vol. iii. p. 532, Custom.

If a man be seised of a house in right of his wife, and another grant to the husband and his heirs to have sufficient estovers to burn in the same house, in that case the estovers are appurtenant to the house, and shall descend to the issue of the husband and wife. So, if one hold a house on the part of his mother, and one grant to him that he and his heirs shall have competent housebote, to be burnt in the same house, this is appurtenant to the house, and although it be a new purchase, it shall go with the house to the heirs on the part of the mother. *Sym's case*, 8 Co. 54, a.

Private ways over another man's land may be grounded on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds to go to church, to market, or the like, in which case the gift or grant is particular, and confined to the grantee alone. It dies with the person, and the grantee cannot assign over his right to any other. 2 Bl. Com. 35; Shep. Touch. 239.

The benefit and burden of an incorporeal right to be exercised and enjoyed over land, and the consequent servitude, cannot be transferred from one person to another, except when it is appendant or appurtenant to an estate or interest in land, and accessorial to the use and enjoyment of landed property.

An easement annexed to the house by the owner, if necessary to its enjoyment, passes with it (*Nicholas v. Chamberlaine, post*, p. 152), but not under "together with the appurtenances." 7 Jur. N. S. 926; 5 L. T. (N. S.) 2.

(A) *By Grant.*

Nicholas v. Chamberlaine, Cro. Jac. 121.

An easement annexed to the house by the owner, if necessary to its enjoyment, passes with it.

Per Cur. "If one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to his house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and *quasi* appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case requires. So if a lessee for years of a house and land erect a conduit upon the land, and after the term the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them."[1]

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[1] See *Thury v. Pigott*, Popham, 166; 3 Bulst. 339. *Coppy v. I. de B.;* 11 Hen. 7, 25, pl. 6. But if the lessee erect such a conduit, and afterwards the lessor, during the lease, sell the house to one, and the land wherein the conduit is to another, and after that the lease determines he who hath the land whereon the conduit is may disturb the other in the using thereof, and may break it, because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation and usage of them together by him who had the inheritance. So it is if a disseisor of a house and land erect such a conduit, and the disseisee re-enter, not taking conusance of any such erection, nor using it; but presently after his re-entry sells it, the house to one and the land to another; he who hath the land is not compellable to suffer the other to enjoy the conduit. *Per Popham, C. J.: Nicholas v. Chamberlaine,* Cro. Jac. 121. See *Brown v. Nicholls,* Moore, 682. *Archer v. Bennett,* 1 Lev. 131. *Hinchliffe v. Earl Kinnoul,* 5 Bing. N. C. 23. *Canham v. Fisk,* 2 C. & J. 126. This doctrine proceeds upon the equitable principle, that if a landed proprietor has annexed peculiar qualities and incidents to different parts of his estates, so that one portion of his land becomes visibly dependent upon another for the supply of water, light, or air, the qualities or incidents thus manifestly imprinted upon the property pass with the lands to which they are annexed to the grantees, as accessorial to the beneficial use and enjoyment of such lands. "Upon the severance," says Mr. Gale (*Easements,* p. 81, 3rd ed.), "of an heritage, a grant will be implied — first, of all those continuous and apparent easements which have, in fact, been used by the owner during the unity, and which are necessary for the use of the tenement conveyed; and, secondly, of all those easements without which the enjoyment of the severed portions could not be had at all." By "apparent easements," must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. *Per Martin, B.: Pyer v. Carter,* 1 H. & N. 922.

Accordingly, where several houses belonging to the same owner are built together, so that each requires the support of the adjoining house, and the owner parts with one of these houses, the right to such support is not thereby lost. *Richards v. Rose,* 9 Ex. 218. So where the owner of two or more adjoining houses sells or conveys one of the houses, the purchaser of the house is entitled to the benefit of all the drains from his house, and is subject to all the drains from the adjoining houses through his land, which are necessary for the enjoyment of such houses, notwithstanding there has been no express reservation or grant upon the severance of the ownership: were it otherwise, the vendee of any house would be enabled to destroy the system of drainage necessarily made for the convenient occupation of the whole. *Pyer v. Carter,* 1 H. & N. 916; 26 L. J. Ex. 258.

And if a man is possessed of a house, and there is actually a way used, or an apparent visible road or path, manifestly intended to be used by the occupiers of the house, a grant or lease of the house will carry with it the right to use the way. *Glave v. Harding,* 27 L. J. Ex. 286: *per Pollock, C. B.* Or, where a man having a close surrounded with his land grants the close to another in fee for life, or for years, the grantee shall have a way over the grantor's land as incident to the grant, for without it he cannot have any benefit from the grant. This is founded upon the legal maxim, *Quando aliquis aliquid concedit concedere videtur et id sino quo res concessa uti non potest.* So it is when he grants the land and reserves the close to himself. *Pennington v. Galland,* 9 Ex. R. *Pomfret v. Ricroft,* 1 Wms. S. 323, n. A way by necessity, when the nature of it is considered, will be found to be nothing else but a way by grant. It derives its origin from a grant, for there seems to be no difference where a thing is granted by express words, and where by operation of law it passes as incident to the grant. In both cases the grant is the foundation of the title, and it is necessary to set forth the title to a way of necessity as it

(B) *By implied Grant.*[1]

(C) *Of Licenses.*

(*a*) *A Parol License may, while it is Executory, be Countermanded at any time.*

WALLIS v. HARRISON, 4 Mee. & W. 538.

A parol license may, while it is executory, be countermanded at any time.[2]

A parol license from A. to B. to enjoy an easement over A.'s land is countermandable at any time while it remains executory; and if A. conveys the land to another the license is determined at once, without notice to B. of the transfer, and B. is liable in trespass if he afterwards enters upon the land. A mere parol license to enjoy an easement on the land of another does not bind

is to a way by grant. 1 Wms. Saund. 323, a. *Proctor v. Hodgson*, 10 Ex. 824; 24 L. J. Ex. 195.

owner of the E. hore. He let N., ant, with express rom the shore to vas a farm lying ing nearer than shore. N., while ., and the lands reyance as "the oyed by the ten- was made of any and there were ogether with all d, that the ease- *d v. Fortune*, 7

orities speak of vet there is no le does not de- nterest granted, bject-matter: a of way can no for years with- ple. *Wood v.* : *per Alderson*, Taunt. 384. B. 574; 21

nnot, how- property wners; for much con- e allowed to and enjoying ess upon their liar character, nto all hands, however remote. *Per Lord Brougham: Keppel v. Bailey*, 2 Mylne & K. 536. In *Ackroyd v. Smith* (10 C. B. 164), the court held that it would be a novel incident annexed to land that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is owner and occupier, have a right of road over other lands; and that a grant of such a privilege or easement could no more be annexed so as to pass with the land, than a covenant for any collateral matter.

[1] A presumption of grant is raised upon the general principle, that what has been done should be presumed to be rightly done. In applying this principle to a right of way, if it be found that the act has been often repeated (for the occasional use of a walk, or a path across a man's field, would hardly be such a use as would establish the right); but if the act must necessarily have been often repeated with the knowledge of the person acting upon an adverse right, it affords a strong presumption in favour of the right so exercised. The same principle is applied to presumptions in the case of light or of flowing water. 3 B. & C. 621.

The stat. 2 & 3 Wm. 4, c. 71, does not supersede the common law. A right of way or other easement may still be claimed by virtue of an express grant. *Bright v. Walker*, 1 C., M. & R. 223. *Blewett v. Tregoning*, 3 Ad. & E. 554. *Plant v. James*, 4 id. 749. And it may be pleaded by immemorial user. *Onley v. Gardiner*, 4 Mee. & W. 496. *Richards v. Fry*, 3 Nev. & P. 72.

In order to use the presumption of a grant from long-continued enjoyment, the enjoyment must have been open and notorious, not exercised as a matter of grace or favour, but as of right. Therefore, where the enjoyment can be satisfactorily accounted for, and is consistent with there having been no grant or conveyance, there is no ground for presuming one, and it is necessary that the jury should be satisfied that a conveyance of the right has, in fact, been executed. In the case of enjoyment by one man of a right of common or profit *à prendre* on the land of another, and in every user of a way, the original enjoyment must have been unlawful, unless the privilege had been exercised with the privilege and sanction of the owner of the soil, and can only be accounted for on the supposition that a grant had been made, and when the enjoyment had been long continued without interruption a grant was presumed; but when the enjoyment of the privilege is accounted for, and is consistent with the fact of there having been no grant, the presumption does not arise. *Doe v. Reed*, 5 B. & A. 236. *Livett v. Wilson*, 3 Bing. 118. *Boyle v. Tamlin*, 6 B. & C. 337.

[2] Although a parol license to enter upon land may be an excuse for a trespass till such license is countermanded, it is clear that such a license cannot be made available in any way as a contract. *Carrington v. Roots*, 2 Mee. & W. 248. And in general

the grantor after he has transferred his interest and possession in the land to a third person. In order to make the grantee a wrong-doer in such a case, he is not entitled to notice from the purchaser of the change of ownership in the soil, as that is a fact which he is obliged to know at his peril.

(D) *By Prescription.*

(*a*) *By uninterrupted User as of Right for Twenty Years.*

(*b*) „ „ „ *for Forty Years.*

By uninterrupted user as of right for twenty years, a title is acquired which cannot be defeated by showing that

The 2 & 3 Wm. 4 c. 71, s. 2, enacts, "no claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse,[1] or the use of any water to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs, or successors, or being part of the duchy of Lancaster, or duchy of Cornwall, or being the property of any ecclesiastical or lay person or body corporate, when such way or other matter as hereinbefore last mentioned shall

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an easement on the land of another cannot be acquired merely by parol license. *Taplin v. Florence*, 10 C. B. 744. Thus, it has been held that a right of passage for water through an artificial drain or watercourse in another man's land, where the party claiming the right has no interest in the land through which the water flows, or ought to flow, is an incorporeal right lying in grant, and is claimable only by deed or by prescription. *Hewlins v. Shippam*, 5 B. & C. 229. "In the case," said *Mr. Baron Alderson*, "of a parol license to come on my land and there to make a watercourse to flow through my land, there is no valid grant of the watercourse; the license remains a mere license, capable of being revoked: but if the license were granted by deed then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse, and if it did, then the license would be irrevocable." *Wood v. Leadbitter*, 13 Mee. & W. 845. See *Lee v. Stevenson*, 27 L. J. Q. B. 263. *Cocker v. Cowper*, 1 C., M. & R. 421. *Fentiman v. Smith*, 4 East, 108. So, if a parol license or permission be granted to a neighbour to open a window overlooking the adjoining ground of the defendant, the parol license will not prevent the defendant from building a wall on his own land and thereby shutting out the light and air from the newly-opened window. *Bridges v. Blanchard*, 1 Ad. & E. 549. *Wood v. Leadbitter*, 13 Mee. & W. 845. And where, in an action for obstructing a drain, the plaintiff claimed right and title to the drain by virtue of a license granted to his landlords, their heirs and assigns, to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard into another yard appurtenant to the premises in the plaintiff's occupation, it was held that the interest declared upon by the plaintiff being in its nature freehold, and the license to support it being merely by parol, and not by deed, the action was not maintainable. *Hewlins v. Shippam*, 5 B. & C. 221; 7 D. & R. 783. See *Cocker v. Cowper*, 1 C., M. & R. 418; 11 Ad. & E. 34. But if the immediate consequence of the license is to induce the person to whom it is given to incur expense, the party granting the license should expressly reserve the power of revoking the license after it has been carried into effect (*Siggins v. Inge*, 7 Bing. 694); and accordingly where the plaintiff by parol authorised the defendant to put a skylight over the defendant's area, which impeded the access of light and air to a window in the plaintiff's dwelling-house, the court held that such license could not, after the erection of the skylight, be recalled; at least not without tendering the expense which the defendant had incurred in making the skylight; and that, therefore, no action was maintainable as for a private nuisance from the existence of such skylight. *Winter v. Brockwell*, 8 East, 308. So where, by the license of a millowner, a riparian possessor was induced to lower the bank of the river and to erect a weir, it was held that the millowner could not complain of a diminution of the flow of water to his mill consequent thereupon. *Siggins v. Inge*, 7 Bing. 682. See *Mason v. Hill*, 5 B. & Adol. 15. *Duke of Devonshire v. Elgin*, 14 Beav. 530; 20 L. J. Ch. 495.

A mere license of pleasure, such as a license to hunt over a man's land, whether made by deed or simple contract, is revocable; but a license to hunt and carry away the game killed amounts, if under seal, to a grant, and cannot be revoked. *Wood v. Leadbitter*, 13 Mee. & W. 838: *per Alderson, B. Thomas v. Sorrell*, Vaugh. 351; Bro. Abr. Licenses.

[1] A claim by the owner of a copper mine to sink pits in his own land for the water pumped out of his mine, and for the precipitation of the copper contained in such water, and for that purpose to put iron into the pits, and to cover the same with the water, and afterwards to let it off, impregnated with metallic substances, into a watercourse flowing over the land of another, is a claim to a watercourse within the 2nd section of the statute. *Wright v. Williams*, 1 Mee. & W. 77; 1 Tyr. & Gr. 375.

have been actually enjoyed by any person having right thereto, without interruption, for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at some time prior to such period of twenty years; but nevertheless such claim may be de-

it commenced at an earlier period,[1] and if for forty years, it can

[1] The presumption of a legal title, by grant or otherwise, to incorporeal hereditaments in the lands of others, founded on adverse possession and enjoyment of such rights for the period of twenty years, appears to have been adopted in analogy to the enactment of the Statute of Limitations (21 Jac. 1, c. 16), which made an adverse enjoyment of twenty years a bar to an action of ejectment (*Holcroft v. Heel*, 1 Bos. & Pul. 400; 2 Saund. 175, a); for, as an adverse possession of that duration will give a possessory title to the land itself, it seems to be also reasonable that it should afford a presumption of right to a minor interest arising out of land. *Campbell v. Wilson*, 3 East, 274.

If there has been uninterrupted possession of light, water, or any other easement, it affords a ground for presuming a right by grant, covenant, or otherwise, according to the nature of the easement, and if there is nothing to rebut the presumption, a jury may be directed to act upon it. *Cross v. Lewis*, 2 B. & C. 686. *Yard v. Ford*, 2 Wms. S. n. 2. *Livett v. Wilson*, 3 Bing. 115. *Williams v. Morland*, 2 B. & C. 914.

The enjoyment during the twenty years must be continuous in order to the acquisition of the right. It will be defeated by unity of possession during all or part of the twenty years. *Clay v. Thackera*, 9 C. & P. 47; 2 M. & Rob. 244. And such unity of possession need not be specially replied under the 5th section. *Onley v. Gardiner*, 4 Mee. & W. 496.

According to the true construction of the statute, in order to make a user "as of right," it must be exercised for the period prescribed as of right against all persons, so as to be evidence of a perfect right. *Winship v. Hudspeth*, 10 Ex. 5. Though no interruption for less than a year breaks the period when once the enjoyment as of right has begun, yet interruptions acquiesced in for less than a year may show that the enjoyment never was of right. *Eaton v. Swansea Waterworks Co.* 17 Q. B. 267. Accordingly it has been held, that under a general traverse of the enjoyment as of right the defendant may show that the plaintiff asked leave from time to time. The asking leave from time to time within the forty or twenty years breaks the continuity of the enjoyment as of right; because each asking of leave is an admission that at that time the asker had no right; and, therefore, the evidence of such asking *within* the period is admissible, under a general traverse, of the enjoyment for forty or twenty years as of right. It follows that not only an asking leave, but an agreement, *commencing within the period*, may be given in evidence under the general traverse, notwithstanding the words of the 5th sect.; for the party does not, and cannot rely on it as an answer to an enjoyment as of right, which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement, but as showing that there was not at the time when the agreement was made an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years: *per Lord Denman, C. J., Tickle v. Brown*, 4 Ad. & E. 383. *Monmouthshire Canal Co. v. Harford*, 1 C., M. & R. 614; 5 Tyr. 68.

It is essential, in order to constitute an interruption, that there should be an actual discontinuance of the enjoyment in fact, by reason of an obstruction submitted to and acquiesced in for a year. *Plasterers' Co. v. Parish Clerks' Co.* 6 Ex. 630.

Where, before the commencement of twenty years previously to the bringing of the action, it appeared that the stream had flowed through the plaintiff's lands, but there had been some interruption about twenty-two years before the action, and it was not until nineteen years that the stream had again flowed constantly in its former course; and it was objected that there was a want of sufficient evidence to support the plaintiff's claim; *Tindal, C. J.*, said that it would be very dangerous to hold that a party should lose his right in consequence of such an interruption. If such were the rule the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment. *Hall v. Swift*, 4 Bing. N. C. 381. See *Carr v. Foster*, 3 Q. B. 381.

An enjoyment for nineteen years and a fraction will establish the right, provided the action be brought before the interruption has continued for the full period of a year. Accordingly where, after an enjoyment for nineteen years and three hundred and thirty days, the defendant first interrupted the enjoyment by the erection of a building, which interruption continued down to the commencement of the suit, and it was proved upon the trial that the erection of the wall which was the act or matter complained of, was not submitted to or acquiesced in by the plaintiff for one year after he had notice of it, but for a very small portion of a year only, inasmuch as within a few months from the time of erecting the wall the plaintiff below brought the action; the court held that such erection of the wall, and continuing it so erected, could not, according to the express words of the 4th section, be deemed an interruption within the act. *Flight v. Thomas*, 11 Ad. & E. 688; 3 Per. & D. 442; in error, 8 Clark & Fin. 231.

only be defeated by showing a consent or agreement in writing.[1]

feated in any other way by which the same is now liable to be defeated: and where such way or other matter as herein last before-mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, until it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

(1) *In the case of Lights an Indefeasible Right is acquired, unless the Enjoyment was by Deed or Writing.*

In the case of lights an indefeasible right is acquired, unless the enjoyment was by deed or writing.[2]

By 2 & 3 Wm. 4, c. 71, s. 3, "where the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years, without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

(2) *Computation of Period.*

(*a*) *The Periods are computed from the time next before the Commencement of an Action in which the Right is brought in question.*

The periods are computed from the time next before the commencement of an action in which the right is brought in question.[3]

By sect. 4, "each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period shall relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption within this statute, unless the same shall have been submitted to or acquiesced in for one year after the party interrupted shall have had, or shall have notice thereof, and of the person making or authorising the same, to be made."

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[1] To support a plea for a right of way enjoyed for forty years, evidence may be given of user more than forty years back. If evidence of user beyond forty years were excluded, it might be that after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail because he was unable to carry his case on without going back to the distance of forty-one years (*Lawson v. Langley*, 4 Ad. & E. 890); but a plea of forty or twenty years' user is not supported by evidence of user for a period exceeding these periods respectively: but without any evidence with respect to the year which elapsed immediately before commencing the action, it is necessary that some act of user should be shown to have been exercised in the year in which the action was brought. *Lowe v. Carpenter*, 8 Ex. 825. *Parker v. Mitchell*, 11 Ad. & E. 788; 3 Per. & D. 655.

[2] The 3rd section converts into a right such an enjoyment only of access of light over contiguous land as has been had for twenty years in the character of an easement distinct from the enjoyment of the land itself; and the statute places this kind of negative easement on the same footing, in this respect, as those positive easements provided for by the other sections. *Harridge v. Warwick*, 3 Ex. 552.

This section in effect repeals that custom of London, according to which, by building on an ancient foundation, ancient lights might be obstructed. *Salters' Co. v. Jay*, 3 Q. B. 109; 2 Gale & D. 414. *Truscott v. Merchant Taylors' Co.* 2 Jur. N. S. 356.

An actual enjoyment of light for twenty years, although permission of the person entitled to obstruct has been asked for and verbally given, confers a right under the 3d section. *Mayor of London v. Pewterers' Co.* 2 M. & Rob. 409.

And even where the occupier of a house paid an annual sum under a parol agreement to the owner of the adjoining land for the liberty of keeping the windows open which looked upon such land, and continued in such active enjoyment for twenty years, it was held in an action for an obstruction of these lights that such payment was no evidence of an interruption of the enjoyment, for the interruption in the 3d section must be such an interruption as that contemplated in the 4th; and looking at the two sections together, there must be an actual discontinuance of the enjoyment, by reason of an obstruction which is submitted to or acquiesced in for a year. *Plasterers' Co. v. Parish Clerks' Co.* 6 Ex. 630; 20 L. J. Ex. 362.

[3] The 4th section is applicable not only

(*b*) *In the case of Disability.*

(1) *Except where by the Statute the Title is declared to be Indefeasible, the Time during which the Person entitled to resist the Claim to the Easement is under Disability ought to be excluded.*

Except where by the statute the title is declared to be indefeasible, the time during which the person entitled to resist the claim to the easement is under disability ought to be excluded.[1]

2 & 3 Wm. 4, c. 71, s. 7, provides, "that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, feme covert, or tenant, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

(*c*) *In case the Lands are on Lease.*

(1) *If the Lands over which the Easement is exercised are on Lease, the Term will be excluded in reckoning the period of Forty Years, provided the Right be disputed by the Reversioner within Three Years after the Expiration of the Term.*

If the lands over which the easement is exercised are on lease, the term will be excluded in reckoning the period of forty years, provided the right be disputed by the reversioner within three years after the expiration of the term.[3]

2 & 3 Wm. 4, c. 71, s. 8, provides that, "when any land or water upon, over, or from which any such way or other *convenient*[2] watercourse or use of water, shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end, or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof."

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to obstructions preceded and followed by portions of the twenty years, but also to an obstruction ending with that period, and therefore a prescriptive title to the access and use of light may be gained by an enjoyment for nineteen years and three hundred and thirty days, followed by an obstruction for thirty-five days. *Flight v. Thomas*, 11 Ad. & E. 688; in error, 8 Clark & Fin. 231. See *Eaton v. Swansea Waterworks' Co.* 17 Q. B. 267.

"The decision in *Flight v. Thomas*," said *Lord Campbell, C. J.* (17 Q. B. 272), "may establish conclusively that when an easement has once been enjoyed as of right, such enjoyment must be taken for the purposes of the act to continue, though interrupted, unless the interruption be acquiesced in for a year."

No right, it seems, can be obtained unless an user be proved of the easement at least once a year during the prescribed period. See *per Parke, B.: Lowe v. Carpenter*, 6 Ex. 831. *Carr v. Foster*, 3 Q. B. 581. *Hall v. Swift*, 4 Bing. N. C. 381.

[1] According to the construction of this section, in computing the period of forty years, disability is never to be deducted; in computing that of twenty years, it will, if rendered available by being pleaded, be deducted. *Clayton v. Corby*, 2 Q. B. 813. *Pye v. Mumford*, 11 id. 675.

[2] The word "convenient" appears to have been, probably by a miscopying, inserted instead of the word "easement." See *Per Parke, B.: Wright v. Williams*, 1 Mee. & W. 77.

[3] During the period of a tenancy for life the exercise of an easement will not affect the fee; in order to do that there must be that period of enjoyment against the owner of the fee. In *Bright v. Walker* (1 C., M. & R. 211; 4 Tyr. 508), a way had been used adversely, and under a claim of right for more than twenty years, over land in the possession of a lessee who held under a lease for lives granted by the Bishop of Worcester, the court held that no easement was acquired either as against the bishop or the lessee. "In order," said *Parke, B.*, delivering the judgment of the court, "to establish a right of way, and to bring the case within the 2d section, it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which by sect. 5 such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been

enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done, if he shall have occasionally asked the permission of the occupier of the land, no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it would not, if there had been unity of possession during all or part of the time, for then the claimant would not have enjoyed as of right the easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated, that is by the same means by which a similar claim arising by custom, prescription, or grant, would now be defeasible, and therefore it may be answered by proof of a grant, or of a license written or parol for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. So far the construction of the act is clear, and this enjoyment of twenty years having been uninterrupted and not defeated on any ground above mentioned would give a good title. But if this enjoyment take place with the acquiescence or by the laches of one who is tenant for life only, the question is, what is its effect according to the true meaning of the statute? Will it be good to give a right against the see and those claiming under it by a new lease, or only as against the termor and his assigns during the continuance of the term, or will it be altogether invalid? In the first place it is quite clear that no right is gained against the bishop; whatever construction is put on the 7th section, it admits of no doubt under the 8th. It is quite certain that an enjoyment of forty years, instead of twenty under the circumstances of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period as against the bishop, it certainly must from the shorter. Therefore there is no doubt that this possession of twenty years gives no possession as against the bishop, and cannot affect the right of the see. The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title as against the lessee and the defendants claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion upon this point, but upon the fullest consideration we think that no title at all is gained by a user which does not give a valid title against all, and permanently affect the fee.

"As it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good as against any one, and therefore not as against the defendant. According to the 7th section a tenancy for life is included in the period of forty years; the 8th section only takes it out on condition that the reversioner shall bring his action within three years after its determination. An user of forty years confers a *primâ facie* title, which is good, unless the reversioner pursues his remedy within the three years." *Wright v. Williams*, 1 Mee. & W. 77; Tyr. & G. 393. See *Onley v. Gardiner*, 4 Mee. & W. 300. *Palk v. Skinner*, 18 Q. B. 568.

Where the plea was of an enjoyment of an easement for forty years, a replication setting up an existing tenancy for life, and which did not show that the plaintiff was the party entitled to the reversion expectant upon such life estate, was held bad for this defect. The court said, "the enjoyment of the right during forty years alleged in the plea being admitted, the replications which state only an existing tenancy for life are no answer, for the time for a tenancy for life in a person who might otherwise be capable of resisting the claim, though excluded by the 7th section from the computation of the shorter period of twenty years absolutely, is by the 8th section excluded from the computation of the longer period of forty years *conditionally* only; that is, provided the reversioner expectant, on the determination of the term for life, shall within three years (that is, probably, before the end of three years), after such determination resist the right; and it does not appear that *the plaintiff is entitled to the reversion expectant on that lease*, though it is averred that he has a reversion expectant on the determination of the interest of the tenant in possession. The tenancy for the life of the *cestui que vie* is therefore not to be excluded on these pleadings from the period of forty years, and such period being complete, the defendant is entitled to an indefeasible right to the easement claimed. *Wright v. Williams*, 1 Mee. & W. 100.

The ground upon which the exclusion of a term during which the land is on lease in the qualified manner provided by the statute proceeds, existed in principle before this act, and has been thus expressed:—"The foundation of presuming a grant against any party, is that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant; and that cannot be presumed against him unless there was some probable means of his knowing what was done against him." *Per Lord Ellenborough: Daniel v. North*, 11 East, 374. *Runcorn v. Cooper*, 5 B. & C. 701. Therefore, if an easement, or profit *à prendre* has been enjoyed on land let on lease, the landlord is not to be prejudiced in his rights, or the inheritance burdened through the laches or acquiescence of the tenants in matters affecting the inheritance and privity and sanction of the landlord. *Benest v. Pipon*, 1 Knapp, P. C. 70. *Davis v. Stephens*, 7 C. & P. 570.

(*d*) *No Presumption is raised by Evidence of Enjoyment for a Shorter Period than the Time of Prescription.*

Sect. 6 enacts, "that in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case or to the nature of the claim."

No presumption is raised by evidence of enjoyment for a shorter period than the time of prescription.

III. Of the Mode of Pleading an Easement.

(A) *Plea claiming Right by Prescription ought to follow the words of the Statute, 2 & 3 Wm. 4, c. 71.*

2 & 3 Wm. 4, c. 71, s. 5, enacts, "that in all actions on the case, and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenements[2] in respect whereof the same is claimed, for and during such of the periods mentioned in this act, as may be applicable to the case, and without claiming in the

Pleadings may claim a prescriptive right for the periods mentioned in stat. 2 & 3 Wm. 4, c. 71,[1] and if the other party means to rely on any contract or disability, &c. he must set it forth in answer.[3]

[1] The latter part of the 5th section, in express terms, applies only to rights which can be claimed by the occupiers of a tenement in respect of it. It has been contended that it is confined to a claim appendant or appurtenant, and that it does not apply to a right in gross, as to a right to take the whole pasturage in gross. *See* 6 Mee. & W. 542; 5 id. 402; 7 id. 81.

The 5th section gives a new plea, by enacting that in certain cases it shall be sufficient to allege the enjoyment "as of right." If parties choose to avail themselves of that provision they must follow the very words. Since the statute, it is usual in pleading a right of way to plead first a prescriptive right, then a right of way existing for the last forty years, and then a right of way existing twenty years: and so of other rights under that statute. See *per Alderson, B.: Earl of Stamford v. Dunbar*, 13 id. 827. Where, to an action of trespass, the defendant pleaded that he and all other occupiers of a certain tenement, for twenty years next before the commencement of the suit, had used and actually enjoyed without interruption, and of right ought to have had used, and actually enjoyed, &c., a way through the *locus in quo*, the plea was held bad, after verdict, as the actual enjoyment was not alleged to have been under the right claimed, and the enjoyment was, therefore, not shown to be "as of right," and did not in that respect comply with the statute. *Holford v. Hankinson*, 5 Q. B. 584; 1 Dod. & Mer. 473. See *Jackson v. Pesked*, 1 M. & S. 234.

In case for annoying plaintiff in the enjoyment of his house, by causing offensive smells to arise near to, in, and about it, defendant pleaded enjoyment as of right for twenty years, of a mixen on defendant's land, contiguous and near to plaintiff's house, whereby, during all that time, offensive smells necessarily and unavoidably arose from the mixen; and after verdict for the defendant, the court held the plea bad, because it did not show a right to cause offensive smells on the plaintiff's premises, nor that any smells had, in fact, been used to pass beyond the limits of the defendant's own land. *Flight v. Thomas*, 10 Ad. & E. 590.

[2] A party must prove a prescriptive right commensurate with the right claimed (2 Camp. 313; 2 H. Black. 224; 5 Rep. 79; 2 Roll. Abr. 706); but he will not be precluded from recovering because he proves a more ample right than that claimed, provided the right alleged be included in that which is proved. *Bailey v. Appleyard*, 8 Ad. & E. 167. *West v. Andrews*, 1 B. & C. 77.

Where a plaintiff claimed an easement for the tenants and occupiers of a messuage of fastening ropes to the messuage, and across the defendant's close to a wall in the said close, in order to hang linen thereon, and of hanging linen thereon to dry as often as they had occasion so to do, at their free will and pleasure, it was held that proof of a privilege for the tenants to hang lines across the yard for the purpose of drying the linen of their own family only, did not support the alleged right. *Drewell v. Towler*, 3 B. & Ad. 735.

The right may, notwithstanding the statute, still be pleaded as acquired by virtue of immemorial prescription. *Lowe v. Carpenter*, 6 Ex. 825. *Onley v. Gardiner*, 4 Mee. & W. 496.

[3] A license in writing must be replied to a plea of forty years' enjoyment, if it cover

name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or any cause or matter of fact or law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

(B) *Plea of Lost Grant.*[1]

EAST India Bond: Forging. *See* 24 & 25 Vic. c. 98, s. 7; *post*, Forgery.

Stealing. *See* id. s. 1; *post*, Larceny.

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the whole time; and the same of a parol license, in case of a plea for twenty years. *Tickle v. Brown*, 4 Ad. & E. 369. So, where a right to the use of a haling-path was claimed by prescription, a replication setting out that within twenty years before the commencement of the action another haling-path was set out under the powers of an act of parliament, and that thereupon, by virtue of the same act, the haling-path over the *locus in quo* was abandoned, was held good, for it showed that the defendant could not have exercised the right, either by custom, prescription, or grant. *Kinloch v. Neville*, 6 Mee. & W. 806.

In trespass *quare clausum fregit* the defendant pleaded a justification under a right of way over the plaintiff's close by the occupiers of a close called W., for twenty years next before the commencement of the suit. The plaintiff replied, that before the twenty years mentioned in the plea, one W. C. was served in fee, as well of the close mentioned in the declaration as of the close called W., and continued so seised during part of the said period of twenty years; to wit, until, &c., when he died so seised. The replication was held bad on special demurrer, on the ground that unity of seisin was not consistent with the right alleged in the plea; and unity of possession — if that were meant by the replication — might have been given in evidence, under a traverse of the right as alleged in the plea. *England v. Wall*, 10 Mee. & W. 699.

Where the plea was of a right of way for the occupiers of a close for twenty years to pass with horses, carts, waggons, and carriages, at their free will and pleasure, and the replication traversed such right, the plaintiff was held entitled to show that the defendant had a right of way for horses, carts, waggons, and carriages, for certain purposes only, and not for all, and that the purpose for which the defendant had used the road was not one of those to which the right extended. *Cowling v. Higginson*, 4 Mee. & W. 245. See *Lowe v. Carpenter*, 6 Ex. 825: *per Parke, B. Bright v. Walker*, 1 C., M. & R. 217: *per Patteson, J.*

[1] In order to obviate the difficulty of proving an immemorial usage, it became a practice to plead a right of way by what was termed a non-existing grant (*Blewett v. Tregoning*, 3 Ad. & E. 554), that is, a feigned grant by deed, supposed to be lost from a former freeholder of the land, in or upon which the easement was exercisable, to a former freeholder of the tenements, in respect of which it was claimed; but it was necessary that the names of the parties to, and the date of, such supposed grant, should be stated (*Hendry v. Stephenson*, 10 East, 55); but profert of the deed was excused, if it were averred that the deed had been lost by time and accident. *Read v. Brookman*, 3 T. R. 151. If, under this plea, "the evidence establish a user as far back as memory goes, and there does not appear to have been any time at which it did not exist, that is proof of prescription; and supposing the evidence sufficiently strong, a prescription is what the jury would find; and they have no right to find a grant, unless more be shown. Supposing the evidence in such a case to leave it doubtful whether the right existed sixty or seventy years ago, it may be protected under a plea of non-existing grant; but if the evidence of user goes far enough to prove a prescription, such evidence cannot be relied upon to prove a grant." *Blewett v. Tregoning*, 3 Ad. & E. 583: *per Littledale, J.* Accordingly it was held, in a case where the defendant pleaded a grant of right of way by a lost deed, and there was conflicting evidence as to the uninterrupted user of the way, that the judge correctly directed the jury that if they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, they would find for the defendant, but if they thought there had been no way granted by deed, they should find for the plaintiff. *Lovell v. Wilson*, 3 Bing. 115; 10 Moore, 439. See *Doe d. Fenwick v. Read*, 5 B. & A. 232.

It is necessary, if the fact be traversed, to prove that the persons alleged as the former freeholders of the respective properties were so. *Blewett v. Tregoning*, 3 Ad. & E. 554. If the plaintiff merely traverse a non-existing grant of a way, he cannot on the trial give evidence to show that the supposed grantor was not, as alleged in the plea, seised in fee, even for the purpose of rebutting the presumption of the grant. *Cowlishaw v. Cheslyn*, 1 C. & J. 48.

EASTER Offerings.[1]

EASTER Term begins on the 15th of April, and ends the 8th of May; but "if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter-day shall fall within Easter Term, there shall be no sittings on any of such intervening days, but the term shall, in such case, be prolonged and continue for such number of days of business[2] as shall be equal to the number of the intervening days before mentioned, exclusive of Easter-day; and the commencement of the ensuing Trinity Term shall, in such cases, be postponed, and its continuance prolonged for an equal number of days of business."[3] 11 Geo. 4, and 1 Wm. 4, c. 70, s. 6. *See* also 1 Wm. 4, c. 3, s. 3; and *post*, Terms.

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[1] By 2 & 3 Edw. 6, and by the rubric at the end of the Communion Office, it is directed that "yearly, at Easter, every parishioner shall reckon with the parson, vicar, or curate, or his or their deputy or deputies, and pay to them, or him, all ecclesiastical duties accustomably due, then and at that time to be paid."

Easter offerings are due of common right, and not by custom only. *Egerton v. Still*, Bunb. 178. And a custom that every inhabitant of the age of 16 should pay 4*d.* yearly is good and binding, even upon Quakers. *Fuller v. Say*, Willes, 629.

So, in *Carthew v. Edwards*, cited 3 Burn. C. L. 21, it was decreed by the Exchequer that Easter offerings were due of common right, after the rate of twopence a-head for every person in the defendant's family of 16 years of age. So, an offering of fourpence for each married householder, three-halfpence for every son, daughter, or other servant, not having wages, and twopence for every servant having wages, if they receive the sacrament, was deemed good. *See* 1 Wood's Dec. 341.

[2] *Wright v. Lewis*, 9 Dowl. 183.

[3] See *Downes v. Bostock*, id. 242.

[4] Building a roof with eaves which discharge rain-water by a spout into adjoining premises is an injury for which the landlord of such premises may recover as reversioner while they are under demise, if the jury think there is a damage to the reversion; for the very existence of the building is a nuisance, and permanent injury to the property, and would, if allowed to continue, impose a servitude thereon. *Tucker v. Newman*, 11 Ad. & E. 40.

[5] The first Ecclesiastical Commissioners were appointed in 1835, to consider the state of the several dioceses of England and Wales, with reference to the amount of their revenues, and the more equal distribution of episcopal duties; and also to consider the state of the cathedral and collegiate churches in England and Wales, with a view to the suggestion of such measures as might render them most conducive to the efficiency of the Established Church; and further to devise the best mode of providing for the cure of souls, with special reference to the residence of the clergy in their respective benefices. *See* the statutes relating to their functions, and carrying into effect their suggestions: 6 & 7 Wm. 4, c. 77; 3 & 4 Vic. c. 113, s. 78; 4 & 5 id. c. 39; 6 & 7 id. cc. 37, 77; 7 & 8 id. c. 94; 13 & 14 id. cc. 41, 94; 14 & 15 id. c. 104; 16 & 17 id. c. 85, s. 50; 17 & 18 id. c. 116; 19 & 20 id. cc. 55, 104; 20 & 21 id. c. 74; 22 & 23 id. c. 46; 23 & 24 id. c. 124; 24 & 25 id. cc. 116, 131.

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I. Persons.

(A) *Relative to the different Kinds of, and their particular Rights, Privileges, and Disabilities.*

(*a*) *Archbishops and Bishops.*[1]

[1] Bishop is derived from the Saxon word *biscop*, an overseer or superintendent. *See* Godol. 22. An archbishop is the chief bishop of the province, who, next and immediately under the Queen, has supreme power and jurisdiction in all causes and things ecclesiastical. *See* id. 12. There are within the kingdom only two archbishops — Canterbury and York. *See* Co. Litt. 94, a. Each archbishop has, within his province, bishops of several dioceses. The Archbishop of Canterbury has under him, within his

province, Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Lichfield and Coventry, Hereford, Llandaff, St. David, Bangor, St. Asaph, and four founded by King Henry VII. created out of the ruins of dissolved monasteries, viz. Gloucester, Bristol, Peterborough, and Oxford. The Archbishop of York has under him six: namely, the bishop of the county palatine of Chester, Durham, Carlisle, Manchester, Ripon, and Sodor and Man. *See* 1 Inst. 194; 6 & 7 Wm. 4, c. 77; and 10 & 11 Vic. c. 108.

The archbishops have the style and title of "Grace," and "Most Reverend Father in God by Divine Providence." The bishops that of "Lord," and "Right Reverend Father in God by Divine Permission."

Formerly, bishoprics were elective by the clergy and people. *See* Ayl. Par. 126. But now the right of donation is in the Queen. *See* 1 Inst. 134.

Bishops ought to be personally resident, to take care of their particular provinces, and for the comfort of the churches espoused to them, especially on solemn days in Lent and Advent, unless their absence is required by their superiors, or for other just cause. *See* Rogers, 118.

By 25 Hen. 8, c. 20, a bishop, upon his election, shall be deputed and taken as *lord elected.* And, by several other statutes, bishops are called peers of the land. *See* 1 Inst. 1. It has been asserted that a statute made where bishops have not been present is not good; but this has been contradicted by Lord Coke. *See* 1 Burn. E. L. 213. A bishop has three powers: —1st. His power of ordination, which is gained on his consecration, and not before, and thereby he may confer orders, &c., in any place throughout the world. 2d. His power of jurisdiction, which is limited and confined to his see. And lastly, his power of administration and government of the revenues; both of the latter powers he gains by his confirmation; and some are of opinion that the bishop's jurisdiction, as to ministerial acts, commences on his election. *See* Palm. 473.

The right of trial by the lords of parliament, as their peers, it is said, does not extend to bishops, who, though they are lords of parliament (except Sodor and Man), and sit there by virtue of their baronies, which they hold *jure ecclesiæ,* yet are not ennobled in blood, and, consequently, not peers with the nobility. *See* 1 Inst. 30; 1 Bl. Com. 40.

Archbishoprics and bishoprics may become void by death, deprivation for any very gross and notorious cause, and also by resignation. All resignations must be made to some superior. Therefore, a bishop must resign to his metropolitan; but the archbishop can resign to none but the Queen herself. *See* 1 Bl. Com. 382.

In Ireland there are two archbishops and ten bishops.

In Scotland, seven bishops.

An ancient office, with a salary, usually granted for life before the 1 Eliz. c. 19, may be granted by a bishop, as before that statute. *Trelawney v. the Bishop of Winchester,* 1 Ken. 256; 1 Burr. 219.

A *mandamus* to a bishop to grant a license to a curate must show that the party applying for it is entitled to the relief prayed. *Rex v. the Bishop of Oxford,* 7 East, 345, 600; 3 Smith's Rep. 241. And a *mandamus* will not lie to the Archbishop of Canterbury to procure the admission of a person as a doctor of civil law. *Rex v. the Archbishop of Canterbury,* 8 East, 213; *see* 1 Show. 217; 3 Mod. 332; 1 Lev. 75; 2 Stra. 893; Bac. Abr. G. 198; 2 Roll. Abr. 285; 1 Stra. 58; 1 Vent. 143; 2 Stra. 1114; 3 Burns' E. L. 319, Sexton; 1 Salk. 166.

The judgment of the bishop is conclusive on questions of qualification for lectureships. *Rex v. the Archbishop of Canterbury and the Bishop of London,* 15 East, 117.

A bishop may sue before his own commissary. *Harrison v. Austin,* Comb. 128. *See* Bishop, vol. ii. p. 502.

H. having been elected Bishop of Hereford by the dean and chapter, letters-patent issued to the metropolitan commanding him to confirm the election and consecration. The metropolitan appointed commissioners for the purpose, and notice of the confirmation to be performed at Bow Church was published, with a citation of opposers. On the day named in the notice the certificate of election was read, and opposers were publicly called to appear on pain of contumacy. Three clergymen, two of them holding benefices in the diocese of Hereford, then offered to appear, and claimed to put in a libel or plea stating objections to the confirmation, on the grounds that H. had published works repugnant to the doctrine of the Established Church, and had been, therefore, censured by the University of Oxford. The Commissioners refused to hear the objections, and confirmed the election in the forms usual where no opposition is made. A rule *nisi* having been obtained on behalf of the objectors for a *mandamus* to the metropolitan, or his vicar-general, to hear the objections, the court was divided in opinion upon the question; two of the learned judges thinking that the objection could not be heard, the 25 Hen. 8, c. 20, making it imperative on the metropolitan to confirm without taking cognisance of such objections, and other two being of opinion that the objections ought to have been heard, or that, at least, there was ground for requiring a return. *Reg. v. Archbishop of Canterbury,* 11 Q. B. 483; 17 L. J. Q. B. 252.

The space of twenty-eight days, specified in the 95th canon for a bishop to inquire into the sufficiency and qualities of every minister after he hath been presented unto him to be instituted into any benefice, is not an absolute limitation, rendering an examination after that period void. *Gorham v. Bishop of Exeter,* 2 Rob. E. R. 1; 13 Jur. 238.

(*b*) *Archdeacons.* *See* vol. i. p. 512.

(*c*) *Canons, Prebendaries, and Vicars-Choral.*[1]

(*d*) *Churchwardens.* *See* vol. iii. p. 114.

(*e*) *Curates.*[2]

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[1] A prebend is an endowment in land or pension, in money, given to a cathedral or conventicle church *in præbendum;* that is, for the maintenance of a secular priest or regular canon. A canonry also is a name of office, and a canon is the officer in like manner as a prebendary; and a prebend is the maintenance or stipend both of the one and of the other. *See* Gibs. 172; 2 Burn. E. L. 88.

There is no lapse to the bishop in the case of canonry; and it seems that the bishop, by virtue of his visitorial power, has no right to appoint *pro tempore*, in default of appointment by the dean and chapter. *Bishop of Chichester v. Harwood*, 1 T. R. 653.

The admission of a canon into the *plenum jus*, has relation back to the time when his title to the profits accrued. *Garnett v. Gordon*, 1 M. & S. 205.

A *mandamus* lies to admit a prebendary to his stall and voice. *Rex v. Dean and Chapter of Norwich*, 1 Stra. 159. But no *mandamus* lies to a visitor to restore to a prebend a person displaced by him for incontinency. *Rex v. Bishop of Chester*, 1 Wils. 206.

A vicar-choral is a corporation sole. *Gleaves v. Parfitt*, 7 C. B. (N. S.) 838; 29 L. J. C. P. 216. A vicar-choral in a cathedral church who succeeds or is appointed to a house of his predecessor in the vicar-choralship, is within the custom of ecclesiastical dilapidations, and, therefore, his representatives may be sued in respect thereof at his death. (Id.)

[2] A curate represents the incumbent of a church, parson or vicar, and takes care of divine service in his stead, in case of pluralities of livings; or where a clergyman is old and infirm, it is requisite there should be a curate to perform the cure of the church. He is to be licensed and admitted by the bishop of the diocese, or by an ordinary having episcopal jurisdiction; and, when a curate hath the approbation of the bishop, he usually appoints the salary too; and in such case, if it be not paid, the curate has a remedy in the ecclesiastical court, by sequestration of the profits of the benefice; but if he has no license from the bishop, he is compelled to seek his remedy at common law. *See* Tomlin's *Law Dict.* Curate.

An unlicensed, but not a licensed curate, is removable at pleasure. *Martyn v. Hind*, Cowp. 440; 1 Dougl. 141.

It has been decided, that if a rector give a person a title to the bishop, by which he appoints him curate of his church, and undertakes to continue him and pay him a salary till he shall be otherwise provided for by some ecclesiastical preferment, or for fault by him committed, lawfully removed, he cannot remove him without cause. (Id.)

A curacy is augmented by the mere order for augmentation. *Doe d. Graham v. Scott*, 11 East, 477.

By 1 & 2 Vic. c. 106, "the bishop has power, after having given to the curate sufficient opportunity of showing reason to the contrary, to revoke summarily and without further process any license granted to any curate, and to remove such curate for any cause which appears to the bishop to be good and reasonable. It has been held that the bishop may, under this section, remove, not only for an act cognisable under the 3 & 4 Vic. c. 80, but also for a cause which would not constitute an ecclesiastical offence so cognisable. *Reg. v. Archbishop of Canterbury*, 28 L. J. Q. B. 154; 5 Jur. N. S. 958.

Under sect. 98 of the 1 & 2 Vic. c. 106, which enacts that a curate whose license shall have been revoked by the bishop under that section, may, within one month after service upon him of such revocation, appeal to the archbishop of the province, who shall confirm or annul such revocation as to him shall appear just and proper. The archbishop is bound, if requested by the curate, to hear him, either in person or by counsel, as to the validity of the grounds of such revocation, and to receive fresh evidence tendered on his behalf upon that point. *Reg. v. Archbishop of Canterbury*, E. & E. 545. The appeal to the archbishop is final. *Poole v. Bishop of London*, 7 Jur. N. S. 347; 9 W. R. 485.

In *Daniel v. Morton* (16 Q. B. 168; 20 L. J. Q. B. 98), a monition was issued under sect. 83 of the 1 & 2 Vic. c. 106, by the bishop, which recited that a complaint had been made by the curate that arrears of stipend were due to him, which A. had wilfully neglected and refused to pay, and that A. and the curate having appeared before him, the bishop heard summarily the differences, and that the complaint was duly proved before him, and that he adjudged the same to be true; it then administered and required A. to pay the arrears. Default being made in payment, the sequestration issued, under which the fruits of the benefice were seized to satisfy the arrears of the stipend. The court held that A. could not, after the sequestration issued, object that he had not been guilty of a refusal to pay the stipend, or that he had no notice of the curate being appointed by the bishop.

The 28 Hen. 7, c. 11, ss. 5, 10, is not repealed by the 1 & 2 Vic. c. 106. Therefore where, after the passing of the later

(*f*) *Dean and Chapter.*[1]
(*g*) *Lecturer.*[2]
(*h*) *Parish Clerk.*[3]

statute, an action was brought against the incumbent of a living by a curate, to recover compensation for having discharged the parochial duty during the vacancy, and the declaration stated that the plaintiff, during the vacancy, duly served and kept the cure, at the request of the special sequestrators thereof appointed by the bishop of the diocese, the court held the action maintainable. *Dakins v. Seaman*, 9 Mee. & W. 777.

[1] There are four sorts of deans and deaneries, of which, and of whom, the law of this realm takes notice. The first is a dean who hath a chapter, consisting of prebendaries or canons, subordinate to the bishop, as a council assistant to him in matters spiritual relating to religion, and in matters temporal relating to the temporalities of his bishopric. Foreseeing that it was impossible but that sects, schisms, and heresies, should arise in the church, it was a Christian policy thought fit and necessary that the burden of the whole church, and the government thereof, should not lie upon the person of the bishop only; and, therefore, it was deemed expedient that every bishop within his diocese should be assisted with a council, to consult with him in matters of difficulty concerning religion, and deciding of the controversies thereof, and also for the better ordering and disposing of the things of the church, and to their assents to such estates as the bishop should make of the temporalities of his bishopric; for it was not convenient that the whole power and charge thereof should remain in any one sole person only. The second is a dean who hath no chapter, and yet he is presentative, and hath cure of souls; he hath a peculiar, and a court, wherein he holdeth ecclesiastical jurisdiction; but he is not subject to the visitation of the bishop or ordinary: such is the dean of Battel, in Sussex, which deanery was founded by King William the Conqueror, in memory of his conquests; and the dean there hath cure of souls, and hath spiritual jurisdiction within the liberty of Battel. The third dean is ecclesiastical also, but the deanery is not presentative, but donative, nor hath any cure of souls: but he is only by covenant or condition; and he also hath a court and a peculiar, in which he holdeth plea and jurisdiction of all such matters and things as are ecclesiastical, and which do arise within his peculiar, which oftentimes extends over many parishes: such a dean, constituted by commission from the metropolitan of the province, is the dean of the Arches and the dean of Bocking, in Essex; and of such deaneries there are many more. The fourth sort of dean is he who is usually called "rural dean," having no absolute judicial power in himself, but he is to order the ecclesiastical affairs within his deanery and precinct, by the direction of the bishop, or of the archdeacon, and is a substitute of the bishop in many cases. Hughes, c. 2. Deans of the old foundation are instituted by election of the chapter upon the king's *congé d'élire*, with the royal assent, and confirmation of the bishop, much in the same way as the bishops themselves do; but (generally) the deans of the new foundation come in by the king's letters patent; upon which they are nominated by their respective bishops, and then installed upon a mandate, pursuant to such institution, and directed to the chapters. *See* Gibs. 173; 2 Burn. E. L. 79, 81.

A chapter of a cathedral church consists of persons ecclesiastical, canons and prebendaries, whereof the deanery is chief, all subordinate to the bishop, to whom they are as assistants in matters relating to the church, for the better ordering and disposing the things thereof, and for confirmation of such leases of the temporalities and offices relating to the bishoprics, as the bishop from time to time should happen to make. *See* Godol. 58; Burn. E. L. 86.

Of common right, the dean and chapter are guardians of the spiritualities during the vacancy of a bishopric; but by custom, the archbishop is in the suffragan diocese. *Dean and Chapter of Durham v. Archbishop of York*, 1 Vent. 225.

[2] To constitute a lectureship, there must be both an endowment and a right to use the pulpit. *See* 1 Wils. 15; 15 East, 135. On a rule to show cause why a *mandamus* should not issue to the defendants, commanding them to grant their certificate to the bishop on the election of A. B. to the lectureship of the parish of C., in order that the bishop might license him, it appeared that the election to this office was made by ballot, by the parishioners paying scot and lot, and not receiving alms from the parish. It also appeared that there was no endowment for the lecturer, but that he received a certain sum from the parish officers, out of the money raised by the poor-rates. *Per Cur.* "We cannot concur with *Lord Mansfield, C. J.*, in 1 T. R. 331, that no person can use the pulpit without the rector's consent, unless there be an immemorial custom for it; where there is such a custom, it is binding on the rector, as it supposes a consideration to him. In such a case, the right of the lecturer partially supersedes the right of the rector. But in the present case there is no such custom, and the emoluments are not permanent — they depend on voluntary contributions."— Rule discharged. *King v. Field*, 4 T. R. 125. *See* also *Rex v. Bishop of London*, 1 id. 331. *Rex v. Bishop of Exeter*, 2 East, 462.

[3] The office of parish clerk is a here-

(*i*) *Reader.*[1]

(*j*) *Visitor.*[2] *See post*, Visitor.

(*k*) *Organist.*[3]

(B) *Relative to Appropriate Benefices.* *See* Advowson, vol. i. p. 219.

(C) „ *the Duty to Reside within the Parish, and of the Penalty incurred by Non-Residence.*

In case of non-residence incumbent forfeits profits of benefice.[4]

By 1 & 2 Vic. c. 106, s. 32, "that every spiritual person holding any benefice shall keep residence on his benefice, and in the house of residence (if any) belonging thereto; and if any such person shall, without any such license or exemption as is in this act allowed for that purpose, or unless he shall be resident

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ditament within the meaning of the word, as used in 9 & 10 Vic. c. 95, s. 58, and the county court has no jurisdiction to try a plaint in which title to that office comes in question. *Stephenson v. Raine*, 2 E. & B. 744.

A plea to a *mandamus* to restore a parish clerk, justifying his removal on the ground of misconduct, ought to show that he had, before removal, been summoned to answer for his conduct. *Reg. v. Smith*, 5 Q. B. 614. See *Ex-parte Newman*, 9 Jur. 959.

A parish clerk cannot sue for fees in the spiritual court. They must be due by custom; and therefore the subject of an action at law. *Pitts v. Evans*, 2 Stra. 1108.

[1] A readership is not an ecclesiastical preferment within the meaning of the usual title given by a rector to his curate. See *Martyn v. Hind*, Cowp. 437; abridged *ante*. *Rex v. Field*, 4 T. R. 125.

[2] The power of an ordinary visitor does not extend to deprivation. *Reg. v. Archbishop of York*, 2 Q. B. 2; Gale & D. 202.

[3] A *mandamus* will not lie to compel the vicar, churchwardens, and parishioners of a parish, to meet for the purpose of electing an organist to the parish church, although within the time of living memory there had always been an organist who was paid out of the church rates. *Ex-parte Le Cren*, 2 D. & L. 571. *Reg. v. St. Stephens*, 9 Jur. 255.

[4] The bishop may proceed against the incumbent by monition and sequestration. *See* secs. 54–56.

If it appear to the bishop that the spiritual person does not sufficiently reside, he has authority under the above 54th section of the 1 & 2 Vic. c. 106, to issue his monition to such person to require him to reside, and to make a return. The question as to the fact of non-residence, and the sufficiency of the excuse for it, is for the determination of the bishop, and the remedy against his judgment thereon is by appeal to the archbishop. *In re Bartlett*, 3 Ex. 28; 18 L. J. Ex. 25; S. C. 12 Q. B. 488. In proceedings under the 1 & 2 Vic. c. 106, for the sequestration of a benefice for non-residence, it is not necessary that the bishop's monition should be preceded by a citation or other warning to the incumbent. *Bartlett v. Kerwood*, 2 E. & B. 771.

A proceeding in the Consistorial Court to recover penalties for non-residence under the 1 & 2 Vic. c. 106, ss. 32, 114, is not a criminal suit within the 3 & 4 Vic. c. 86, s. 23, but a civil suit, and, therefore, is not to be instituted in the mode pointed out by sect. 3 of the latter act. *Rackham v. Bluck*, 9 Q. B. 691; 16 L. J. Q. B. 32. Where a sentence of the Consistorial Court condemned the party charged in payment of one-third of the annual value of his benefice, with the reasonable expense of the promoter of the suit, the court refused a prohibition, holding that the sentence was valid, and consistent with the 1 & 2 Vic. c. 106, s. 10, though it went on to order that the amount of such third part and of such expense should "be ascertained in the usual accustomed manner by the registrar" of the court, it appearing that the sentence was conformable to the practice of the Consistorial Court, and that by such practice payment would not be enforced until the bishop had received the registrar's report of the amount and made an order thereon. *Rackham v. Bluck, supra.*

Where an incumbent, having begun to reside upon his benefice in obedience to a monition or order, afterwards and before the expiration of twelve months wilfully absents himself for one month, the bishop is justified in issuing an order on the incumbent to reside; though he might, under sect. 56 of the 1 & 2 Vic. c. 106, without issuing such order, sequester the benefice. *Bonaker v. Evans*, 16 Q. B. 163; 20 L. J. Q. B. 137.

Imprisonment for a crime is no legal cause of exemption within the 54th sect. of 1 & 2 Vic. 106. *In re Bartlett*, 3 Ex. 28; 18 L. J. Ex. 25.

It was held under the similar act of 21 Hen. 1, c. 13, s. 26, that the want of a parsonage-house did not authorise the incumbent's residing out of the parish. *Wilkinson v. Allott*, 9 Burr. 2725; Cowp. 429. And that a sequestration on a benefice with a *fieri facias* was no excuse for the non-residence of the incumbent. *Doe d. Rogers v. Mears*, Cowp. 129.

A prebend was held to be a benefice within the 48 Geo. 3, c. 84, as to non-residence. *Cathcart v. Hardy*, 2 M. & S. 534.

The 21 Hen. 8, c. 13, was held not to apply to curates augmented by Queen Anne's

at some other benefice of which he may be possessed, absent himself from such benefice or from such house of residence (if any) for any period exceeding the space of three months together, or to be accounted at several times in any one year, he shall, when such absence shall exceed three months and not exceed six months, forfeit one-third part of the annual value of the benefice from which he shall so absent himself; and when such absence shall exceed six months and not exceed eight months, one-half part of such annual value; and when such absence shall exceed eight months, two-third parts of such annual value; and when such absence shall have been for the whole of the year, three-fourth parts of such annual value."

(D) *Relative to their Rights.*[1]

(E) „ „ *Privileges.* *See* Clergymen, vol. iii. p. 121.

(F) „ „ *Liabilities.* *See* vol. iii. p. 121; and *ante*, Dilapidations.

(G) „ *the Laws by which they are Governed.* *See* Canon Law, vol. iii. p. 21.

II. Courts.[2]

bounty. *Jenkinson v. Thomas*, 4 T. R. 665.

The incumbent of two livings, one of which had a house of residence upon it, and the other not, might, it was held, reside on that in which there was no parsonage-house, without a license from the bishop, and such residence excused him from residing on the other living. *Wynn v. Smythies*, 6 Taunt. 198; 1 Marsh. 547. But the non-residence on one benefice under a license from the diocesan thereof was not equivalent to actual residence thereon, so as to excuse the incumbent's non-residence on another benefice. *Wright v. Flamank*, 6 Taunt. 52; 1 Marsh. 368.

The words "any one year," used in the 43 Geo. 3, as to non-residence of spiritual persons, was held to mean any one year before the commencement of a suit for the penalty (*Cathcart v. Hardy*, 2 M. & S. 534), affirming judgment in 5 Taunt. 2. And the words "annual value," used in the 43 Geo. 3, c. 84, was held to mean average value, taking one year with another. (Id.)

A rectory in one diocese annexed to a deanery in another requires a distinct license for non-residence. *Wright v. Legge*, 6 Taunt. 48.

The certificate of a license of non-residence obtained pursuant to 54 Geo. 3, c. 54, but not allowed by the archbishop according to 43 Geo. 3, till afterwards, was, however, valid from the time it was originally granted until the moment it was ratified. *Waight v. Lamb*, 5 Taunt. 806; 1 Marsh. 372.

Where a benefice within the archbishop's peculiar is locally situate in another diocese, a license for non-residence need only be registered in the registry of the archbishop. *Wynne v. Moore*, 5 Taunt. 757.

[1] When a parson resigns he is not entitled to the emblements. *Bulwer v. Bulwer*, 2 B. & A. 470.

By the act of induction, the parson is put in possession of a part for the whole, and may maintain trespass. *Bulwer v. Bulwer*, *supra*.

In pleading a title to present the facts must be clearly developed. Thus, in *quare impedit*, the defendant pleaded that one M. O., under whom he claimed, being seised in fee of one moiety of the advowson, to present to one turn in every two turns, presented one I. O. in her proper turn; that the church being afterwards vacant, one J. W., under whom the plaintiff claimed, presented in his proper turn; that the church being again vacant, the plaintiff presented; and that, the church being a fourth time vacant, it belonged to the defendant to present. On demurrer to this plea, the court held that the defendant had not shown a title to present, since he had not shown whether the third presentation was by usurpation or by agreement, and that it could not be presumed that the defendant was entitled to present in the first and fourth turn, and the plaintiff in the second and third, since the plea averred that M. O. had presented to the first turn in her proper turn, and J. W. in his proper turn. *Birch v. the Bishop of Lichfield*, 3 B. & P. 444.

[2] The ordinary course of proceeding is, first, by citation, to call the party injuring before them; then by libel (*libellus*, a little book), or by articles drawn out in a formal allegation, to set forth the complainant's ground of complaint. To this succeeds the defendant's answer, upon oath; when, if he denies or extenuates the charge, they proceed to proofs by witnesses examined, and their depositions taken down in writing, by an officer of the court. If the defendant has any circumstances to offer in his defence, he must also propound them in what is called his defensive allegation; to which he is entitled, in his turn, to the plaintiff's answer upon oath, and may from thence proceed to proofs as well as his opponent.

By the stat. of 13 Car. 2, c. 12, it is enacted, that it shall not be lawful for any bishop or ecclesiastical judge to tender or administer to any person whatsoever the oath usually called "the oath *ex officio*," or

(A) *Relative to the different Kinds of Courts.*

(*a*) *Arches.* *See* vol. i. p. 513.

(*b*) *Archdeacon's Court.* *See* vol. i. p. 512.

(*c*) *Audience.*[1]

(*d*) *Consistory.*[2]

(*e*) *Convocation.*

any other oath, whereby he may be compelled to confess, accuse, or purge himself of any criminal matter or thing, whereby he may be liable to any censure or punishment. When all the pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of a single judge, who takes information by hearing advocates on both sides, and thereupon forms his interlocutory decree, or definitive sentence, at his own discretion; from which there generally lies an appeal.

By 3 & 4 Vic. c. 93, it is enacted, "that, after the passing of this act, it shall be lawful for the judicial committee of her Majesty's most honourable privy council, or the judge of any ecclesiastical court, if it shall seem meet to the said judicial committee or judge, to make an order upon the gaoler, sheriff, or other officer in whose custody any party is or may be hereafter, under any writ *de contumace capiendo* already issued, or hereafter to be issued, in consequence of any proceedings before the said judicial committee, or the judge of the said ecclesiastical court, for discharging such party out of custody; and such sheriff, gaoler, or other officer shall, on receipt of the said order, forthwith discharge such party: Provided always, that no such order shall be made by the said judicial committee or judge without the consent of the other party or parties to the suit: Provided always, that, in cases of subtraction of church-rate for an amount not exceeding 5*l.*, where the party in contempt has suffered imprisonment for six months and upwards, the consent of the other parties to the suit shall not be necessary to enable the judge to discharge such party, so soon as the costs lawfully incurred by reason of the custody and contempt of such party shall have been discharged, and the sum for which he may have been cited into the ecclesiastical court shall have been paid into the registry of the said court, there to abide the result of the suit; and the party so discharged shall be released from all further observance of justice in the said suit."

Under the Church Discipline Act, 3 & 4 Vic. c. 86, the bishop is empowered to issue a commission to inquire into alleged offences against the ecclesiastical law charged to have been committed by a clerk in orders, and upon the report of such commissioners that there is foundation for inquiry, he either hears the articles himself, or sends the cause to the Court of Appeal. *See* ss. 11, 12, 13.

By sect. 15, "it shall be lawful for any party who shall think himself aggrieved by the judgment pronounced in the first instance by the bishop, or in the Court of Appeal of the province, to appeal from such judgment; and such appeal shall be to the archbishop, and shall be heard before the judge of the Court of Appeal of the province where the cause shall have been heard and determined in the first instance by the bishop, and shall be proceeded on in the same Court of Appeal, in the same manner and subject only to the same appeal as in this act is provided with respect to causes sent by letters of request to the same court; and the appeal shall be to the queen in council, and shall be heard before the judicial committee of the Privy Council, when the cause shall be heard and determined in the first instance in the court of the archbishop."

An appeal lies to the Court of Arches, under sect. 17 of the Church Discipline Act, 3 & 4 Vic. c. 86, from a judgment of a diocesan court presided over by the Archbishop of Canterbury, under sect. 24, in consequence of the bishop of the diocese being the patron of the preferment held by the party proceeded against. *Reg. v. Court of Arches, Ex-parte Denison*, 7 E. & B. 315; 26 L. J. Q. B. 178.

It is the object of letters of request, under 3 & 4 Vic. c. 86, s. 3, to present to the Court of Arches the subject of future proceedings; but it is not necessary to state therein matters over which the judge cannot exercise jurisdiction, notwithstanding that they may have found a place in the report of the commissioners upon which the letters of request are founded. *Bonwell v. Bishop of London*, 7 Jur. N. S. 1001; 9 W. R. 874.

[1] A court belonging to the Archbishop of Canterbury, having the same authority with the Court of Arches, though inferior to it in dignity and antiquity. Its jurisdiction does not relate to causes between party and party, but to matters *pro formâ*. *See* 4 Inst. 337.

[2] Every bishop has his Consistory Court, held before his chancellor or his commissary, for all his ecclesiastical causes within his diocese. *See* 4 Inst. 338; *see* vol. iii. p. 178.

The Consistory Court has power to order a proctor to refund money improperly in his hands. *Morris v. Gardner*, 1 Dowl. 524.

In an action by a curate against a rector for his salary, the summary jurisdiction of the bishop under the 57 Geo. 3, c. 99, is pleadable in bar. *West v. Turner*, 1 Nev. & P. 612.

(*f*) *Delegates.*[1]
(*g*) *Faculties.*[2]
(*h*) *Prerogative.*[3]
(*i*) *Judicial Committee of the Privy Council.*[4]

(B) *Relative to the Jurisdiction of.* *See* Analysis, p. 162.
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[1] Was the great court of appeal in all ecclesiastical causes, appointed by the king's commission under his great seal, and issuing out of Chancery. This commission is frequently filled with lords spiritual and temporal, and always with judges of the courts of common law, and doctors of the civil law. *See* Bl. Com. 66. Its functions are now performed by the judicial committee of the Privy Council.

[2] The Court of Faculties is an especial court under the Archbishop of Canterbury, having power by favour and indulgence to grant to a man that which he has no right to by law; as, to marry persons without the banns, or to ordain a deacon under age. *See* 4 Inst. 337.

[3] *See* vol. i. p. 165, Administration; and *post*, Executors; Probate; and 20 & 21 Vic. c. 77, s. 16.

[4] By 2 & 3 Wm. 4, c. 92, it was provided that every person who might formerly have appealed under 25 Hen. 8, c. 19, may for the future appeal to her Majesty in council; and, by 3 & 4 Wm. 4, c. 41, s. 3; 6 & 7 Vic. c. 38, s. 11; and 7 & 8 id. c. 69, s. 9, her Majesty, by order in council, may direct that all appeals from the ecclesiastical or other courts shall be referred to the judicial committee of the Privy Council.

Under 25 Hen. 8, c. 19, an appeal lay from the archbishop's court to the delegates in all spiritual causes, whether touching the king or not; and, therefore, by the 2 & 3 Wm. 4, c. 92, and 3 & 4 id. c. 41, s. 3, there is now an appeal in such cases to the judicial committee of the Privy Council, whose decision is final. *Gorham v. Bishop of Exeter*, 5 Ex. 630; 19 L. J. Ex. 376; 15 Q. B. 52; 10 C. B. 102.

[5] A sentence in the Consistorial Court for disturbing the plaintiff in the enjoyment of a pew was reversed by the Arches: — *Held*, that these sentences were not conclusive in an action for a disturbance. *Cross v. Salter*, 3 T. R. 639.

[6] The law and practice of the ecclesiastical courts are matters of fact to be proved by witnesses. *Beaurain v. Scott*, 3 Camp. 388.

[7] An action lies against a judge of an ecclesiastical court for an excess of jurisdiction. (Id.)

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XII. Of the Proceedings in Ejectment by a Landlord against his Tenant, p. 184.

(A) *Where there is a Right of Re-Entry for Non-Payment of Rent*, p. 184.

(B) *After the Determination of the Tenancy*, p. 186.

(*a*) *Form of Judgment in Default of finding Bail*, p. 186.

(C) *Of the Recovery of Mesne Profits*, p. 187.

(D) „ *Finding of Bail upon Stay of Execution*, p. 187.

(E) *Writ where Right of Entry has accrued on or after Hilary or Trinity Terms*, p. 188.

XIII. Of the Proceedings in Ejectment by Mortgagee against Mortgagor, p. 188.

I. Nature of Proceedings in.[1]

II. Of the Writ.

(A) *Form of Indorsement and Direction of Writ.*

In ejectment a writ is issued directed to the persons in possession by name, and to all persons entitled to defend possession, requiring them within sixteen days to appear and defend the possession, &c.

15 & 16 Vic. c. 76, s. 168, enacts, "instead of the present proceeding by ejectment, a writ shall be issued, directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty."

Id. s. 169. "The writ shall state the names of all the persons in whom the title is alleged to be, and command the persons to whom it is directed to appear within sixteen days after service thereof, in the court from which it is issued, to defend the possession of the property sued for, or such part thereof as they may think fit, and it shall contain a notice that, in default of appearance, they will be turned out of possession; and the writ shall bear test of the day on which it is issued, and shall be in force for three months, and shall be in the form contained in the Schedule (A) to this act annexed,[2] marked No. 13, or to the like

[1] The proceedings in the action of ejectment are now regulated principally by the 15 & 16 Vic. c. 76, *supra*. But, by the 221st section of that act it is enacted, that the several courts and the judges thereof respectively shall and may exercise over the proceedings the like jurisdiction as heretofore exercised in the action of ejectment, so as to insure a trial of the title and of actual ouster when necessary, only and for all other purposes for which such jurisdiction may at present be exercised, and the provisions of all statutes not inconsistent with the provisions of this act, and which may be applicable to the altered mode of proceeding, shall remain in force, and is applied thereto.

Since the Common Law Procedure Act, tenants in common may recover in a joint writ the whole of the property to which they are entitled. *Ellis v. Ellis*, 27 L. J. Q. B. 316; 22 Jur. 1181.

[2] The following is the form so prescribed:—

Writ of Ejectment.

Victoria, &c., to X. Y. Z., and all persons entitled to defend the possession of [*describe the property with reasonable certainty*] in the parish of in the county of to the possession whereof A., B., and C., some or one

effect; and the name and abode of the attorney issuing the same, or if no attorney, the name and residence of the party shall be indorsed thereon,[1] in like manner as hereinbefore enacted with reference to the indorsements on a writ of summons in a personal action; and the same proceedings may be had to ascertain whether the writ was issued by the authority of the attorney whose name was indorsed thereon, and who and what the claimants are, and their abode, and as to staying the proceedings upon writs issued without authority, as in the case of writs of personal actions."

(B) *Service of Writ.*

The writ is served in the same manner as an ejectment, or as shall be ordered; or, in case of vacant possession, by posting a copy on the premises.[2]

By id. s. 170, "the writ shall be served in the same manner as an ejectment has heretofore been served, or in such manner as the court or a judge shall order, and, in case of vacant possession, by posting a copy thereof upon the door of the dwelling-house, or other conspicuous part of the property."

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of them, claim to be [*or*, to have been on and since the day of A.D.] entitled, and to eject all other persons therefrom. These are to will and command you, or such of you as deny the alleged title, within sixteen days after the service hereof, to appear in our court of to defend the property, or such part thereof as you may be advised, in default whereof judgment may be signed, and you turned out of possession.

[1] The Christian as well as the surname of the tenant should be inserted in the direction of the writ, where it can be ascertained. *Doe d. Smith v. Roe*, 6 Dowl. 629. It was held under the old practice that a notice directed "to the assignees and personal representatives" of a deceased tenant, without naming them, was good. *Harrington v. Assignees of Bytham*, 2 Com. Law Rep. 1033. But see *Doe d. St. Margaret v. Roe*, 1 Moore, 113.

[2] A copy of the writ should be served on each of the tenants in possession. *Doe d. Lord Darlington v. Cook*, 4 B. & C. 259. In the case of joint-tenants, if all be named in the writ, service on one of them will be sufficient. *Doe d. Bennett v. Roe*, 7 C. B. 137. *Doe d. Brady v. Roe*, 10 id. 668. In the case of premises in the possession of a firm, service on an acting partner has been held sufficient. *Doe d. Overton v. Roe*, 9 Dowl. 1039. And service on one of two co-executors in possession of the premises is good. *Doe d. Strickland v. Roe*, 4 D. & L. 431.

The service should be personal. If on the tenant, the service may be anywhere. *Doe d. Hope v. Roe*, 3 C. B. 770. *Doe d. Woodroffe*, 7 Dowl. 494. Or it may be on the tenant's wife, provided such service be effected on the premises, or at the husband's dwelling-place or house of business. *Doe d. Royle v. Roe*, 4 C. B. 256. *Doe d. Boullott v. Roe*, 7 Dowl. 463.

The service may, however, be sufficient without manual delivery, as where the person is turned out of the house while explaining it to the tenant, and thrusts the writ under the door. *Doe d. Frith v. Roe*, 3 Dowl. 569. *Doe d. Nash v. Roe*, 8 id. 306. And where neither the tenant nor his wife was at home, and the service was effected on his servant or child, or, it seems any other person, and it afterwards appeared that the tenant received the document in due time, it was held sufficient service of the declaration, and would, therefore, appear to be sufficient service of the writ. *Doe d. Kenrick v. Roe*, 5 D. & L. 578. *Doe d. Emerson v. Roe*, 6 Dowl. 736. But in such a case judgment cannot be signed for default of appearance, without a rule of court or judge's order for that purpose. Reg. Gen. Pr. H. T. 1853, r. 112.

It has been questioned whether it is necessary under the new practice, as under the old, that the writ should be explained, or read over and explained, at the time of service. *Edwards v. Griffiths*, 15 C. B. 397. *Doe d. Wade v. Roe*, 6 Dowl. 51. *Doe d. Cuttell v. Roe*, 9 id. 1023.

If the party served refuse to listen, or turn out the person effecting the service, or leave the place, he ought to explain it in a loud voice. *Doe d. Summers v. Roe*, 5 Dowl. 552. If the tenant be an attorney, no explanation is necessary (*Doe d. Portland v. Roe*, 1 Dowl. N. S. 183); but in other respects the service must be the same as in ordinary cases. *Doe d. Fowler v. Roe*, 4 D. & L. 639. The neglect to read or explain the writ is a mere irregularity which may be waived. *Edwards v. Griffith*, 15 C. B. 397.

Should the tenant in possession be a lunatic, service on him will notwithstanding be good. *Doe d. Gibbard v. Roe*, 3 Scott, N. R. 363.

Service on the official assignee of a bankrupt, and on the messenger in possession under the fiat (*Doe d. Baring v. Roe*, 6 Dowl. 456), or on one of the assignees who is stated to be tenant in possession (*Doe d. Ask v. Roe*, 6 Jur. 238), is good service.

In ejectment for a house rented by a parish, service on the churchwardens and overseers has been deemed sufficient *Tupper v. Doe*, Barnes, 181.

In the case of a chapel, if the chapel is vested in the minister, service should be upon him; if he cannot be found, the service may be on the person holding the keys,

(C) *Effect of Want of Certainty in Description of Property.*

By the 15 & 16 Vic. c. 76, s. 175, "want of 'reasonable certainty' in the description of the property, or part of it, in the writ or notice, shall not nullify them, but shall only be ground for an application to a judge for better particulars of the land claimed, or defended, which a judge shall have power to give in all cases."

Want of reasonable certainty in description of property does not nullify the writ.

(D) *Of the giving of Notice by the Tenant to the Landlord.*

By sect. 209, "every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack-rent of the premises demised or holden, in the possession of such tenant, to the person to whom he holds, to be recovered by action in any court of common law having jurisdiction for the amount."

The tenant must give his landlord notice of the writ under penalty of forfeiture of three years' rent.

III. Of the Appearance.

(A) *By Persons named as Defendants.*

By sect. 171, "the persons named as defendants in such writ, or either of them, shall be allowed to appear within the time appointed."

Persons named as defendants may appear.[1]

(B) *By Persons not named in Writ.*

By sect. 172, "any other persons not named in such writ shall, by leave of the court or a judge, be allowed to appear and defend on filing an affidavit, showing that he is in possession of the land, either by himself or his tenant."

So may any other person named on filing an affidavit that he is in possession.[2]

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and by posting a copy of the writ on the chapel door. *Doe d. Scott v. Roe*, 6 Scott. 546. See *Dickens v. Roe*, 7 id. 121. *Doe d. Somers v. Roe*, 8 id. 292. Lush. Pr. 769, 2d ed.

In ejectment against a corporation aggregate, service on the mayor, or other head officer, or on the town-clerk, treasurer, or secretary, as the case may be, at his office, or on the premises, will, in analogy to the service of a writ of summons, in general suffice. *Doe d. Coopers' Co. v. Roe*, id. 134. *Doe d. Fisher v. Roe*, 10 Mee. & W. 21. *Doe v. Roe*, 1 Dowl. 23. If the act incorporating the company authorise "proceedings" to be served in a particular way, the service of the writ may be effected in such way. *Doe d. Martyns v. Roe*, 6 Scott, 610; 7 Wm. 4; and 1 Vic. c. 73, s. 16. Thus, service on the secretary of a railway company is sufficient service on the company under 8 & 9 Vic. c. 16, s. 125. *Doe d. Burgess v. Roe*, 4 D. & L. 311.

In the case of vacant possession, service may be effected by posting a copy of the writ upon the door of the dwelling-house, or other conspicuous part of the property. A mere temporary discontinuance to occupy will not constitute a vacant possession; the possession must be entirely abandoned (*Doe d. Norman v. Roe*, 2 Dowl. 399), and the premises be incapable of occupation, as where they are in an unfinished state. *Doe d. Schovell v. Roe*, 3 Dowl. 691.

The court, or a judge, may direct service to be effected in a particular manner. Under the old practice, where the court were satisfied upon affidavit that due diligence had been used, and that the tenant resided abroad, or had absconded, or kept out of the way of being served, they granted a rule *nisi*, that service already effected on the attorney of the defendant, or relation, servant, or some other person on the premises, or by posting the declaration on the doors, &c. should be deemed good service, and directed in what manner the rule should be served; or where satisfied that the person served was an agent of the tenant for the purpose of receiving service, as where he was an attorney or broker, and the key had been left with him, the rule was absolute in the first instance. *Doe d. Chippendale v. Roe*, 7 C. B. 125. *Doe d. Watson v. Roe*, 5 C. B. 521. *Doe d. Mather v. Roe*, 5 Dowl. 652. *Doe d. Scott v. Roe*, 6 Bing. N. C. 207.

[1] A tenant named as defendant is not bound to appear (*Right v. Wrong*, Barnes, 173); and the landlord cannot, without his consent, defend in his name. *Jones v. Roe*, id. 178.

To entitle a person to be let in to defend under the 172d section, he must be in possession either by himself or his tenant. A remainderman has not such a possession within the meaning of the statute. *Whitworth v. Humphrey*, 5 H. & N. 125; 24 Jur. 231; 29 L. J. Ex. 113.

[2] By Reg. Gen. H. T. 1853, r. 113, "where a person not named in the writ of ejectment has obtained leave of the court or a judge to appear and defend, he shall enter an appearance according to the Common Law Procedure Act, 1852, intituled in the action against the party or parties

A person appearing as landlord must state in his appearance that he so appears.

By sect. 173, "any person appearing to defend as landlord in respect of property whereof he is in possession only by his tenants, shall state in his appearance that he appears as landlord; and such person shall be at liberty to set up any defence which a landlord appearing in an action of ejectment has heretofore been allowed to set up, and no other."

(*a*) *Form of Affidavit in such case.*[1]

IV. Of the Defence.

(A) *May be limited to Part.*

The defence may be limited to part of the premises, provided notice to that effect be given.[2]

By 15 & 16 Vic. c. 76, s. 124, "any person appearing to such writ shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in a notice intituled in the court and cause, and signed by the party appearing or his attorney; such notice to be served within four days after appearance upon the attorney whose name is indorsed on the writ (if any), and if none, then to be filed in the master's office; and an appearance without such notice confining the defence to part, shall be deemed an appearance to defend for the whole."

(*a*) *Form of Notice limiting Defence.*[3]

(*b*) *Striking out Appearance and Defence.*

Appearance and defence by person not in possession may be struck out.

By sect. 176, "the court or a judge shall have power to strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants."

V. Of the Judgment for Default of Appearance or Want of Defence to Part.

In default of appearance or want of defence to part judgment may be signed.[4]

By 15 & 16 Vic. c. 76, s. 177, "in case no appearance shall be entered into within the the time appointed, or if an appearance be entered, but the defence be limited to part only, the plaintiff shall be at liberty to sign a judgment that the person whose title is asserted on the writ shall recover possession of the land, or of the part thereof to which the defence does not apply; which judg-

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named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff if he sue in person."

The following may be such notice of appearance:—

In the [*title of Court*].

Between A. B. plaintiff,
and
C. D. defendant.

Take notice, that E. F., by leave of the Honourable Mr. Justice [*or* Baron] on the day of A.D. appeared to this action.

Yours, &c.
X. Y.
Attorney for the said E. F.

To Mr. J. S., plaintiff's attorney or agent.

[1] *Affidavit by Person not named in Writ that he is in Possession of the Land.*

In the Q. B. [C. P. *or* Exch. of P.]

Between A. B. plaintiff,
and
C. D. defendant.

I, E. F., of make oath and say:—

1. That this is an action of ejectment brought for the recovery of a messuage, land, [*or as the case may be*] and premises, situate at

2. That I am in possession of the said messuage [land and premises] [*or* of part of the said premises] by myself [*or* by the abovenamed C. D. as my tenant].

Sworn, &c.

[2] Want of reasonable certainty in the description of the part of the property in the notice does not nullify it, but is ground for an application to a judge for better particulars of the land defended. 15 & 16 Vic. c. 76, s. 175, *ante*, p. 173.

[3] *Form of Notice.*

In the Q. B. [C. P., *or* Exch. of P.]

Between A. B. plaintiff,
and
C. D. defendant.

Take notice, that the abovenamed defendant limits his defence in this action to a part only of the property mentioned in the writ in this action, and sought to be recovered herein, and that such part consists of [*describing the part with reasonable certainty*].

Dated, &c. Yours, &c. X. Y.
Attorney for the said defendant.

To Mr. J. S. plaintiff's attorney or agent.

[4] By Reg. Gen. H. T. 1853, r. 112, "judgment for want of appearance or defence, whether limited or otherwise, cannot be

ment, if for all, may be in the form contained in the Schedule (A) to this act annexed, marked No. 14, or to the like effect; and if for part, may be in the form contained in the Schedule (A) to this act annexed, marked No. 15, or to the like effect."

(A) *Form of Judgment for Default of Appearance.*[1]

(B) „ *as to Part to which there is no Defence.*[2]

VI. Of Relief against Forfeiture by Non-Payment of Rent or Neglect to Insure.

(A) *Against Forfeiture by Non-Payment of Rent.*

The court or a judge may give the same relief as the Court of Chancery.

The 23 & 24 Vic. c. 126, s. 1, enacts, "in the case of any ejectment for a forfeiture brought for non-payment of rent, the court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, up to and within the like time after execution executed, and subject to the same terms and conditions in all respects as to payment of rent, costs, or otherwise, as in the Court of Chancery; and if the lessee, his executors, administrators, or assigns, shall, upon such proceeding, be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease."

(B) *Relief against Forfeiture by Neglect to Insure.*

The 23 & 24 Vic. c. 126, s. 2, enacts, "in the case of any ejectment for a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, the court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, in all cases in which such relief may now be obtained in the Court of Chancery, under the provision of an act 22 & 23 Vic. c. 35, intituled, 'An Act to further Amend the Law of Property, and to Relieve Trustees,' as upon such terms as would be imposed in such court."

(C) *Indorsement of Order on Lease.*

By sect. 3, "where such relief shall be granted, the court or a judge shall direct a minute thereof to be made, by indorsement on the lease or otherwise."

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signed without first filing an affidavit of the service of the writ according to the Common Law Procedure Act, 1852, and a copy thereof; or where personal service has not been effected, without first obtaining a judge's order or a rule of court authorising the signing such judgment, which rule or order, or a duplicate thereof, must be filed, together with a copy of the writ."

[1] *Judgment in Ejectment in case of Non-Appearance.*

In the Queen's Bench.
The day of 18 [*date of writ*].
Lancashire } On the day and year above
to wit. } written a writ of our Lady the Queen issued forth of this court in these words; (that is to say,)

Victoria, by the grace of God [*here copy the writ*], and no appearance has been entered or defence made to the said writ: therefore it is considered that the said [*here insert the name of the persons in whom title is alleged in the writ*] do recover possession of the land in the said writ mentioned, with the appurtenances.

[2] *Judgment as to Part to which there is no Defence.*

In the Queen's Bench.
On the day of A.D. 18
Cumberland } On the day and year above
to wit. } written a writ of our Lady the Queen issued forth of this court in these words:—

Victoria, by the grace of God [*here copy the writ*], and C. D. has, on the day of appeared by his attorney [*or* in person] to the said suit, and has defended for a part of the land in the writ mentioned; (that is to say,) [*here state the part*] and no appearance has been entered or defence made to the said writ, except as to the said part: Therefore it is considered that the said A. B. [*the claimant*] do recover possession of the land in the said writ mentioned, except the said part with the appurtenances, and that he have execution thereof forthwith; and as to the rest, let a jury come, &c.

(D) *Of the Appeal against the Rule or Order.*

The order of the judge is subject to be reviewed by the court.

By 23 & 24 Vic. c. 126, s. 4, "any order made by a judge, upon an application for relief under the provisions of this act, shall be subject to an appeal to the court, and may be discharged, varied, or set aside by the court, upon such terms as the court shall think fit, on application made thereto by any party dissatisfied with such order."

And an appeal lies from a rule or order of the court to the Courts of Error.

By sect. 5, "it shall be lawful for the party, against whom the courts make any rule or order in respect of such relief, to appeal from such rule or order."

By sect. 6, "the Courts of Error shall be courts of appeal for the purposes of this act."

Notice of appeal must be given,

By sect. 7, "no appeal shall be allowed, unless notice thereof be given in writing to the opposite party or his attorney, and to one of the masters of the court, within four days after the decision complained of, or such further time as may be allowed by the court or a judge."

which operates as a stay of execution if bail be given.

By sect. 8, "notice of appeal shall be a stay of execution, provided bail to pay the sum demanded, and costs, be given in like manner, and to the same amount, as bail in error, within eight days after the decision complained of, or before execution delivered to the sheriff."

The appeal is upon a case.

By sect. 9, "the appeal hereinbefore mentioned shall be upon a case to be stated by the parties (and in case of difference to be settled by the court, or a judge of the court appealed from), in which case shall be set forth in so much of the pleadings, facts, and the order, rule, or judgment objected to, as may be necessary to raise the question for the decision of the Court of Appeal."

And the Court of Appeal gives the relief which ought to have been given by the court below.

By sect. 10, "the Court of Appeal shall give such judgment or make such rule as ought to have been given or made in the court below, and shall have power to remit the cause, with such directions as they shall think proper; and all such further proceedings may be taken thereupon as if the judgment or a rule had been given or made by the court below."

And may award costs.

By sect. 11, "the Court of Appeal shall have power to adjudge payment of costs, and to order restitution."

VII. Of Staying Proceedings till Security given for Costs, in case of Second Ejectment for the same Premises.

The claimant may be required to give security for costs in case of second ejectment for the same premises.[1]

By 17 & 18 Vic. c. 125, s. 92, "if any person shall bring an action of ejectment, after a prior action of ejectment for the same premises has been or shall have been unsuccessfully brought by such person, or by any person through or under whom he claims against the same defendant, or against any person through or under whom he defends, the court or a judge may, if they or he think fit, on the application of the defendant at any time after such defendant has appeared to the writ, order that the plaintiff shall give to the defendant security for the payment of the defendant's costs, and that all further proceedings in the cause shall be stayed until such security be given, whether the prior action has been or shall have been disposed of by discontinuance, or by nonsuit, or by judgment for the defendant."

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[1] In *Morgan v. Nicholl* (3 H. & N. 215) the court stayed proceedings in an action of ejectment, until the costs of a former action, which had been brought by a son of the plaintiff, should be paid; it appearing that at the trial of the former ejectment evidence had been adduced to show that the plaintiff, in the second ejectment, had not been heard of for a long period, in order to raise a presumption of his death, when in truth he was in the neighbourhood, and knew of the action; and the father, the plaintiff in the second ejectment, claimed title by descent from the same ancestor upon which the son's claim was founded. *See* also *Doe d. Brayne v. Baker*, 12 Q. B. 941.

And, where the plaintiff is an infant (*Throgmorton v. Miller*, 2 Stra. 932. *Doe d. Roberts v. Roberts*, 6 Dowl. 556), or resides abroad (*Doe d. Hudson v. Jameson*, 4 M. & R. 570), he may be required to give security for costs.

VIII. Of the Issue, and its Trial.

(A) *Of the Issue.*

Upon appearance being entered, an issue may be made up

By 15 & 16 Vic. c. 76, s. 178, "in case an appearance shall be entered an issue may at once be made up, without any pleadings by the claimants or their attornies, setting forth the writ, and stating the fact of the appearance, with its date, and the notice limiting the defence, if any, of each of the persons appearing, so that it may appear for what defence is made, and directing the sheriff to summon a jury; and such issue, in case defence is made for the whole, may be in the form contained in the Schedule (A) to this act annexed, marked No. 16, or to the like effect; and in case defence is made for part, may be in the form contained in the Schedule (A) to this act annexed, marked No. 15, or to the like effect." *See* Form of Issue, *infra.*

(*a*) *Form of Issue.*[1]

(B) *A Special Case may be stated.*

A special case may be stated.

By 15 & 16 Vic. c. 76, s. 179, "by consent of the parties, and by leave of a judge, a special case may be stated, according to the practice heretofore used."

(C) *Of the Trial of the Issue.*

If no special case be stated, the issue will be tried as other actions.[2]

By sect. 180, "the claimants may, if no special case be agreed to, proceed to trial upon the issue in the same manner as in other actions: and the particulars of the claim and defence, if any, or copies thereof, shall be annexed to the record by the claimants; and the question at the trial shall, except in the cases hereinafter mentioned, be, whether the statement in the writ of the title of the claimants is true or false; and, if true, then which of the claimants is entitled, and whether to the whole or part; and if to part, then to which part of the property in question: and the entry of the verdict may be made in the form contained in the Schedule (A) to this act annexed, marked No. 17, or to the like effect, with such modifications as may be necessary to meet the facts."

(*a*) *Form of Verdict.*[3]

(D) *Of the Verdict where Claimant's Title has Expired.*

The claimant is entitled to a verdict if he had a title to the premises when the writ issued.

By 15 & 16 Vic. c. 76, s. 181, "in case the title of the claimant shall appear to have existed as alleged in the writ, and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant shall, notwithstanding, be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suits."

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[1] *Form of Issue in Ejectment.*

In the Queen's Bench.

Cumberland } On the day of A.D. 18 On the day and year above to wit. } written, a writ of our Lady the Queen issued forth of this court in these words; (that is to say,)

Victoria, by the grace of God [*here copy the writ*], and C. D. has, on the day of appeared by his attorney [*or*, in person] to the said writ, and defended for the whole of the land therein mentioned: Therefore let a jury come, &c.

[2] The judge, at the trial of an ejectment by a mortgagee of trust property, may amend the record by adding the names of the trustees as claimants. *Blake v. Don*, 7 Jur. N. S. 1306, Ex.

[3] *Form of Verdict in Ejectment.*

Afterwards, on the day of A.D. before and justices of our Lady the Queen, assigned to take the assizes in and for the within county, came the parties within-mentioned, and a jury of the said county being sworn to try the matters in question, upon their oath say that A. B. [*the claimant*] within-mentioned, on the day of A.D. was, and still is, entitled to the possession of the land within-mentioned, as in the writ alleged: Therefore, &c.

(E) *Of the Place of Trial.*

The issue may be ordered to be tried in a place other than that in which the venue is laid.

By sect. 182, "the court or a judge may, on the application of either party, order that the trial shall take place in any county or place other than that in which the venue is laid; and such order being suggested on the record, the trial may be had accordingly."

(F) *Judgment in case of Non-Appearance of either Party.*

If either party do not appear, the other will be entitled to judgment, and the plaintiff will be entitled to his costs.

By sect. 183, "if the defendant appears, and the claimant does not appear at the trial, the claimant shall be non-suited; and if the claimant appears, and the defendant does not appear, the claimant shall be entitled to recover as heretofore, without any proof of his title."

And by Reg. Gen. H. T. 1853, r. 114, "if the plaintiff in ejectment appears at the trial, and the defendant does not appear, the defendant shall be taken to have admitted the plaintiff's title, and the verdict shall be entered for the plaintiff, without producing any evidence, and the plaintiff shall have judgment for his costs of suit as in other cases."

(G) *Special Verdict — Bill of Exceptions.*

By 15 & 16 Vic. c. 76, s. 184, "the jury may find a special verdict, or either party may tender a bill of exceptions."

IX. Of the Judgment and Execution.

(A) *Effect of Judgment.*

Effect of judgment same as in old action of ejectment.

By 15 & 16 Vic. c. 76, s. 207, "the effect of a judgment in an action of ejectment under this act shall be the same as that of a judgment in the action of ejectment heretofore used."

(B) *In case of Judgment for the Claimant.*

Upon a finding for the claimant, judgment may be signed and execution issue for the recovery of possession.

By sect. 185, "upon a finding for the claimant, judgment may be signed, and execution issue for the recovery of possession of the property, or such part thereof as the jury shall find the claimant entitled to, and for costs within such time, not exceeding the fifth day in term after the verdict, as the court or judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen."

(C) *In case of Judgment for the Defendant.*

Upon a finding for the defendant, judgment may be signed for costs.

By sect. 186, "upon a finding for the defendants, or any of them, judgment may be signed and execution issue for costs against the claimants named in the writ, within such time, not exceeding the fifth day in term after the verdict, as the court or judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen."

(D) *Costs.*[1]

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[1] *If the claimant succeed* at the trial, he has judgment for his costs, as well as to recover possession of the lands. And "in case the title of the claimant shall appear to have existed as alleged in the writ at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant shall notwithstanding be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and serving the writ, and so a judgment for his costs of suit." 15 & 16 Vic. c. 76, s. 177. So, in case of confession by the defendant or defendants, the plaintiff may sign judgment for the recovery of possession and costs. (Id.)

If the defendant in ejectment succeed at the trial he is entitled to judgment for his costs by 15 & 16 Vic. c. 76, s. 183: *see supra.* So, if a plaintiff in ejectment be nonsuited at

(E) *Of the Writs of Execution.*

By sect. 187, "upon any judgment in ejectment for recovery of possession and costs, there may be either one writ, or separate writs of execution, for the recovery of possession and costs, at the election of the claimant." Execution for the costs may be by the same or separate writ.

(*a*) *It is not necessary before issuing Execution to enter the Proceedings on any Roll.*

By sect. 206, "it shall not be necessary, before issuing execution upon any judgment under the authority of this act, to enter the proceedings upon any roll, but an *incipitur* thereof may be made upon paper, shortly describing the nature of the judgment, according to the practice heretofore used, and judgment may thereupon be signed, and costs taxed, and execution issued, according to the practice heretofore used: Provided nevertheless that the proceedings may be entered upon the roll, whenever the same may become necessary for the purpose of evidence, or of bringing error or the like."

(*b*) *Forms of Writs of Execution in Ejectment.*[1]

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the trial, the defendant shall be entitled to his costs of suit. Reg. Gen. H. T. 1853, (Pl.), r. 29. And if the plaintiff discontinues, the defendant is entitled to sign judgment for his costs. 15 & 16 Vic. c. 76, s. 200. Further, where the claimant has neglected to proceed to trial after notice from the defendant, in accordance with the 15 & 16 Vic. c. 79, s. 202, the defendant may sign judgment, and recover the costs of defence.

The issue may be entered divisibly in actions of ejectment, as in other cases, for the purpose of entitling the defendant to the costs of defending a part of the lands claimed, as to which the plaintiff has been unsuccessful. *See* vol. iii. p. 303. Thus, if the declaration in one count claim several messuages, and the jury find for the plaintiff as to some only, the issue is divisible, and the defendant is entitled to the costs applicable to the claim in respect of those messuages as to which he has made a successful defence. *Doe v. Errington*, 4 Dowl. 602. *Doe v. Lewis*, 13 Mee. & W. 241. *Alcock v. Wilshaw*, 24 Jur. 628. And the same rule was applied in cases under the old practice, where the plaintiff claimed closes under distinct demises from different persons; if he succeeded as to one and failed as to the other, the defendant was entitled to have the verdict entered for him as to the demise on which the plaintiff had failed, and to have taxed for him the costs occasioned thereby. *Doe d. Smith v. Webber*, 2 Ad. & E. 448.

[1] The following writs are prescribed by Reg. Gen. H. T. 1853, and are numbered respectively 23, 24, and 25, in the Schedule of Forms:—

Writ of Habere Facias in Ejectment upon a Judgment by Default.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas A. B., lately in our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] by the judgment of the same court recovered possession of [*here describe the property as in the writ of ejectment, or if part only of the land has been recovered, describe such part as in the judgment*] with the appurtenances, in your bailiwick: Therefore we command you, that [*if sued out of the Court of Exchequer, say*, Therefore we command you that you omit not, by reason of any liberty of your county, but that you enter the same and] without delay you cause the said A. B. to have possession of the said lands and premises with the appurtenances. And in what manner you have executed this our writ make appear to us [*or* in the Common Pleas, to our justices, *or* in the Exchequer, to the barons of our Exchequer, *as the case may be*] at Westminster, immediately upon the execution hereof, and have you then there this writ.

Witness at Westminster the day of in the year of our Lord

Writ of Habere Facias and Fieri Facias for Costs upon a Judgment for Plaintiff in Ejectment where Defendant has appeared.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas A. B., lately in our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] recovered possession of [*here describe the property as in the writ of ejectment, or if part of the land only has been recovered, describe such part as in the judgment*] with the appurtenances, in your bailiwick, in an action of ejectment at the suit of the said A. B. against C. D.: Therefore we command you that, without delay, you cause the said A. B. to have possession of the said lands and premises with the appurtenances. And we also command you that [*if sued out of the Court of Exchequer, say*, And we also command you, that you omit not by reason of any liberty of your county, but that you enter the same, and that] of the goods and chattels of the said C. D. in your bailiwick you cause to be made £ which the said

X. Error in Ejectment.

Error may be brought on the judgment after a special verdict, &c.

By sect. 208, "error may be brought in like manner as in other actions upon any judgment in ejectment, after a special verdict found by the jury, or a bill of exceptions, or by consent after a special case stated, but, except in the case of such consent as aforesaid, execution shall not be thereby stayed, unless the plaintiff in error shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the claimant who shall have recovered judgment in such action of ejectment in double the yearly value of the property, and double the costs recovered by the judgment, with condition that if the judgment shall be affirmed by the court of error, or the proceedings in error be discontinued by the plaintiff therein, then the plaintiff in error shall pay such costs, damages, and sum or sums of money, as shall be awarded upon or after such judgment affirmed or discontinued; and it shall be lawful for the court, wherein execution ought to be granted upon such affirmation or discontinuance, upon the application of the claimant, to issue a writ to inquire, as well of the mesne profits as of the damage by any waste committed after the first judgment in ejectment, which writ may be tested on the day on which it shall issue, and be returnable immediately after the execution thereof; and upon the return thereof judgment shall be given, and execution awarded, for such mesne profits and damages, and also for costs of suit."

XI. Of certain Incidental Proceedings.

(A) *Admission, in case of Joint-Tenants, Tenants in Common, or Coparceners, of Claimant's Title to Undivided Share.*

Joint-tenant, &c. may by notice admit

By 15 & 16 Vic. c. 76, s. 188, "in case of such an action being brought by some or one of several persons entitled as joint-tenants, tenants in common, or coparceners, any joint-tenant in common, or coparcener in possession, may,

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A. B. lately in our said court recovered against the said C. D., for the said A. B.'s costs of the said suit, whereof the said C. D. is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord on which day the judgment aforesaid was entered up, and have that money and interest aforesaid in our said court immediately after the execution hereof, to be rendered to the said A. B.; and that you do all things as by the statutes passed in the second year of our reign you are authorised and required to do in that behalf. And in what manner you shall have executed this our writ make appear to us [*or* in the Common Pleas, before our justices, *or* in the Exchequer, before the barons of our Exchequer, *as the case may be*] at Westminster, immediately after the execution hereof, and have you there then this writ.

Witness at Westminster the day of in the year of our Lord

Writ of Fieri Facias for Costs on a Judgment for Plaintiff in Ejectment where Defendant has appeared.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

We command you that [*if sued out of the Court of Exchequer*, you omit not by reason of any liberty of your county, but that you enter the same, and] of the goods and chattels of C. D. in your bailiwick you cause to be made £ which A. B., lately in our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] recovered against him for the said A. B.'s costs of suit in an action of ejectment brought by the said A. B. against the said C. D. in that court, whereof the said C. D. is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum, from the day of in the year of our Lord on which day the judgment aforesaid was entered up, and have that money, with such interest as aforesaid, before us [*or* in the Common Pleas, before our justices, *or* in the Exchequer, before the barons of our Exchequer, *as the case may be*] at Westminster, immediately after the execution hereof, to be rendered to the said A. B.; and that you do all things as by the statute passed in the second year of our reign you are authorised and required to do in that behalf. And in what manner you shall have executed this our writ make appear to us [*or* in the Common Pleas, to our justices, *or* in the Exchequer, to the barons of our Exchequer, *as the case may be*] at Westminster immediately after the execution hereof, and have you there then this writ.

Witness at Westminster, the day of in the year of our Lord

at the time of appearance, or within four days after, give notice in the same form as in the notice of a limited defence, that he or she defends as such, and admits the right of the claimant to an undivided share of the property (stating what share), but denies any actual ouster of him from the property, and may, within the same time, file an affidavit, stating with reasonable certainty that he or she is such joint-tenant, tenant in common, or coparcener, and the share of such property to which he or she is entitled, and that he or she has not ousted the claimant; and such notice shall be entered on the issue in the same manner as the notice limiting the defence, and upon the trial of such an issue the additional question of whether an actual ouster has taken place shall be tried."

claimant's title to undivided share, and deny actual ouster.

By sect. 189, "upon the trial of such issue as last aforesaid, if it shall be found that the defendant is joint-tenant, tenant in common, or coparcener, with the claimant, then the question whether an actual ouster has taken place shall be tried, and unless such actual ouster shall be proved, the defendant shall be entitled to judgment and costs; but if it shall be found, either that the defendant is not such joint-tenant, tenant in common, or coparcener, or that an actual ouster has taken place, then the claimant shall be entitled to such judgment for the recovery of possession and costs."

And the question whether an actual ouster has taken place shall be tried.

(B) *Proceedings in case of Death of Claimant or Defendant pending the Action.*

(*a*) *Death does not cause Abatement.*[1]

By 15 & 16 Vic. c. 76, s. 190, "the death of a claimant or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned."

Death of claimant or defendant does not cause abatement of claim.

(*b*) *Suggestion in case of Death of Claimant.*

By sect. 191, "in case the right of the deceased claimant shall survive to another claimant a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant; and if such a suggestion shall be made before the trial, then the claimant shall have a verdict, and recover such judgment as aforesaid, upon its appearing that he was entitled to bring the action either separately or jointly with the deceased claimant."

Suggestion in case of death of claimant whose right survives to other claimants.

By sect. 192, "in case of the death before trial of one of several claimants, whose right does not survive to another or others of the claimants, where the legal representative of the deceased claimant shall not become a party to the suit in the manner hereinafter mentioned, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant for such share of the property as he is entitled to, and costs."

Suggestion in case of death of claimant whose right does not survive to other claimants.

By sect. 193, "in case of a verdict for two or more claimants, if one of such claimants die before execution executed, the other claimant may, whether the legal right to the property shall survive or not, suggest the death in manner aforesaid, and proceed to judgment and execution for recovery of possession of the entirety of the property and the costs; but nothing herein contained shall affect the right of the legal representative of the deceased claimant, or the liability of the surviving claimant to such legal representative; and the entry and possession of such surviving claimant under such execution shall be considered as an entry and possession on behalf of such legal representative in respect of the share of the property to which he shall be entitled as such representative, and the court may direct possession to be delivered accordingly."

Suggestion in case of death of one of several claimants after verdict and before execution.

By sect. 194, "in case of the death of a sole claimant, or, before trial, of one of several claimants, whose right does not survive to another or others of

Suggestion by legal repre-

[1] *See ante*, vol. i. p. 7.

sentative of deceased claimant.

the claimants, the legal representative of such claimant may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed; and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of the deceased claimant, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion as hereinbefore provided with reference to a judgment for or against such claimant; and in case such suggestion in the case of a sole claimant be made after trial and before execution executed by delivery of possession thereupon, and such suggestion be denied by the defendant within eight days after notice thereof, or such further time as the court or a judge may allow, then such suggestion shall be tried; and if upon the trial thereof a verdict shall pass for the person making such suggestion, he shall be entitled to such judgment as aforesaid, for the recovery of possession, and for the costs of and occasioned by such suggestion; and in case of a verdict for the defendant, such defendant shall be entitled to such judgment as aforesaid for costs."

(c) *Suggestion in case of Death of Defendant.*

Suggestion in case of one of several defendants who defend jointly.

By 15 & 16 Vic. c. 76, s. 195, "in case of the death, before or after judgment, of one of several defendants in ejectment who defend jointly, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the action may proceed against the surviving defendant to judgment and execution."

Suggestion in case of death of sole defendant.

By sect. 196, "in case of the death of a sole defendant, or of all the defendants in ejectment, before trial, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the claimants shall be entitled to judgment for recovery of possession of the property, unless some other person shall appear and defend within the time to be appointed for that purpose by the order of the court or a judge, to be made upon the application of the claimants; and it shall be lawful for the court or a judge, upon such suggestion being made upon such application as aforesaid, to order that the claimants shall be at liberty to sign judgment within such time as the court or judge may think fit, unless the person then in possession, by himself or his tenant, or the legal representative of the deceased defendant, shall within such time appear and defend the action; and such order may be served in the same manner as the writ; and in case such person shall appear and defend the same, proceedings may be taken against such new defendant as if he had originally appeared and defended the action; and if no appearance be entered and defence made, then the claimant shall be at liberty to sign judgment pursuant to the order."

In case of death of sole defendant after verdict.

By sect. 197, "in case of the death of a sole defendant, or of all the defendants in ejectment, after verdict, the claimants shall nevertheless be entitled to judgment as if no such death had taken place, and to proceed by execution for recovery of possession without suggestion or revivor, and to proceed for the recovery of the costs, in like manner as upon any other judgment for money, against the legal representatives of the deceased defendant or defendants."

In case of death of one of several defendants who defends for distinct part.

By sect. 198, "in case of the death, before trial, of one of several defendants in ejectment who defends separately for a portion of the property for which the other defendant or defendants do not defend, the same proceedings may be taken as to such portion as in the case of the death of a sole defendant, or the claimants may proceed against the surviving defendants in respect of the portion of the property for which they defend."

In case of death of one of several defendants who defends

By sect. 199, "in case of the death, before trial, of one of several defendants in ejectment, who defends separately in respect of property for which surviving defendants also defend, it shall be lawful for the court or a judge, at any time before the trial, to allow the person at the time of the death in possession of the property, or the legal representative of the deceased defendant, to appear

and defend on such terms as may appear reasonable and just, upon the application of such person or representative; and if no such application be made, or leave granted, the claimant suggesting the death in manner aforesaid may proceed against the surviving defendant or defendants to judgment and execution." separately for same property.

(C) *Discontinuance of Action.*

(*a*) *By sole Claimant.*

By sect. 200, "the claimant in ejectment shall be at liberty at any time to discontinue the action as to one or more of the defendants, by giving to the defendant or his attorney a notice headed in the court and cause and signed by the claimant or his attorney, stating that he discontinues such action; and thereupon the defendant to whom such notice is given shall be entitled to and may forthwith sign judgment for costs in the form contained in the Schedule (A) to this act annexed, marked No. 18, or to the like effect." The claimant may discontinue on giving notice thereof to the defendant, who may thereupon sign judgment.

(1) *Form of Judgment in such Case.*[1]

(*b*) *By one of several Claimants.*

By sect. 201, "in case one of the several claimants shall be desirous to discontinue, he may apply to the court or a judge to have his name struck out of the proceedings, and an order may be made thereupon upon such terms as to the court or judge may seem fit, and the action shall thereupon proceed at the suit of the other claimants." Discontinuance by one of several claimants.

(D) *Proceedings where Claimant neglects to try the Issue.*

By sect. 202, "if, after appearance entered, the claimant, without going to trial, allow the time allowed for going to trial by the practice of the court in ordinary cases after issue joined to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and if the claimant afterwards neglect to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance to the said notice given by the defendant, and the time for going to trial shall not be extended by the court or a judge, the defendant may sign judgment in the form contained in the Schedule (A) to this act annexed, marked No. 19, and recover the costs of defence." If the claimant neglect to take the cause down to trial, the defendant may give notice to try, and sign judgment on default.[2]

(*a*) *Form of Judgment for Defendant on Neglect after Notice.*[3]

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[1] *Form of Judgment for Defendant upon Discontinuance by Claimant.*

In the Queen's Bench.

On the day of A.D. 18 [*date of writ*].

Lancashire } On the day and year above
to wit. } written, a writ of our Lady the Queen issued forth of this court in these words; (that is to say),

Victoria, by the grace of God [*here copy the writ*], and C. D. has, on the day of appeared by his attorney [*or*, in person] to the said writ, and A. B. has discontinued the action: Therefore it is considered that the said C. D. be acquitted, and that he recover against A. B. £ for his costs of defence.

[2] The 58th section of 15 & 16 Vic. c. 76, which enacts that "a plaintiff shall be deemed out of court unless he declare within one year after the writ of summons is returnable," does not apply to an action of ejectment. *Scope v. Paddison*, 6 H. & N. 641; 30 L. J. Ex. 244.

[3] *Judgment for Defendant on Default to take Ejectment down to Trial after Notice.*

In the Queen's Bench.

The day of A.D. 18 [*date of writ*].

Lancashire } On the day and year above
to wit. } written, a writ of our Lady the Queen issued forth of this court in these words; (that is to say),

Victoria, by the grace of God [*here copy the writ*], and C. D. has, on the day of appeared by his attorney [*or*, in person] to the said writ, and A. B. has failed to proceed to trial, although duly required so to do: Therefore, it is considered that the said C. D. be acquitted, and that he recover against the said A. B. £ for his costs of defence.

(E) *Of Confession of the Action.*

(*a*) *By a sole Defendant, or all the Defendants.*

By sect. 203, "a sole defendant, or all the defendants in ejectment, shall be at liberty to confess the action as to the whole or part of the property, by giving to such claimant a notice, headed in the court and cause, and signed by the defendant or defendants, such signature to be attested by his or their attorney; and thereupon the claimant shall be entitled to and may forthwith sign judgment and issue execution for the recovery of possession and costs in the form contained in the Schedule (A) to this act annexed, marked No. 20, or to the like effect."

(1) *Form of Judgment thereon.*[1]

(*b*) *By one of several Defendants.*

If one of several defendants defends separately, he may give a like notice to the claimant.

By sect. 204, "in case one of the several defendants in ejectment who defends separately for the portion of the property for which the other defendant or defendants do not defend, shall be desirous of confessing the claimant's title to such portion, he may give a like notice to the claimant; and thereupon the claimant shall be entitled to and may sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action may proceed as to the residue."

By sect. 205, "in case one of several defendants in ejectment, who defends separately in respect of property for which other defendants also defend, shall be desirous of confessing the claimant's title, he may give a like notice thereof; and thereupon the claimant shall be entitled to and may sign judgment against such defendant for the costs occasioned by his defence, and may proceed in the action against the other defendants to judgment and execution."

XII. Of the Proceedings in Ejectment by a Landlord against his Tenant.

(A) *Where there is a Right of Re-Entry for Non-Payment of Rent.*

In case of right of re-entry for non-payment of rent, the landlord may, if six months' rent be in arrear, and there be no sufficient distress to countervail the arrear, serve a writ in ejectment.[2]

By 15 & 16 Vic. c. 76, s. 210, "in all cases between landlord and tenant, as often as it shall happen that one half-year's rent be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage; or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment; and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for

[1] *Judgment on Confession.*

In the Queen's Bench.

The day of A.D. 18 [*date of writ*].

On the day and year above written, a writ of our Lady the Queen issued forth of this court in these words; (that is to say),

Victoria, by the grace of God [*here copy the writ*], and C. D. has, on the day of appeared by his attorney [*or*, in person] to the said action, and the said C. D. has confessed the said action [*or*, has confessed the said action as to part of the said land, that is to say (*here state the part*)]: Therefore it is considered that the said A. B. do recover possession of the said land in the said writ mentioned [*or*, of the said part of the said land] with the appurtenances, and £ for costs.

[2] By 15 & 16 Vic. c. 76, s. 218, "nothing herein contained to be construed to prejudice or affect any other right of action or remedy which landlords may possess in any of the cases hereinbefore provided for, otherwise than hereinbefore expressly enacted."

The remedy at common law must be resorted to where this section does not apply; that is, there must be a demand of the precise rent, on the actual day it is due, a convenient time before sunset, upon the land, and at the most notorious place of it. 1 Saund. 287, n. 6.

non-appearance, if it shall be made appear to the court where the said action is depending, by affidavit,[1] or be proved upon the trial, in case the defendant appears, that half-a-year's rent was due[2] before the said writ was served, and that no sufficient distress was to be found on the demised premises,[3] countervailing the arrears then due, and that the lessor had power to re-enter, then, and in every such case, the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or assignee, and other persons claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclaimed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be nonsuited therein, then in every such case such defendant shall have and recover his costs: Provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed.

In case the tenant obtain an injunction, he must pay the amount of rent and costs into court.

By sect. 211, "in case the said lessee, his assignee, or other person claiming any right, title, or interest in law or equity of, in, or to the said lease, shall, within the time aforesaid, proceed for relief in any court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant on such ejectment, bring into court, and lodge with the proper officer, such sum and sums of money as the lessor or landlord shall in his answer swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much, and no more, as he shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession,

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[1] A motion for leave to sign judgment and issue execution under sect. 210 may be made to the court, and is absolute in the first instance. *Youens v. Keen*, 22 C. B. (N. S.) 384.

[2] Three-quarters of rent being due under a lease containing a clause of re-entry for non-payment of rent within twenty-one days after each quarter day, the lessors, on the 2nd October, distrained, and after sale of the distress there remained due more than a quarter, but less than a half-year's rent. On the 2nd of November they served the lessee with a writ in ejectment. The court held that the action was not maintainable, there not being half-a-year's rent in arrear at the time of the service of the writ. *Cotesworth v. Spokes*, 10 C. B. (N. S.) 103; 7 Jur. N. S. 803; 30 L. J. C. P. 220.

[3] See *Wheeler v. Stevenson*, 6 H. & N. 155; 30 L. J. Ex. 46.

The statute does not apply where there is sufficient distress upon the premises (7 T. R. 117); although there be more than a half-year's rent in arrear, the case is within the act. 2 M. & S. 525. It suffices if there be enough to satisfy a half-year's rent (9 Dowl. N. P. 5), although more be payable.

shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands."

Upon payment of arrears and costs, ejectment is discontinued.

By sect. 212, "if the tenant or his assignee do or shall, at any time before the trial on such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators, or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy, the demised lands, according to the lease thereof made, without any new lease."

(B) *After the Determination of the Tenancy.*

The landlord may serve a notice with the writ, requiring the tenant to find bail, and then by rule or summons require that bail should be found.

By sect. 213, "where the term or interest of any tenant, now or hereafter holding under a lease or agreement in writing, any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired or been determined, either by the landlord or tenant, by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand, in writing made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the written ejectment, to address notice to such tenant or person, requiring him to find such bail, if ordered by the court or a judge, and for such purposes as are hereinafter next specified; and upon the appearance of the party on an affidavit of service of the writ and notice, it shall be lawful for the landlord producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the court, or apply by summons to a judge at chambers, for a rule or summons for such tenant or person to show cause within a time to be fixed by the court or judge, on a consideration of the situation of the premises, why such tenant or person should not enter into a recognisance by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the claimants in the action; and it shall be lawful for the court or judge, upon cause shown, or upon affidavit of the service of the rule or summons, in case no cause shall be shown, to make the same absolute in the whole or part, and to order such tenant or person, within a time to be fixed upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute, and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the court or judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit that such rule or order has been made and served and not complied with, shall be at liberty to sign judgment for recovery of possession and costs of suit, in the form contained in the Schedule (A) to the act annexed, marked No. 21, or to the like effect."

(*a*) *Form of Judgment on Default of finding Bail.*[1]

[1] *Form of Judgment on Default of finding Bail.*

In the Queen's Bench.

The day of A.D. 18 [*date of writ.*]

Yorkshire } On the day and year above-
to wit. } written a writ our Lady the Queen issued forth of this court, with a notice thereunder written, the tenor of which writ and notice follows in these words; (that is to say,) [*here copy the writ and notice, which latter may be as follows:*—]

Take notice, that you will be required, if ordered by the court or a judge, to give bail

(C) *Of the Recovery of Mesne Profits.*

Where proof is given of service of notice of trial, the claimant may give evidence of, and recover the mesne profits at the trial of the ejectment.

By sect. 214, "wherever it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear on such trial or not, permit the claimant on the trial, after proof of his right to recover possession of the whole or any part of the premises mentioned in the writ in ejectment, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the claimant shall, in such case, give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits, and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession and costs, but also for the mesne profits found by the jury: Provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in ejectment."

(D) *Of the finding of Bail upon Stay of Execution.*

Where security has been given, execution will not be stayed unless the tenant find bail not to commit waste.[1]

By sect. 215, "in all cases in which such security shall have been given as aforesaid, if upon the trial a verdict shall pass for the claimant, unless it shall appear to the judge before whom the same shall have been had that the finding of the jury was contrary to the evidence, or that the damages given were excessive, such judge shall not, except by consent, make an order to stay judgment or execution, except on condition that, within four days from the day of the trial, the defendant shall actually find security, by the recognisance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure, produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be: Provided always, that the recognisance last abovementioned shall immediately stand discharged and be of no effect, in case proceedings in error shall be brought upon such judgment, and the plaintiff in error shall become bound in the manner herein provided."

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by yourself and two sufficient sureties, conditioned to pay the costs and damages which shall be recovered in this action.

And C. D. has appeared by his attorney [*or*, in person] to the said writ, and has been ordered to give bail pursuant to the statute, and has failed so to do. Therefore it is considered that the said [*here insert the name of landlord*] do recover possession of the land in the said writ mentioned, with the appurtenances, together with £ for costs of suit.

[1] "All recognisances and securities entered into as last aforesaid, may and shall be taken respectively in such manner by and before such persons as are provided and authorised, in respect of recognisances of bail, upon actions and suits depending in the court in which any such action of ejectment shall have been commenced; and the officer of the same court, with whom recognisances of bail are filed, shall file such recognisances and securities, for which respectively the sum of 2*s.* 6*d.*, and no more, shall be paid: but no action or other proceedings shall be commenced upon any such recognisance or security after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord." 15 & 16 Vic. c. 76, s. 216.

(E) *Writ where Right of Entry has accrued in or after Hilary or Trinity Terms.*

By sect. 217, "in all actions of ejectment hereafter to be brought in any of her Majesty's courts at Westminster, by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments in any county, except London or Middlesex, where the tenancy shall expire or the right of entry into or upon such lands or hereditaments shall accrue to such landlord in or after Hilary or Trinity terms respectively, it shall be lawful for the claimant to serve a writ in ejectment in the form contained in the Schedule (A) to this act annexed, marked No. 13, except that it shall command the persons to whom it is directed to appear within ten days after service thereof in the court in which such action may be brought; and the like proceedings shall be thereupon had as hereinbefore provided, save that it shall be sufficient to give at least six clear days' notice of trial to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; and any defendant in such action may, at any time before the trial thereof, apply to a judge by summons to stay or set aside the proceedings, or to postpone the trial until the next assizes; and it shall be lawful for the judge, in his discretion, to make such order in the said cause as to him shall seem expedient."

XIII. Of the Proceedings in Ejectment by Mortgagee against Mortgagor.

The court may grant the mortgagor relief upon payment of the principal monies, interest, and costs.

By 15 & 16 Vic. c. 76, s. 219, "when an action of ejectment shall be brought by any mortgagee, his heirs, executors, administrators, or assignees, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of her Majesty's courts of equity in that part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements, or hereditaments, of the person having right to redeem such mortgaged lands, tenements, and hereditaments, and who shall appear and become defendant in such action, shall, at any time pending such action, pay unto such mortgagee, or, in case of his refusal, shall bring into court where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money for principal, interest, and costs, to be ascertained and computed by the court where such action is or shall be depending, or by the proper officer by such court to be appointed for that purpose), the monies so paid to such mortgagee, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the court shall and may discharge every such mortgagor or defendant of and from the same accordingly, and shall and may by rule of the same court compel such mortgagee, at the costs and charges of such mortgagor, to assign, surrender, or re-convey such mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee has therein, and deliver up all deeds, evidences, and writings in his custody, relating to the title of such mortgaged lands, tenements, and hereditaments, unto such mortgagor, who shall have paid or brought such monies into the court, his heirs, executors, or administrators, or to such other person or persons as he or they shall for that purpose nominate or appoint."

Provided there be no dispute as to the amount of incumbrance, and no prejudice to any subsequent mortgagee.

By sect. 220, "nothing herein contained shall extend to any case where the person against whom the redemption is or shall be prayed shall (by writing under his hand, or the hand of his attorney, agent, or solicitor, to be delivered before the money shall be brought into such court of law, to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; or to any case where the right of

redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by or between different defendants in the same cause or suit; or shall be any prejudice to any subsequent mortgage or subsequent incumbrance, anything herein contained to the contrary thereof in anywise notwithstanding."

ELECTION. The choosing between two rights by a person who desires one of them, under an instrument in which a clear intention appears that he should not enjoy both. *See* Story's Eq. Jur. s. 1077; 2 Sug. Powers, 144; 2 Spence's Eq. Jur. 586.[1]

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[1] The principle of election is, that no one shall claim under and in opposition to the same instrument. There is a tacit condition annexed to all provisions of this nature, that the person taking do not disturb the disposition which his benefactor has made. 2 Sug. Pow. 144.

Election arises in equity in cases where a grantor, or, more commonly, a testator, gives away, either knowingly or by mistake, that in which he has no interest, or the whole of that in which another person besides himself has an interest, and in the same instrument makes a gift to the owner of the property so given away, or to the person entitled to such interest. In such cases, the owner of such property, or the person entitled to such interest, cannot both take the gift and retain his own property or interest, but if he takes the gift, he must resign his own property or interest. On the other hand, if he should elect to hold his own property or interest, or, as the phrase is, if he should elect against the instrument, he cannot have the gift; or, at least, he cannot have the entire gift without compensating the person whom he has disappointed by electing to take his own property. In such case equity, by not suffering the disposition by which such gift is made to enure to the benefit of the person so electing against the instrument, will not render that disposition inoperative, but will make it the means of effectuating that intention of the author of the instrument which such person has frustrated by electing to retain his own property or interest; for equity will treat such gift, or, at least, a part of it, as a trust in the donee or devisee, the person so electing for the benefit of the party disappointed by such person's refusing to give up his own property or interest. Smith's Real & Pers. Pro. 1060. Stateman on Elections and Satisfaction.

The doctrine of election applies even where, in a will not within the Wills' Act (1 Vic. c. 26), a devise of an estate is made to the testator's heirs, and the heirs, according to the old rule, take such estate by descent, and not by purchase, and by the same will the testator devises to another person an estate belonging to the heir, over which the testator has no disposing power. 2 Spence's Eq. Jur. 589; Story's Eq. Jur. s. 1095; 2 Rop. Leg. 1595.

The doctrine is equally applied to all interests, whether immediate or remote, vested or contingent, of value or of no value, and whether in real or personal estate. (Id.)

The doctrine of election is not applied in the case of creditors. They may take the benefit of a devise for payment of debts, and also enforce their legal claim against other funds disposed of by the will; for a creditor claims not as a mere volunteer, but for a valuable consideration. Story, Eq. Jur. s. 1092.

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I. Of the Qualification of Candidates.[1]

(A) *As to who are Eligible.*

(*a*) *Grounds of Incompetency.*[2]

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[1] The law relative to convening parliament, proroguing or dissolving it, as to its duration, the enforcing the attendance of its members, and the privileges an election to sit in parliament creates, will be found under the titles of Parliament; Privilege of Parliament. *See ante*, vol. iii. p. 154.

[2] The following persons are ineligible to

the House of Commons:—Aliens (4 Inst. 47); persons attainted with treason or felony (id.); outlaws in criminal but not civil proceedings (2 Hats. 37); idiots (Hale's Parl. 116), and lunatics, unless in lucid intervals (id.); and the seat of a member becoming a lunatic may be vacated (Grampound, D'Ewes, 126); minors (1 Bl. Com. 162), clergymen (41 Geo. 3, c. 63), peers, Scotch peers, Irish peers for places in Ireland (39 & 40 Geo. 3, c. 67, art. 4); the fifteen judges of England (4 Inst. 147). All sons of English, Scotch, and Irish peers are eligible. 2 & 3 Wm. 4, c. 56, s. 37. Scotch judges are not, and formerly barons of the Scotch Exchequer (7 Geo. 4, c. 6, s. 4) were not, eligible; returning officers for their respective jurisdictions; each sheriff for his own county, or any borough, &c. within it (9 Journ. 725; 1 Dougl. 419); each mayor or bailiff for the particular borough or place for which he makes the return (id.); but the sheriff of a county at large may be elected for a town, being a county of itself, though within the local limits of the county at large, as the sheriff of Hampshire for Southampton. 4 id. 87. Persons concerned in the management of the revenues, with some exceptions, are ineligible. 5 Wm. & Mary, c. 7, s. 517; 41 Geo. 3, c. 59. Persons holding new offices under the Crown, created since 1705 (6 Anne, c. 7, s. 25), together with the other persons mentioned in the same act, are ineligible. So, pensioners during pleasure or for term of years. Id.; 1 Geo. 1, st. 2, c. 56. But a pension received by the wife does not disqualify the husband. Reading, Corb. Dan. 114. Government contractors (22 Geo. 3, c. 45, s. 1), and placemen in the public offices, specified in the 15 Geo. 2, c. 22, s. 9, are disqualified. Though the above-mentioned persons are incapable of being elected, sitting, or voting, yet there are offices connected with the Excise and Customs which only disqualify the holders from sitting or voting, but not from being elected. 11 & 12 Wm. 4, c. 2, ss. 150, 151, 152. These, therefore, if elected, may make their election good, and enable themselves to sit and vote by resigning the office after the election, and before they take their seats. 16 Journ. 98; Orme, 265. Persons returned upon a double return are not competent to sit until the return is decided by a committee (Standing Order); but petitioners are eligible for any other place during the trial of their petition. Resolution, April 16, 1727.

Absence from England is no ground of ineligibility (Simeon, 51); though it was once resolved to be so. 2 Hatsel, 22. And it is said to be doubtful whether being in gaol in execution on a judgment renders a man ineligible (2 Ba. Abrid. 123; 1 Hatsel, 155; Com. Dig. Pierl. D. 9); but a poll was denied to a candidate, he being a person in execution for debt, and the sitting members were declared duly elected. Where the jurisdiction of an ancient court has been enlarged, and a new arrangement made with respect to its officers, the ancient officers, though with new designations, are not within the disqualifying words of the statute (N. Berwick, 2 Dougl. 423), as clerk of the pipe of Scotland. But baggage-master of the forces of Scotland was holden a new office, and within the statute. Fife, 1 Lud. 455. Recorders in England and Wales are ineligible for the borough for which they act. 5 & 6 Wm. 4, c. 76, s. 103. County-court judges are ineligible (10 & 11 Vic. c. 102, s. 18); so is the Judge of the Admiralty Court. 3 & 4 Vic. c. 66. A revising barrister is not eligible for eighteen months after his appointment for the place for which he was appointed. 6 Vic. c. 18, s. 28. Metropolitan police-magistrates are ineligible (3 & 4 Wm. 4, c. 19, s. 19; and the Commissioner of the City of London Police is disqualified. 2 & 3 Vic. c. 94, s. 7.

"If any candidate at any election for any county, city, or borough, shall be declared by any election committee guilty, by himself or his agents, of bribery, treating, or undue influence at such election, such candidate shall be incapable of being elected or sitting in parliament for such county, city, or borough during the parliament then in existence." 17 & 18 Vic. c. 102, s. 36, continued by 24 & 25 Vic. c. 122.

The acceptance of any office of profit from the Crown by a member vacates his seat. 6 Anne, c. 7, s. 26. The amount of the profit is immaterial; and there are two places of *no profit*, which, for the convenience of members desirous of retiring from parliament, are considered within this statute, and enable them to vacate their seats, viz. the steward of the Chiltern Hundreds, and the steward of the East *Hundreds*, in Berks. *See* Rogers' Elections, p. 190, *et seq.* From the operations of this last statute, officers of the army or navy receiving new commissions are excepted (2 Hats. p. 50; Orme, 272); but persons not actually in the service at the time they receive a commission are not protected by the exception. 2 Hats. Pre. 54; Orme, 271. The acceptance of a foreign employment, as that of ambassador, does not vacate the seat (2 Hats. 22, 25, n.); but a patent place for life, out of Great Britain, has been holden to do so. Orme, 261. A member becoming a bankrupt is incapable of sitting and voting for a year, unless within that time the commission be superseded, or the creditors paid the full amount of the debt. 52 Geo. 3, c. 144. It has been decided (*Thompson v. Pearce*, 1 B. & B. 25) that an army-clothier is not a person within the meaning of the statute 22 Geo. 3, c. 45, prohibiting government contractors from sitting in parliament.

[1] Previous to the 21 & 22 Vic. c. 26, the qualification of a knight of the shire was "an estate, freehold or copyhold, for his

(*a*) *Effect of Choosing Incapacitated Persons.*[1]

II. Of the Qualification of Electors.

(A) *Who are Disqualified.*[2]

own life, or for some greater estate, either in law or in equity," of the clear annual value of 600*l.* in Great Britain or Ireland (9 Anne, c. 5; 41 Geo. 3, c. 101, s. 23; 59 Geo. 3, c. 37); of a burgess or baron of the Cinque Ports, of the clear annual value of 300*l.*, such estate not being a mortgage, unless the mortgagee has been in possession seven years (id.): or of personal property to a large amount (1 & 2 Vic. c. 48). But the property qualification is abolished by the above act of 21 & 22 Vic. c. 26.

[1] If there be no other candidate than the person incapacitated, the election will necessarily be void; but if there be another candidate having a minority of votes, it is a very important question whether, in consequence of the incapacity of the former, the electors are to be called upon to reconsider their choice; or whether they are to be represented by the latter as being the next upon the poll, and in reality to be regarded as first, by reason of the nullity of the franchises given to the other candidate. It will seem that the latter proposition is that which constitutes the law in cases where the misapplication of the franchises by the electors is wilful, and therefore made in their own wrong, but that it is confined to such cases. The criterion whereby to decide whether the misapplication of the franchises by the electors has been wilful, is by ascertaining whether or not the fact of ineligibility or disqualification in the candidate was sufficiently known to them. Upon this head it will first be shown how far notice given of such fact is obligatory upon the electors, so as to preclude the plea of ignorance in them, and to annul the votes afterwards given by them to the incapacitated candidate, and it will afterwards be considered whether, in any case, the consequence can be the same where no notice has been given. That franchises so given after such notice are lost and thrown away has been the general doctrine, not only in parliamentary cases, but in cases of analogy in the courts of law. Nor does there appear to be any exception to this rule, unless where notice of incapacity in the candidate has been made under circumstances calculated to counteract that notice, and to impress the electors with an idea that there was no legal foundation for its purport. The following decisions have occurred upon this subject:—18 Journ. 126, 673; 1 Dougl. 419; 1 Lud. 455; 38 Journ. 15, 245, 415, 689; Clifford, 1, 222, 261, 342, 353, 360; 1 Perk. 526; 4 Dougl. 87; 2 Lud. 269. Several exceptions have been urged as taking cases out of the foregoing rule, that votes given to an incapacitated candidate after notice of such incapacity are thrown away and lost, and that the electors in such case are to be represented by the candidate next upon the poll. Of these, however, only one has been distinctly admitted, viz. that which is to be found in the case of Abingdon, 1775 (1 Dougl. 419); where, although notice of the incapacity of one of the candidates was given to the electors, there was fair ground to suppose that they were misled by the declaration and conduct of the returning officer. Another exception contended for depends upon the time of giving the notice of disqualification, it having been insisted upon that it must be given before the commencement of the election. It seems, however, that notice at any time during the election will be sufficient, the effect of such notice being confined to the votes subsequently given. Roe on Elections, p. 275. It remains to consider whether the notoriety of the circumstance that a candidate is ineligible or disqualified can, in any case, supersede the necessity of notice, so as to affect the electors with the same consequences as if notice had been actually given. The object of notice is to bring the law and fact of the incapacity of the candidate immediately within the knowledge and observation of the electors, and thereby to make them aware of the misapplication of their votes; after which, if they persist in such misapplication, they do so of their own wrong, and the consequent loss of their franchise is their own voluntary act. In principle it seems not to be distinguishable, whether the circumstance of disqualification be within the knowledge of the electors, from being within their own observation, or whether from actual notice given to them; and that their votes would be thrown away in the former case equally as in the latter. 18 Journ. 126. *See* Clerk on Election Committees, 157; Rogers, 220, 9th ed.

[2] The right of voting for the choice of representatives to serve in parliament does not extend to infants (7 & 8 Wm. 3, c. 25, s. 8), nor women (4 Inst. 5), nor aliens (12 Journ. 367), unless made denizens by letters patent, or naturalised by act of parliament. Certificated aliens who have taken the oath mentioned in sect. 10 of 7 & 8 Vic. c. 66, may, it seems, vote, unless the right to vote is specially excepted in the certificate. 7 & 8 Vic. c. 66, s. 6. Nor idiots (1 Hey. 259), nor lunatics, except during lucid intervals (id. 261); but mere imbecility is not a sufficient exclusion, if the voter at the time understands what he is doing. 1 Peck. 108. Persons convicted of felony are disqualified (id. 508); so of perjury and subornation of perjury (2 Geo. 2, c. 24, s. 6); so of bribery and undue influence (17 & 18 Vic. c. 102, s. 6): but the mere declaration by a committee that a person has been guilty of perjury will

(B) *Qualifications existing before the Reform Act, and still preserved in Cities and Boroughs.*[1]

not operate as a disqualification. 2 Peck. 245. Whether outlawry in civil suits, or excommunication, creates a disability, has not yet been determined. 1 Hey. 334. Some are excluded for the purpose of securing the freedom of election, as peers. (Annual Resolution.) Irish peers, except when members of the House of Commons themselves. 57 Journ. 5, 276. Revenue officers are disqualified, but commissioners of the land-tax, and persons acting under them, are exempted from disqualification (22 Geo. 3, c. 41, s. 2), as well as those holding freehold offices by letters patent. Id. s. 3. A sub-distributor of stamps appointed by the distributor was considered a good vote. 2 Lud. 552; 1 Peck. 373. A sub-deputy, appointed by a country postmaster to distribute letters in a certain district, and receive the postage at a certain profit per mile on each letter, whose name was not in the Post-office books, was not disqualified (2 Lud. 562); nor the guard of a mail-coach. No police-magistrate's clerk, usher, door-keeper, or messenger of the eight metropolitan police-courts therein mentioned, while holding office, or within six months afterwards, is entitled to vote for the counties of Middlesex or Surrey, the cities of London or Westminster, the boroughs of Tower Hamlets, Finsbury, Marylebone, Southwark, Lambeth, and Greenwich. 2 & 3 Vic. 71, s. 6. And commissioners and members of the City of London Police force are, while holding office, and for six months afterwards, disqualified from voting for the counties of Middlesex, Surrey, Hertford, Essex, and Kent, the city of London, or any borough within the metropolitan police district. 2 & 3 Vic. c. 94, s. 7; *see* also 10 Geo. 4, c. 44, s. 18. And by the 19 & 20 Vic. c. 69, s. 9, no head or other constable, appointed or to be appointed for any borough under the Municipal Reform Act, 5 & 6 Wm. 4, c. 76, (except special constables), shall, during the time he holds office, or within six months afterwards, be entitled to vote for the borough, or the county in which such borough is situate, under a penalty of 10*l.*

Another disqualification arises from the receipt of alms within a limited time before the election, generally a year (2 Dougl. 126); though in particular cases this period is extended. *See* 11 Geo. 1, c. 18, s. 14; 2 Dougl. 104.

By 18 Geo. 3, c. 59, s. 25, "any relief given to the family of any militiaman during the time of actual service shall not deprive such militiaman from voting for the election of any member to serve in parliament."

Private charitable assistance furnished to a voter ought not to affect his franchise (1 Peck. 508); but where a voter, upon his own application, and by order of the parish officers, was attended by the parish apothecary, his vote was not allowed. (Id.) There is another species of pecuniary assistance, derived from "the revenue of certain specific funds which have been established or bequeathed for the purpose of assisting the poor, distinguished in the cases as 'charities.'" 1 Dougl. 370. The receipt of this relief has been in, many instances, considered as no disqualification. 2 Dougl. 122; 1 Lud. 193; Omb. 121; 1 Peck. 510. One charity, however, called Wellborn's Charity, has been holden to work a disqualification. 2 Dougl. 122. Perhaps the best rule upon this subject is in the words of *Mr. Serjeant Heywood:*—"To distinguish between charities which are of such a nature as to imply that the partaker of them is in a state of indigence and abject dependence, and those from which no such inference can be drawn. With respect to the former, they, like parochial relief, may work a disqualification of those who receive them, by proving their incapacity to exercise a will of their own in the choice of a representative."

[1] There were certain qualifications existing at the time the Reform Act was passed, and which it either permanently or temporarily continued.

I. Those to whom the franchise is *permanently* continued are the following:—

Freeholders and burgage tenants in cities and towns being counties corporate, having estates of inheritance.

Freeholders and burgage tenants as before, having estate for life or lives of the value of 10*l.* per annum.

Freeholders and burgage tenants as before, having estate for life or lives under the value of 10*l.* per annum, who

(*a*) Actually and *bonâ fide* occupy the premises.

(*b*) Were seised of the same on the passing of the act.

(*c*) Have acquired the same since that date by marriage, marriage settlement, devise, or promotion to a benefice or office. Sect. 18. *See post*, p. 195.

Freemen and burgesses by servitude, and those claiming by birth through them, in other places than London.

Freemen and liverymen in London.

II. Those to whom the franchise is *temporarily* reserved may be divided into,—

1st. Those whose rights are reserved to them, and those claiming under them, and,—

2nd. Those whose franchise is simply reserved without any such power of transmission.

The former of these are only,—

Freemen who are admitted, or entitled to be admitted, for any cause on the 1st of March, 1831, and those claiming by birth through them. Sect. 32.

The latter comprises,—

(*a*) Freeholders or burgage tenants in

(C) *Qualification for Counties by reason of Estate for Life of Freehold Lands.*[1]

Must be of the clear yearly value of 10*l.*

The 2 Wm. 4, c. 45 (the Reform Act), s. 18, enacts, "that no person shall be entitled to vote in the election of a knight or knights of the shire, to serve in any future parliament, or in the election of a member or members to serve in any future parliament, for any city or town being a county of itself, in respect of any freehold lands or tenements whereof such person may be seised for his own life, or for the life of another, or for any lives whatsoever, except such person shall be in the actual and *bonâ fide* occupation of such lands or tenements, or except the same shall have come to such person by marriage, marriage settlement, devise, or promotion to any benefice or to any office, or except the same shall be of the clear yearly value of not less than 10*l.* above all rents and charges payable out of or in respect of the same, any statute or usage to the contrary notwithstanding: Provided always, that nothing in this act contained shall prevent any person now seised for his own life, or for the life of another, or for any lives whatsoever, of any freehold lands or tenements, in respect of which he now has, or but for the passing of this act might acquire, the right of voting in such respective elections, so long as he shall be so seised of the same lands or tenements, such right of voting in respect thereof, if duly registered according to the respective provisions hereinafter contained."

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ordinary borough towns (including those of New Shoreham, Cricklade, Aylesbury, and East Retford) who were entitled to vote on the 1st March, 1831, or had acquired the estate between that date and the passing of the act (7th June, 1832), by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice or office.

(*b*) Electors qualified as,—

Inhabitants generally.

Inhabitant householders.

Inhabitants paying scot and lot.

Potwallopers.—Rogers' *Elections*, p. 89, 9th ed.

Upon all alike the Reform Act imposes the necessity of registration and residence for six calendar months previous to the last day of July, within the city or borough, as the case may be, or within seven statute miles thereof. 2 Wm. 4, c. 45, s. 31; 6 Vic. c. 18, s. 79.

Where there was no evidence of base tenure or of a manor in the borough, and the burgage tenements had always passed without surrender, or admittance, or fine paid, though the conveyance of them had not been strictly such as is usual in case of freeholds, yet in the absence of evidence that the freehold was in any other person the claimant was held entitled to be registered as a freeholder. *Busher v. Thompson*, 4 C. B. 48. See *Passingham v. Pitty*, 17 C. B. 299; 25 L. J. C. P. 4.

The acquisition of an estate of freehold within the new limits of the city, &c., as settled by the Boundary Act, confers the right of voting as fully as if such estate were situate within the ancient limits. 2 Wm. 4, c. 45, s. 31. *Nicks v. Field*, 4 C. B. 43.

[1] In determining the question whether lands be freehold or copyhold, where a doubt is raised, two of the principal tests is, whether on alienation it is necessary that the assignee or purchaser should be admitted (see *Thompson v. Hardinge*, 1 C. B. 940; 14 L. J. C. P. 268), and whether the lands be parcel of the manor, and not merely situate within it, but is held of it at a certain rent-fealty, &c. The presumption, as between freeholds and lands of other tenure is in favour of freeholds, unless something absolutely inconsistent with such tenure be shown to exist, and the *onus probandi* is on the objector. *Passingham v. Pitty*, *supra*. *Busher v. Thompson*, *supra*.

Where lands were vested by act of parliament in certain deputies, to be allotted in parcels to certain freemen of a borough, to hold at a rent, observing certain rules as long as they (the tenants) should be willing, but a power of re-entry was reserved to the deputies in case any freeman should be in arrear for fourteen days, or should fail to conform to the rules, it was held that the allottees had an estate of such uncertain interest as to amount to a freehold. *Beeson v. Burton*, 12 C. B. 647; 22 L. J. C. P. 33. See *Ashmore v. Lees*, 2 C. B. 31.

Where the claimant owned and occupied freehold lands without the borough, of the value of 40*s.* a-year, and also occupied a house of less value than 10*l.* a-year, at a distance from the lands, the court held that the house and land could not be joined together for the purpose of making up a borough qualification under sect. 27, the land being occupied as owner, and the house as tenant, and therefore not under the same landlord; and that the owner was entitled to the county franchise in respect of the first part of the qualification. *Burton v. Overseers of Ashton*, 8 C. B. 7.

A. owned and occupied freehold land within the borough of D., of the clear yearly value of 40*s.*, and also occupied as tenant a house of the clear yearly value of 10*l.*, also within the borough of D. He was held

(D) *Qualification in respect of Estates for Life not being Freehold.*

Right of voting in counties extended to copyholders, &c., of 10*l.* yearly value;

The 19th sect. 2 Wm. 4, c. 45, enacts, "that every male person of full age, and not subject to any legal incapacity, who shall be seised at law or in equity of any lands or tenements of copyhold, or any other tenure whatever, except freehold, for his own life, or for the life of another, or for any lives whatsoever, or for any larger estate, of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same, shall be entitled to vote in respect of the election of a knight or knights of the shire, to serve in any future parliament for, or for the riding, parts, or divisions of, the county in which such lands and tenements shall be respectively situate."

(E) *Qualification in respect of Leaseholds.*

And leaseholders and occupiers of premises of certain value.

The 20th sect. enacts, "that every male person of full age, and not subject to any legal incapacity, who shall be entitled, either as lessee or assignee, to any lands or tenements, whether of freehold or any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created, for a period

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entitled to be registered as a county elector in respect of the lands, and as a borough elector in respect of the house. *Capel v. Overseers of Ashton*, 8 C. B. 1.

An owner of a copyhold house within a borough who does not occupy, but lets it out in separate tenements, is disqualified, in respect of such house, for a county vote, the house being of sufficient value to give him a borough vote, although the separate tenements are each not of a value to qualify for a borough vote. *Proctor v. Annison*, 7 C. B. (N. S.) 48; 1 K. & G. 297; 29 L. J. C. P. 90.

Where several persons claimed to be registered for a county, as the owners each of an undivided thirty-fifth share of freehold property, producing a net rental sufficient to give to each of them 2*l.* 0*s.* 6*d.* per annum. This was reduced to 40*s.* to each owner, by the allowance of a commission of 5*l.* a-year to one of the thirty-five, who undertook the management of the property, and the transmission to each of the others of his share. The barrister found that "the allowance of such commission was, from the nature of the property, necessary for the collection of the rents." The court held that they were bound by his finding, and that they therefore could not say that the claimants had freeholds of the clear yearly value of 40*s.* *Sherlock v. Steward*, 7 C. B. (N. S.) 21; 1 K. & G. 286; 29 L. J. C. P. 87.

Fellows of a college who are entitled *qua* fellows to an annual payment of less than 10*l.* under a will, do not acquire an estate "by devise," neither is their appointment a promotion to an office within the 18th sect. *West v. Robson*, 27 L. J. C. P. 262.

Where lands were conveyed upon trust, to divide the rents among the beadsmen of D., who were appointed for life and received 50*s.* a-year, but who, neither under the trust of the deed nor as beadsmen, were liable to perform, or did perform, any duties, it was held that they did not acquire an estate by promotion "to any office" within the same section. *Faulkner v. Overseers of Boddington*, 27 L. J. C. P. 20.

The payment of interest on a mortgage is to be considered as a deduction from the annual value of the estate. *Lee v. Hutchinson*, 8 C. B. 18. *Copland v. Bartlett*, 6 C. B. 18.

A. claimed to vote in respect of land at C., proved to be of the yearly value of 5*l.* It appeared that this land, together with the land of the voter worth 50*l.*, was subject to a mortgage of 300*l.*, the interest of which was 15*l.* The court held that the mortgage debt might be apportioned, and that the claimant was substantially seised of an estate of 40*s.* clear of all charges. "He had," said *Maule, J.*, "an estate of 3*l.* 12*s.* 10*d.*, and a fraction, per annum." *Moore v. Overseers of Carisbrooke*, 12 C. B. 661; 22 L. J. C. P. 64. See *Barrow v. Buckmaster*, 12 C. B. 664; 22 L. J. C. P. 65.

Where a member of a building society had mortgaged his freehold to the society, and was liable by its rules, and the provisoes in the mortgage deed, to make certain monthly payments, amounting to 11*l.* 14*s.* per annum, though only 2*l.* 10*s.* of that sum was strictly for interest on the mortgage, and his whole estate was worth 6*l.* per annum, yet, as he was bound to pay the other sums to protect his right, it was held that the whole amount of 11*l.* 14*s.* was a charge upon the estate. *Beamish v. Overseers of Stoke*, 11 C. B. 29; 21 L. J. C. P. 9. See *Copland v. Bartlett, supra*. *Mosley v. Baker*, 17 L. J. Ch. 257.

Members of a corporation aggregate, having perpetual succession and a common seal, under 19 & 20 Vic. c. 47, and 20 & 21 Vic. c. 14, with power to hold lands, are not entitled to vote at elections in respect of the shares they hold in the company. *Bulmer v. Norris*, 9 C. B. (N. S.) 19. *Acland v. Lewis*, id. 32.

of not less than sixty years (whether determinable on a life or lives or not), of the clear yearly value of not less than 10*l.*, over and above all rents and charges payable out of or in respect of the same, or for the unexpired residue, whatever it may be, of any term originally created for a period of not less than twenty years (whether determinable on a life or lives or not), of the clear yearly value of not less than 50*l.*, over and above all rents and charges payable out of or in respect of the same; or who shall occupy as tenant any lands or tenements for which he shall be *bonâ fide* liable to a yearly rent of not less than 50*l.*, shall be entitled to vote in the election of a knight or knights of the shire, to serve in any future parliament for the county, or for the riding, parts, or division of the county in which such riding, parts, or divisions shall be respectively situate: Provided always, that no person being only a sub-lessee, or the assignee of a lease, shall have a right to vote in such election, in respect of any such term of sixty years or twenty years as aforesaid, unless he shall be in the actual occupation of the premises."

(F) *Qualification in respect of Occupation of Lands of the Annual Value of* 50*l.*[1]

(G) *Qualification to Vote in City or Borough.*

Occupier of house, &c. of the annual value of 10*l.*, if duly registered, is entitled to vote.[2]

2 Wm. 4, c. 45, s. 27, enacts, "that in every city or borough which shall return a member or members to serve in any future parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being either separately or jointly with any land within

[1] By the 6 Vic. c. 18, s. 73, the right of voting in counties is put on the same footing as in boroughs, with regard to premises occupied in immediate succession. If, therefore, there be no interval between the several occupations, a change of premises will not destroy the right to be registered, provided a new claim be sent in. *Burton v. Grey*, 5 C. B. 7.

The occupier of premises under different landlords, not being liable to a yearly rent of 50*l.* to any one landlord, is not entitled to be registered: as, where he pays 35*l.* rent to one landlord, and 20*l.* to another. *Gadsby v. Barrow*, 7 Man. & G. 21.

It has been held that the committee of a lunatic's estate could not create a tenancy in himself by his own act; nor could the master in lunacy make him tenant by allowing him to charge himself with rent; and that he was not entitled to be registered as an occupying tenant. *Burton v. Langham*, 5 C. B. 92.

[2] Voters for boroughs now consist of,—

1st. Those enfranchised by the 2 Wm. 4, c. 45.

2d. Those whose previous right of voting is continued to them for ever, by ss. 18, 31, 32.

3d. Those whose rights are *temporarily* reserved by ss. 32–35.

In the newly-enfranchised boroughs the right is entirely confined to the first class; in the old boroughs it is mixed, and comprehends all. The necessity, however, of residence and registration is extended to all classes, except voters for the universities, who are entirely excepted out of the operation of the Reform Act, by sect. 78. Rogers' *Elections*, 9th ed. p. 47.

With respect to the nature of the premises, where the claimant occupied rooms in a house in which the landlord also occupied a shop and parlour, but did not sleep, and each had a key to the outer door, he was held entitled to be registered. *Toms v. Luckett*, 5 C. B. 23. See *Judson v. Luckett* 2 id. 197. *Downing v. Luckett*, 5 id. 40. *Brady v. Ryan*, 3 Ir. L. R. (N. S.) 187. *Score v. Huggett*, 7 Man. & G. 95.

But where the landlord resides on the premises, it is presumed that he is *paterfamilias*, and the under-tenants his lodgers or inmates; which presumption can only be rebutted by showing that by the terms of the agreement the landlord has relinquished all right of interference with the rooms demised, and all control over the outer door. *Wansey v. Perkins*, 7 Man. & G. 155. *Potts v. Smedley*, 7 id. 85. *Monks v. Dykes*, 4 Mee. & W. 567.

Where premises are occupied by an officer of an institution, the question whether he occupies as tenant depends upon the nature of his occupation, whether it be by way of payment for his services, or to enable him to perform his duty. "A master," said *Tindal, C. J.*, "may pay his servant by conferring on him an interest in real property, and if he do so, the servant is entitled to the legal incidents of the estate as much as if he had purchased it. On the other hand, a servant may occupy a tenement of his master, not as payment for service, but for the purpose of performing it; not being *permitted* to occupy as a reward,

such city, borough, or place, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10*l.*, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough: Provided always, that no such person shall be so registered in any year, unless he shall have occupied such premises as aforesaid for twelve calendar months next previous to the last day of July in such year; nor unless such person where such premises are situate in any parish or township in which there shall be a rate for the relief of the poor, shall have been rated in respect of such premises to all rates for the relief of the poor in such parish or township made during the time of such his occupation, so required as aforesaid; nor unless such person shall have paid, on or before the 20th day of July in such year, all the poor-rates and assessed taxes which shall have become payable from him in respect of such premises

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but *required* to occupy in performance of the contract to serve. *Hughes v. Overseers of Chatham*, 5 Man. & G. 54. *Dobson v. Jones*, id. 112. *Clark v. Overseers of Bury St. Edmonds*, 1 C. B. (N. S.) 23; 26 L. J. C. P. 12.

Though the words "other building," are not to be extended to their widest limits, which would include bridges, garden walls, and the like, yet if the building, whatever it may be, is capable of being occupied, there seems no reason for its exclusion (Rogers' *Elections*, 9th ed. p. 60); as a cow-house or stable (*Whitmore v. Bedford*, 5 Man. & G. 9); a substantial shed used for putting barrows, &c. under (*Watson v. Gotton*, 17 L. J. C. P. 68; 5 C. B. 51). Rooms in a factory let off to different persons for the purpose of cotton-spinning, have been held to be buildings conferring a vote. *Wright v. Town-Clerk of Stockport*, 5 Man. & G. 33.

The question, whether a particular structure is a "building" within the act, is a question of fact; and the court will not review the decision of the barrister upon the question, unless he give a description inconsistent with its being such. (Id.) See *Wood v. Overseers of Willesden*, 2 C. B. 15.

A permanent unbroken dwelling in a particular place is not required to constitute residence, if there be a power of returning at any time, and an intention to return whenever it may suit the party's pleasure or convenience; absence, no matter how long continued, will not prevent a constructive legal residence: but if a person has relinquished his dominion over his house for any period, however short, or has abandoned the intention to return to it, it seems impossible to say that such person has even a constructive residence. *R. v. Sargent*, 5 T. R. 466. *R. v. the Duke of Richmond*, 6 id. 560. *R. v. Brighthelmstone*, 24 L. J. Q. B. 65. *See* further, as to residence, *Withorn v. Thomas*, 7 Man. & G. 1. *Jarvis v. Peele*, 11 C. B. 15. *Palmer v. Allen*, 6 C. B. 51.

It has been held that a person occupying under one landlord a house, and a garden not immediately adjoining the house, at an entire rent of 10*l.* per annum, was entitled to be registered. *Collins v. Thomas*, 12 C. B. 639; 22 L. J. C. P. 38. See *Burton v. Overseers of Ashton*, 8 C. B. 7: *per Maule, J.*

As to occupation by joint lessees, see *Luckett v. Bright*, 2 C. B. 193.

Two subject-matters of qualification cannot be joined for the purpose of giving the qualification, the word "house, warehouse," &c. being in the singular number, and standing independently of each other. *Dewhurst v. Fielden*, 7 Man. & G. 182. Where, however, the building is within the same curtilage as the dwelling-house it may be joined with it, or, with greater strictness, the two are considered as one house. *Powell v. Price*, 4 C. B. 104. *Pownall v. Davidson*, 11 id. 9. *Jolliffe v. Rice*, 6 id. 1; 18 L. J. C. P. 25.

It is provided by the 28th section of 2 Wm. 4, c. 45, that the qualifying premises need not be the same, but may be different premises occupied "in immediate succession" by the voter during the twelve calendar months next before the last day of July. In order to constitute good successive occupation, it is necessary that both sets of premises should be of clearly sufficient value to entitle the occupier to vote for them separately (*Wigan, Hart's case*, B. & Aust. 167); and he must be registered in respect of all. *Bartlett v. Gibbs*, 5 Man. & G. 81. *Onions v. Bowdler*, 5 C. B. 65.

Where a house and land were demised to A. by the same landlord, but in the course of the year of occupation the landlord sold the reversion in a part of the premises to a third person, the court held, that the tenant having taken the premises from the same landlord, so long as he continued to hold under that demise held upon the same terms; and the reversion, whether severed or not, was, as to his interest, the same reversion; and his qualification subsisted. *French v. Tucker*, 29 L. J. C. P. 93. See *Smerdon v. Tucker*, 7 C. B. (N. S.) 37; 29 L. J. C. P. 93; 1 K. & O. 305.

A claimant to vote for a borough in respect of different premises occupied in immediate succession, need not show that he has been rated by name on the rate-books for the premises for which he claims a vote: he is entitled to vote if he has paid all the rates. *Rogers v. Lewis*, 7 C. B. (N. S.) 29; 1 K. & G. 279; 29 L. J. C. P. 85.

previously to the 6th day of April,[1] then next preceding. Provided also, that no such person shall be so registered in any year, unless he shall have resided for six calendar months next previous to the last day of July in such year within the city or borough, in respect of which city, borough, or place respectively he shall be entitled to vote, or within seven statute miles thereof, or of any part thereof."

III. Of the Register of Voters.[2]

The qualifying premises must be of the clear yearly value of not less than 10*l.*, or if the occupation be joint, the value of the premises so jointly occupied must be of such an amount as shall give not less than 10*l.* to each occupier. And in cases of joint occupation, unless the clear yearly value when divided amongst all the occupiers be sufficient to enable all to vote, none are entitled to be registered. Rogers' *Elections*, p. 73, 9th ed.

The proper criterion of value is the rent which the premises would fetch if *boná fide* let, the tenant bearing the ordinary burdens incident to his occupation. *Cogan v. Luckett*, 2 C. B. 182. Nothing is deducted from the rent in respect of landlord's repairs and insurance. *Colville v. Wood*, 2 C. B. 210.

Where an institution is of purely an eleemosynary character, such as that of the military knights of Windsor, and the occupation by the persons appointed thereto of their respective houses is subject to the immediate control of others in whom the legal estate is vested, and is subordinate to the general purposes of the charity, there is no sufficient occupation as owner within the 27th section, although the appointment be *quamdie se bene gesserint*. *Heartley v. Banks*, 28 L. J. C. P. 144. See *Heath v. Haynes*, 27 id. 50.

Where A. was the sole lessee of premises which were jointly occupied by himself and his partners in trade, it was held that there was a sufficient occupation by the partners as tenants. *Rogers v. Harvey*, 28 L. J. C. P. 17.

As to the effect of the voter's bankruptcy, see *Jones' case*, F. & F. 163.

The object of the provision as to rating appears to be, that additional evidence should be thereby furnished of the actual occupation of the claimant. *Wright v. Town-Clerk of Stockport*, 5 Man. & G. 51: *per Tindal, C. J.*

Where on the face of it a poor-rate was void, and not merely irregular, the court held that nonpayment of such a rate did not work a disqualification. *Fox v. Davies*, 6 C. B. 11. *See* further, as to the payment of rates, 6 Vic. c. 18, s. 75; 14 & 15 Vic. c. 14, s. 3. *Moss v. Overseers of Lichfield*, 7 Man. & G. 5. *Judson v. Luckett*, 2 C. B. 197. *Pariente v. Luckett*, id. 177. *Cook v. Luckett*, id. 168. *Bishop v. Smedley*, 2 id. 90. *Godsell v. Inaons*, 17 id. 299. *Wansey v. Perkins*, 7 Man. & G. 133. *Smedley v. Ford*, 12 C. B. 622; 22 L. J. C. P. 35. *Wright v. Town-Clerk of Stockport*, 5 Man. & G. 33.

The omission of a person's name in a rate is not "a misnomer or inaccurate description" within sect. 75 of 6 & 7 Vic. c. 18. *Rogers v. Lewis*, 7 C. B. (N. S.) 29; 1 K. & G. 279; 29 L. J. C. P. 85.

[1] 5th day of January: 11 & 12 Vic. c. 90.

[2] By 6 Vic. c. 18, provision is made for the formation of lists in each county and borough of the names and addresses of the persons qualified to vote, with the nature of their qualification, and for the revision of such lists by the revising barrister.

Persons entitled to be registered for counties, but whose names are not on the register then in force, or who, being on such register, have changed their qualification or place of abode, must, on or before the 20th of July, deliver or send to the overseers a notice in writing, signed by the claimant, specifying their place of abode and the nature of their qualification, according to a form prescribed by the act 6 Vic. c. 18, s. 4. See *Burton v. Gery*, 5 C. B. 7. A misnomer in the direction will not invalidate the notice, provided the overseers be thereby described in such a manner as would be commonly understood. *Elliott v. Overseers of St. May*, 4 id. 85. *Jones v. Inaons*, 17 id. 294. *Hinton v. Hinton*, 7 Man. & G. 163.

In boroughs, claimants desirous of having their names inserted in the list, or inserted for a different qualification, are to wait till after the publication of the lists by the overseers, or town-clerks in the case of freemen, on the 1st of August (it being the duty of the overseer to insert all persons entitled), and then, on or before the 25th of August, to give, or cause to be given, a notice to the overeers, and in the case of freemen to the town-clerk, in the form prescribed by the act 6 Vic. c. 18, s. 15.

As to the description of the qualification in the list, it has been held that a description by occupation of "part of a house" (*Judson v. Luckett*, 2 C. B. 197), or "apartments" (*Score v. Huggett*, 7 Man. & G. 95), would be referred to a legal qualification, and was not open to objection.

With reference to local description.—The form given by the statute for county voters is headed in this respect by the words "street, lane, or other like place, &c., and number of house (if any), &c., *or* name of the property, &c., *or* name of the occupying tenant," &c. The word *or* is disjunctive, and creates three different descriptions; and it is sufficient if the description complies with any one of them. *Eckersley v.*

(A) *Objection to Voter.*[1]

Barker, 7 Man. & G. 76. *Howitt v. Stephens*, 28 L. J. C. P. 105.

In the description of a fee-farm rent obtained by the purchase of land-tax charged on land belonging to two parties, it is sufficient to mention one of them in the fourth column, at all events, if the sum assessed on the land of that one is sufficient to give the franchise. *Cooper v. Ashfield*, 28 L. J. C. P. 35.

Where the claim is in respect of the occupation of houses in immediate succession, each must be described with the same accuracy as in the case of a single house. *Flounders v. Donner*, 2 C. B. 63. *Bartlett v. Gibbs*, 5 Man. & G. 81. *Onions v. Bowdler*, 5 C. B. 65. But it is sufficient in the statement of qualifications to say "a house." *Hitchins v. Brown*, 2 C. B. 25.

In the case of joint occupation in boroughs, it is not necessary to state in the list of voters that the property is occupied jointly. *Daniel v. Camplin*, 7 Man. & G. 167.

If a party has no fixed place of abode, it is sufficient in the list of voters, and consequently in a claim, to insert the words "travelling abroad," for the direction in the schedule only requires the place of abode to be stated where the party has one. *Walker v. Payne*, 2 C. B. 12.

Copies of a list of county voters, in which a voter's name was accidentally omitted, were sold by a clerk of the peace before they were signed by him or delivered to the sheriff. A corrected copy inserting the name was afterwards signed by the clerk of the peace and delivered to the sheriff. It was held that the latter was the true register. *Bremner v. Brumfitt*, 9 C. B. (N. S.) 1.

The register of voters required by 6 & 7 Vic. c. 18, to be kept by the sheriff or returning officer, is a public book, and may be proved as such by a certified copy, under 14 & 15 Vic. c. 95. *Reed v. Lamb*, 29 L. J. Ex. 452.

[1] An objector to a county voter (other than an overseer) is directed by 6 Vic. c. 18, s. 7, on or before the 25th of August, to give or cause to be given to the overseers of the parish to which the list of voters containing the name of the person so objected to relates, a notice, signed by himself according to a form prescribed by the statute, and on or before the same day to give or cause to be given to the person objected to, or leave or cause to be left at his place of abode, as described in such list, another notice in writing, according to a form also prescribed, or to the like effect. Whenever the place of abode of the party objected to as described in the list is not in the parish or township to which the list relates, and the name of the occupying tenant of the whole or any part of the qualifying property, together with his place of abode, appears in such list, a *duplicate* notice is to be sent or left there also on or before the same day.

An objector in boroughs must, on or before August 25, give or cause to be given to the overseer making the list a notice signed by himself, according to a form prescribed, or if the name be inserted in any list of freemen (excepting in the case of London), the notice is to be given to the town-clerk. The objector must also, on or before the same day, give or cause to be left at the place of abode of the person objected to, as stated in the list, another notice signed by himself, according to a prescribed form, 6 Vic. c. 18, s. 17.

If there be more than one list of voters (as is sometimes the case in old boroughs), the notice served on the overseers or town-clerk should specify the list to which the objection refers; a defect in this respect will render it invalid. *Burton v. Ashley*, 2 C. B. 4. See *Huggett v. Lewis*, 15 id. 245. *Wansey v. Perkins*, 7 Man. & G. 127. But this is not necessary in the notice served on the party himself. *Wansey v. Perkins*, *supra*. *Allen v. House*, id. 157.

The notice must be dated (*Beenlen v. Hockin*, 4 C. B. 19), and signed by the objector himself. *Toms v. Cuming*, 7 Man. & G. 29. The place of abode of the objector must be stated, and upon what list of voters his name appears. *Eidsforth v. Farrer*, 4 C. B. 9. *See*, as to sufficiency of description of objector, *Gadsby v. Warburton*, 7 Man. & G. 11. *Pruen v. Cox*, 1 C. B. 1. *Knowles v. Brooking*, 2 id. 226. *Wills v. Adey*, 2 id. 246. *Woollett v. Davis*, 4 id. 115. *Lambert v. Overseers of St. Thomas, New Sarum*, 12 id. 642. *Feddon v. Sawyers*, 12 id. 680. *Hinton v. Hinton*, 7 Man. & G. 163. *Tudball v. Town-Clerk of Bristol*, 5 id. 5.

The service of the notice on the party objected to may be personal, or by leaving the notice at his place of abode, but not at his place of business (*Allen v. Greensill*, 4 C. B. 100), and at a reasonable hour. *Watson v. Pott*, 5 id. 77. It may be sent by post, or, in the case of county voters, in the particular cases required, to the occupying tenant, whose name and place of abode shall appear in the list, 6 Vic. c. 18, s. 100. The notice to the overseers may be delivered to any one of them, or sent by post, addressed "To the Overseers of," &c. 6 Vic. c. 18, s. 101. See *Beenlen v. Hockin*, 4 C. B. 19. *Elliott v. Overseers of St. Mary*, 1676. *Points v. Attwood*, 6 C. B. 38.

The notice of objection to the party when sent by post must be free of postage, and be directed to him at his place of abode as described in the list. See *Flint v. Sharp*, 17 C. B. 281. It must be delivered duly directed, open, and in duplicate, to the postmaster of an office where money-orders are received and paid, within such hours as shall have previously been given notice of at such office. 6 Vic. c. 18, s. 100. Where the postmaster received the notice at an

IV. Of the Election.

(A) *As to Violations of the Freedom of Elections.*

(*a*) *By Improper Conduct of Candidates.*[1]

(*b*) „ *the Interference of Peers.*[2]

(*c*) „ „ *of Persons holding certain Offices.*[3]

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hour later than that so mentioned, it was held not thereby invalidated. *Hannaford v. Whiteway*, 1 C. B. (N. S.) 53. *Paddon v. Whiteway*, id. 62. The postmaster is required to compare the notice and duplicate, and being satisfied that they correspond in their contents, and in the address, he is to forward one to its address, and return the other to the party bringing it, duly stamped with the stamp of the post-office, and it thereby becomes evidence of the giving of the notice at the time, when in due course of post it will be delivered to the voter. Sect. 100. See *Cuming v. Toms*, 7 Man. & G. 29. *Cooper v. Coates*, 5 id. 98. *Bishop v. Helps*, 2 C. B. 45. *Hornby v. Robson*, 1 C. B. (N. S.) 63. *Baley v. Overseers of Nantwich*, 2 C. B. 118. *Colville v. Lewis*, 2 id. 60. By sect. 101, these provisions are extended to all notices to be given to any person whatsoever, or to a public officer, which includes overseers. *Bishop v. Helps*, *supra*.

Service at the house of an overseer on the 20th of July, which happened to be a Sunday, was held good. *Rawlins v. Overseers of West Derby*, 2 C. B. 72. See *Colville v. Lewis*, 2 id. 60.

If an objector to a voter for a county has changed his place of abode since the last publication of the register of voters, it is not a sufficient compliance with 6 & 7 Vic. c. 18, s. 7, sched. A., form 5, that he inserts in his notice of objection his place of abode as described in such register; he must state his place of abode at the time of giving the notice. *Melbourne v. Greenfield*, 7 C. B. (N. S.) 1; 1 K. & O. 261; 29 L. J. C. P. 81.

The Court of Common Pleas has no jurisdiction to interfere with the lists of voters in cases in which no appeal lies. Therefore, where the name of a voter appeared on both the borough and county list, and the revising barrister intending to expunge his name out of the county list, by mistake expunged it from the borough list, the court held that they had no power to give him relief, or make any order under 6 & 7 Vic. c. 18, s. 67. *Rogers v. Lewis*, 7 C. B. (N. S.) 29; 1 K. & O. 279; 29 L. J. C. P. 85.

[1] Such improper conduct may consist in the offences of bribery and treating; as to which, *see* 17 & 18 Vic. c. 102, *post*. Bribery by a candidate, though in one instance only, and though a majority of unbribed votes remain in his favour, will avoid the particular election (St. Ives, 2 Dougl. 389, 414), and disqualify him from being re-elected to fill such vacancy (Camelford, Corb. Dan. 249, and the cases there cited); or from being elected, or sitting during the whole parliament then in existence for the place where the bribery was committed. 17 & 18 Vic. c. 102, ss. 2, 3.

[2] The freedom of election may be disturbed by undue or corrupt influence; this also is provided against by a resolution passed at the beginning of every session, and by a standing order to the effect, that it is a high infringement of the liberties of the Commons for any peer, except Irish peers, when candidates for places in Great Britain, to concern themselves in the election of members of the House of Commons; and a declaration to the same effect was made by the house in 1779, in respect of the ministers and servants of the Crown. 37 Jour. 507.

[3] The prohibition by the standing order of the House of Commons, as to the interference of peers, embraces also the cases of lord-lieutenants of counties, who are thereby not absolutely forbidden to concern themselves in elections, but it is declared to be a high infringement of the liberties and privileges of the Commons for any lord-lieutenant to avail himself of an authority derived from his commission to influence the election of any members to serve for the Commons in parliament. It seems that the lords-warden of the Cinque Ports used formerly to claim, as of right, a power of nominating and recommending to each of the cinque ports, the two ancient towns, and their respective members, one person to be elected for each of such places; but the stat. 2 Wm. & M. c. 7, after reciting by s. 1 that they had so pretended and claimed contrary to the ancient right, usage, and freedom of elections, declares, by sect. 2, all such nominations or recommendations to be contrary to the laws and constitution of this realm, and to be void to all intents and purposes. Upon the same principle, that persons holding certain offices are disqualified from being themselves in parliament, persons in the several offices hereinafter-mentioned are forbidden to interfere in elections; and heavy penalties are imposed upon such persons if they presume to interfere. Officers or persons employed in charging, collecting, levying, or managing the duties of excise, not to interfere in elections, under a penalty of 100*l.*, and disabled from holding any place or office under the Crown. 5 Wm. & M. c. 20, s. 48. Commissioners and officers of customs, postmasters, or postmasters-general, or their deputies, or persons employed in the revenue of the post-office, commissioners' officers, or persons employed in the duties granted by 9 Anne, c. 11, and by 10 id. c. 16, are all liable to the same restriction and penalty, which also applies to the

(*d*) *By the Military.*[1]

(*e*) *By Riots.*[2]

(B) *Of the Election Proceedings.*

(*a*) *Of the Writ.*[3]

magistrates and officers of all the police-offices; but the penalty does not attach for acts done in discharge of duty. *See* 12 & 13 Wm. 3, c. 10, s. 91; 9 Anne, c. 10, ss. 44, 49; 10 id. c. 19; 39 & 40 Geo. 3, c. 87, s. 24; 42 id. c. 76, s. 15. Undue interference of all the above not declared to avoid elections.

[1] In 1645 (4 Journ. 346), the House of Commons came to the following resolution: "That this house doth declare and order, that all elections of any knight, citizen, or burgess to serve in parliament, be made, without interruption or molestation by any commander, governor, officer, or soldier, that hath not, in the county, city, or borough respectively, right of electing." And *see* 8 Geo. 2, c. 30.

By the 10 & 11 Vic. c. 21, s. 3, the Clerk of the Crown is required, as soon as the new writ has been made out, to give notice of the election to the Secretary at War, or, in case there be no Secretary at War, to the person officiating in his stead, and he to the general commanding the district, who is to see that no soldier, within two miles of the place of election or poll, shall be allowed to go out of barracks on the day of nomination or of polling, unless to mount or relieve guard, or to give his vote at the election; and that going out for that purpose, he shall return with all convenient speed.

[2] The interruption of the proceedings of an election by riot and tumult is a great violation of the freedom of elections; wherefore, and as such interruption will have the effect of impugning the return, it is highly important to prevent and repress any tendency to a breach of the law in this particular. It is the duty, not only (as will be seen) of the returning officer to do his utmost to carry into effect the exigency of the writ, and, therefore, to resist any interruption to the proceedings thereunder; but it is also the duty of magistrates, whether applied to or not, to assist in preserving the public peace. There being a responsibility to the House of Commons, in respect of the proceedings at the election, such proceedings are under their particular superintendence and protection, resort to which may be had in cases of difficulty (immediately, if they are sitting), in addition to the ordinary aid and powers of the law. 32 Journ. 95. It only remains to observe that, wherever there has been an interruption of the proceedings by riot and tumult, notwithstanding that the returning officer has been able to continue and finish the poll, and to comply with the exigency of the writ, by the return of the members, the election has been holden totally void; but, in a case where the riot which prevailed after the close of the poll, and before making the return, was found to have been contrived and promoted by the sitting member, whose return was executed by the returning officer under compulsion, when he was about to return the opposite candidate, the candidate who so ought to have been returned, and who had the majority of votes, was seated. 14 Journ. 24 But in order to make the election void, it must appear that the riot and disturbance was such as really to interrupt the proceedings, inasmuch as otherwise it cannot be considered that the freedom of election has been violated. 10 Journ. 254.

[3] The writs which are issued for the election of members of parliament issue under different authorities upon a general election and upon the vacancy of particular seats during the continuance of a parliament. The writs are made out by the Clerk of the Petty Bag in Chancery, and directed respectively to the sheriffs of counties, and of cities, towns, or boroughs, which are counties of themselves, to the "Chancellor of the county palatine of Lancaster, or to his lieutenant or deputy there;" to the "Chamberlain of the county palatine of Chester, his lieutenant or deputy" (34 & 35 Hen. 8, c. 13); to the "Bishop of Durham, or to his chancellor in temporalities of the county palatine of Durham" (25 Car. 2, c. 9); to the "Constable of the castle of Dover, and warden of the Cinque Ports, or to his lieutenant or deputy there."

By 15 & 16 Vic. c. 23, "whenever a new parliament shall be summoned, there are to be thirty-five days at least between the day of the proclamation and the day appointed for the meeting thereof."

The ancient form of the writ is still adhered to, except so far as by the operation of the 2 Wm. 4, c. 45, s. 77, and 16 & 17 Vic. c. 68, s. 1, it may require to be varied. The form of a writ at a general election commands the sheriff to cause to be elected for his county, and for any riding, parts, or division thereof, a certain number of knights, the most fit and discreet, girt with swords.

Till the 16 & 17 Vic. c. 68, the same writ commanded the sheriff to return for every city or borough within his county one or two citizens or burgesses, as the case might be, and he issued his precepts to the returning officers of the several cities or boroughs. Now, distinct original writs are directed to the returning officers of every borough, town corporate, port, &c. in England and Wales, and to the Vice-Chancellors of the Universities of Oxford and Cambridge, who are thereupon to proceed to election, and after such election to certify the same, together with such writs, directly to the Clerk of the Crown. And all writs are to be

framed in manner and form necessary for the purposes of the act 16 & 17 Vic. c. 68.

All writs for election upon vacancies emanate from the House of Commons, and under that authority, communicated by warrant from the Speaker, are made out by the Clerk of the Crown in Chancery. Inconvenience being felt from the circumstance, that when vacancies happened during a recess of parliament, the new writs could not be issued until the meeting of the house, provisions were made by the stats. 10 Geo. 3, c. 41, and 15 Geo. 3, c. 36, to enable the Speaker to make out new writs in the room of members dying, or becoming peers, during such recess. These provisions, for the purpose of reducing them into one act, and extending them, were repealed by the stat. 24 Geo. 3, c. 26. That stat. by sect. 1, reciting the stats. of the 10 & 24 Geo. 3, and that they have been found highly advantageous to the public, by causing speedy elections of members of the House of Commons; and the expediency that the provisions therein contained should be further extended, and freed from certain of the restrictions in those acts specified; and that further provisions should be made for carrying the said powers into execution, in the cases of the death of the Speaker, or of his seat becoming vacant, or of his absence out of the realm, and that it would be convenient that the provisions contained in those two acts should be reduced into one act, and that for that purpose those provisions contained in the said two acts should be repealed; repeals the former of the two acts, and so much of the latter as enabled the Speaker to issue his warrants to make out new writs for the election of members to serve in parliament. The same act, by sect. 2, empowers and requires the Speaker, during any recess of the house, whether by prorogation or adjournment, to issue his warrant to the Clerk of the Crown to make out a new writ for electing a member of the House of Commons in the room of any member dying, or becoming a peer of Great Britain, either during such recess or previous thereto, as soon as he shall receive notice, by a certificate under the hands of two members of the House of Commons, of the death of such member; or that a writ of summons has been issued, under the Great Seal of Great Britain, to summon such peer to parliament; the certificate to be in the form or effect comprised in the schedule to that act. Sect. 3 directs the Speaker, after receiving such certificate, to cause notice thereof to be inserted in the *London Gazette*, and not to issue his warrant until after the insertion of such notice. By sect 4, the Speaker is not to issue such warrant unless the return of the writ (by virtue of which the member deceased or becoming a peer was elected) shall have been brought into the office of the Clerk of the Crown, fifteen days at the least before the end of the last sitting of the house, immediately preceding the time when such application shall be made to the Speaker to issue such warrant; nor unless such application shall be made so long before the then next meeting of the house for the dispatch of business, so that the writ for the election may be issued before the day of such next meeting; nor in case such application shall be made with respect to any seat vacated, in either of the methods before-mentioned, by any member, against whose election or return a petition was depending at the time of the then last prorogation or adjournment of the house. By sect 5, to prevent any impediment to execution of the act by the death of the Speaker, or by his seat becoming vacant, or by his absence out of the realm, the then Speaker was empowered and required, within a convenient time after the passing of the act, and so every future Speaker, within a convenient time after he shall be in that office, at the beginning of any parliament, by any instrument in writing under his hand and seal, to nominate and appoint a certain number of members of the House of Commons, not more than seven nor less than three, authorising them, or any one of them, to execute the powers given to the Speaker for the time being, for issuing such warrants, subject to the regulations and exceptions in the act; which instrument is, notwithstanding the death of such Speaker, or the vacating his seat in parliament, to be in force until the dissolution of the parliament in which it is made. By sect. 6, as often as the number of persons so to be appointed shall by death, or by their seats in parliament being vacated, be reduced to less than three, a new appointment may be made in the same manner. By sect. 7, every such appointment is to be entered in the Journals, and to be published once in the *London Gazette*; the instrument is to be preserved by the clerk of the house, and a duplicate is to be filed in the office of the Clerk of the Crown in Chancery. By sect. 8, the act is not to extend, or be construed to extend, to give any power or authority to any person so to be nominated and appointed, except in the case of there being no Speaker, or of his absence out of the realm; nor for any longer time than the person so to be appointed shall continue a member of the house. By sect. 9, the publisher of the *Gazette*, when any such notice of issuing any such warrant shall be brought to him, signed by any person so appointed, is to give a receipt for the same, specifying the day and hour when it was received; and, in case more than one such notice shall be brought to him relative to the same election, he is to insert in the *Gazette* only the notice first received. The provisions of this act do not operate except upon vacancies upon death of members, or their becoming peers. But by the 21 & 22 Vic. c. 110, similar provision is made for the case of members accepting a disqualifying office during a recess, on the Speaker's receiving, in addition to the certificate, notice from the member (which he may give by countersigning the certificate) of his acceptance of the office. The issuing writs upon vacating

(*b*) *Delivery of the Writ.*[1]
(*c*) *Of the Precept.*[2]
(*d*) „ *Notice of the Election.*
(1) *For Counties.*[3]

a seat upon any other ground does not take place except upon motion made in the house. There is no precise interval fixed by law between the issuing and return of the writs issued on vacancies, nor any day mentioned in the writ whereupon the member to be returned is to attend in parliament.

[1] The stat. 7 & 8 Wm. 3, c. 25, s. 1, directed that the writs should be delivered to the proper officer to whom the execution belonged, and to no other person, but not how the writs were to be delivered; and various frauds were practised by interested persons, who obtained them to deliver them to the officer, and delayed doing so till it suited their convenience that the election should commence. Any means, however, might have been selected of sending them to the returning officer, excepting transmission by a candidate. But all difficulties are now removed by the stat. 53 Geo. 3, c. 89, which requires the writs to be conveyed by the post, and prescribes certain regulations for their delivery at the post-office, and transmission to the proper officers, to whom they are directed. The writs to the sheriffs of London and Middlesex are to be delivered at their offices by the messenger of the Great Seal (53 Geo. 3, c. 89, s. 1); so to any other sheriff or officer to whom writs are to be delivered, whose office is in London, Westminster, or Southwark, or within five miles thereof. (Id. s. 3.)

[2] The writ is uniformly the origin of the authority from the Great Seal for the election of members of parliament; but the officer to whom the writ is directed and delivered is, with the exception of the case of an election for a county (other than for a county palatine), or for a city, town, or borough being a county of itself, not the person who superintends the election to be holden under such writ. Therefore, in the cases of the counties palatine, and of the Cinque Ports, the whole exigency of the writ is delegated by such officer to some other quarter, for the purpose of its being carried into effect; and in other cases, so much of it as regards the election of citizens and burgesses.

As soon as the sheriff receives the writ, he should indorse thereon the day of receiving it (7 & 8 Wm. 3, c. 25, s. 1; 53 Geo. 3, c. 89; 23 Hen. 6, c. 14), and give a receipt in writing to the person appointed to deliver it, specifying the day and hour of the delivery.

In England and Wales the writs are now sent at once to the returning officer. Previous to the passing of the 16 & 17 Vic. c. 58, all writs were directed to the sheriffs of the several counties, requiring knights to be elected for their respective counties, and also citizens and burgesses for the several cities and boroughs within their shires. The sheriff upon the receipt of this writ made out a precept to the returning officer of the city or borough, directing him to cause the election to be made: a mode of proceeding still continued in Irish elections.

[3] By 7 & 8 Wm. 3, c. 25, s. 3, and 18 Geo. 2, c. 18, s. 10, the election for knights of the shire was to be holden at the county court, and provision was made for its adjournment within a limited period for that purpose. But now a special court is to be holden for such election, and proclamation of holding it is to be made within two days after the receipt of the writ at the place where the election is to be holden (25 Geo. 3, c. 84, s. 3); that is, at the most usual place of election for the last forty years. 7 & 8 Wm. 3, c. 25, s. 3. It must not be holden on Sunday, Good Friday, or Christmas-day, nor more than twelve nor less than six days from the day of proclamation. 16 & 17 Vic. c. 68, s. 3.

With regard to boroughs, &c., counties of cities, or towns in England and Wales, the returning officer is to proceed to the election within six days after the receipt of the writ, giving three clear days' notice at least of the day of election, exclusive of the day of proclamation and the day of election. The returning officer must, therefore, give notice on the day after the receipt of the writ at latest. The 17 & 18 Vic. c. 102, provides a form of notice in lieu of the proclamation or notice of election theretofore held, which every returning officer at all elections in the United Kingdom is to cause to be published. Sect. 11. This section enacts, that "for the more effectual observance of this act, every returning officer to whom the execution of any writ or precept for electing any member or members to serve in parliament may appertain or belong shall, in lieu of the proclamation or notice of election heretofore used, publish or cause to be published such proclamation or notice of election as is mentioned in Schedule (B) to this act, or to the like effect.

The following forms are prescribed in the schedule:—

Proclamation to be used in Counties.

Election of Knight, &c.

The sheriff of the county of will, at the day of now next ensuing, proceed to the election of a knight [*or* knights, member *or* members, *as the case may be*], for the county [*or* division of a county, *as the case may be*]; at which time and place all persons entitled to vote at the

(*e*) *As to the Place of Election.*

(1) *For Counties.*[1]

(2) „ *other Places.*[2]

(*f*) *As to the Erection of Booths.*[3]

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said election are requested to give their attendance.

And take notice, that all persons who are guilty of bribery at the said election will, on conviction of such offence, be liable to the penalties mentioned in that behalf in the Corrupt Practices Prevention Act, 1854.

And take notice, that all persons who are guilty of treating or undue influence at such election will, on conviction of such offence, be liable to the penalties mentioned in that behalf in the Corrupt Practices Prevention Act, 1854.

[*Signature of the proper officer.*]

Notice of Election in Boroughs.

City or borough of day of

In pursuance of a writ received by me for electing a burgess [*or* burgesses, *as the case may be*] to serve in parliament for the city [*or* borough, *as the case may be*], I hereby give notice that I shall proceed to election accordingly, on the day of at o'clock, when and where all persons concerned are to give their attendance.

And take notice, that all persons who are guilty of bribery at the said election will, on conviction of such offence, be liable to the penalties mentioned in that behalf in the Corrupt Practices Prevention Act, 1854.

And take notice, that all persons who are guilty of treating or undue influence at the said election will, on conviction of such offence, be liable to the penalties mentioned in that behalf in the Corrupt Practices Prevention Act, 1854.

[*Signature of the proper officer.*]

[1] By the common law, the election might have been at any place within the county, there being no restriction herein upon the sheriff as to his county court. In particular counties, the place for holding such courts was fixed by several early statutes; but there was no general provision until that of the stat. 7 & 8 Wm. 3, c. 25, s. 3, and which directs that at every such election the sheriff shall hold his county court at the most public and usual place within the county, and where the same has been most usually holden for forty years last past. This statute is only directory, and although the non-observance of it will subject the sheriff to answer for a breach of his duty, yet in a case where this requisition had not been complied with, the election was nevertheless holden to be valid. *See* Rogers on Election, p. 242.

[2] With respect to elections for places being counties of themselves, and for other places, there is no positive provision of the law as to where the elections are to be holden. It should seem that the election ought to be within the place to be represented; but that, with that qualification, the returning officer may use his own discretion. In this, however, as in other points, any departure from the usual practice is an act attended with responsibility, and it will behove him, if he do so, to be prepared to show that he had good grounds for such proceeding. Elections for cities and boroughs in Wales and Monmouthshire are, by the stat. 35 Hen. 8, c. 11, s. 3, to be at lawful and reasonable places; but there is no further definition of the intent of the law. *See* Roe on Election, p. 521.

The court for the election of the North Riding of Yorkshire is holden at York, for the West Riding at Wakefield, for the East Riding at Beverley; for the division of Lincolnshire called the parts of Lindsey, at Lincoln; and for the division of the parts of Holland and Kesteven, at Sleaford. 2 & 3 Wm. 4, c. 45, ss. 12, 13. The courts for the other divided counties, are by sect. 14 of the 2 & 3 Wm. 4, c. 45, to be holden at the places specified by the Boundary Act, 2 & 3 Wm. 4, c. 64, as the principal places of election for each division respectively. By sect. 34, the court may be held at any convenient place in the neighbourhood of the place appointed by that act, or of the place where the poll has been heretofore holden. By sect. 16, the court in the Isle of Wight is to be holden at Newport.

No borough election shall be holden "in any church, chapel, or other place of public worship." 2 Wm. 4, c. 45, s. 68.

[3] When there is reason to expect a contest at an election, where the electors are very numerous, it is usual, as a preliminary step for the convenience of all parties, for the candidates to cause booths to be erected for the purpose of taking the poll.

The 2 Wm. 4, c. 45, ss. 64, 68, gives directions as to the mode of preparing polling-booths. But in counties as many polling-booths are to be provided as will allow one for every 450 electors on the register. 6 & 7 Wm. 4, c. 102, s. 3. In boroughs, not more than 300 shall be allotted to poll in each booth or compartment. 5 & 6 Wm. 4, c. 36, s. 3.

On the requisition of any candidate, or of any elector, being the proposer or seconder of any candidate, the booths or compartments shall be so divided that not more than a hundred electors shall be allotted to poll in each booth or compartment. 5 & 6 Wm. 4, c. 36, s. 4. The candidate or elector making the requisition shall pay all expenses incident upon the division.

By the 2 Wm. 4, c. 45, s. 68, the returning officer in English boroughs is directed to

(*g*) *As to the Officer's Duty previous to the Demand of a Poll, and Time of the Demand of a Poll, and the Appointment of Sub-Sheriffs, Poll-Clerks, &c.*[1]

(*h*) *Proceedings during the Poll.*[2]

give public notice of the situation, division, and allotment, of the different booths, two days before the commencement of the poll.

Unless a candidate goes to the poll he is not a candidate within the meaning of the 2 Wm. 4, c. 45, s. 71, and therefore not liable for the expense of the booths. *Muntz v. Sturge*, 8 Mee. & W. 302.

The sheriff or returning officer may, instead of erecting booths, hire houses, for the purpose of taking the poll. But by the 16 & 17 Vic. c. 68, s. 7, it is enacted that "no poll at any election for members of parliament in England and Wales shall be taken at any inn, hotel, tavern, public-house, or other premises licensed for the sale of beer, wine, or spirits; or in any booth, hall, room, or other place directly communicating therewith, unless by consent of all the candidates expressed in writing."

[1] On the day appointed for the election, and at a seasonable hour (23 Hen. 6, c. 14), which for counties is between eight and eleven, the returning officer opens the proceedings, after proclamation for silence is made, by reading the writ of summons, if the election be for a county, or city, or town which is a county of itself. He should then take and subscribe the bribery oath, which may be administered by a justice of the peace of the county, if at a county election; of the borough, if at a borough election; or, in the absence of the justice of the peace, by any three electors. 2 Geo. 2, c. 24, s. 3.

Before the passing of the Corrupt Practices Prevention Act, 1854, continued by 24 & 25 Vic. c. 122, the sheriff or other returning officer was required to read the whole of the Bribery Act (2 Geo. 2, c. 24), openly before the electors there assembled. This is no longer necessary, as the whole of that act, with the exception of the 3d sect., has been repealed by the 76th sect. of 18 Vic. c. 102. Those portions of the act, however, which relate to the taking of the oath by the returning officer, and the penalties incurred by taking a false oath, or neglecting to take the oath, remain in full force.

If the election be for a place where the franchise is in the whole, or in part in freemen, "the Durham Act," as it is called, "An Act to Prevent Occasional Freemen from Voting," must be read next. 3 Geo. 3, c. 35. And at New Shoreham, Cricklade, Aylesbury, the statutes particularly relating to those places. 11 Geo. 3, c. 55; 22 id. c. 31; 44 id. c. 60. He is then to call upon the electors to name the candidates. If no more candidates are named than the legal number of representatives, the returning officer has no authority to open a poll to allow time for the appearance of another candidate (Nottingh. 1 Peck, 815); but should return those nominated as duly elected. *See* Rogers on Election, p. 23, &c.

The election is made by the view, when the inclination of the electors is taken by the voices, by holding up of hands, or by sometimes collecting the friends of the respective candidates into separate bodies. And if no poll be demanded, an election so determined will be sufficient. Whitel. 393. The election is made by the poll when the voices are taken, or votes numbered man by man; and if a poll be legally demanded, the returning officer is bound to grant it. 1 Journ. 802.

A poll must be demanded by a candidate, or by an elector, but it seems from the case of Leominster, 22d of March, 1662, that, if a demand of a poll be made by a candidate who shall turn out to be ineligible, the refusal to him will not avoid the election. 8 Journ. 392. It must also be demanded in due time; that is, before the majority is declared upon the view, or within a reasonable time afterwards. 1 id. 468; 1 id. 280. A poll must not be demanded in a partial or qualified manner; it must be demanded generally, as to all the electors. Glanv. 104.

[2] In the Universities of Oxford, Cambridge, and Dublin, electors may vote by voting papers; at all other places, personal attendance is required.

In English counties the polling commences on the day next but two after the day fixed for the election, unless the next day shall be Sunday, and in that case on the Monday following. 2 Wm. 4, c. 45, s. 62.

The polling is limited to one day. 16 Vic. c. 15. It begins at eight in the morning, and can only be kept open until five in the afternoon.

In English boroughs the time of poll is fixed by the 5 & 6 Wm. 4, c. 36, s. 2, which provides that at every contested election for any city, borough, or town, or county of a city, or county of a town, the polling is to commence at eight o'clock of the next day following the day fixed for the election, to last one day only, and no poll is to be kept open later than four o'clock in the afternoon.

As no voter can vote at any booth but that to which he is allotted, the notice of what parishes are to vote at each booth should be placed in legible letters on a conspicuous part of the booth. Clerk on Elections, 27. And when different compartments are allotted to different letters, the notice should be distinctly given. 2 Wm. 4, c. 45, ss. 44, 68. *See* as to Ireland, 13 & 14 Vic. c. 68, ss. 3, 10.

Inspectors or check-clerks are allowed to each candidate for the purpose of checking the poll. 7 & 8 Wm. 3, c. 25, s. 3; 2 Wm. 4, c. 45, ss. 64, 68.

Previously to the passing of the Reform Act the returning officer had frequently to

(1) *Personation of Voter.*[1]

decide upon the qualification of voters; but now he has the register before him, and every man upon the register is entitled to record his vote. By the 6 Vic. c. 18, s. 81, it is provided that at all future elections in England and Wales no inquiry should be permitted at the time of polling as to the right of a person to vote, except as follows:—

The voter may be asked,—

1. Are you the same person whose name appears as A. B. on the register of voters now in force for the [*as the case may be*]?

2. Have you already voted, either here or elsewhere at this election for the county [*or, &c. as the case may be*]?

These questions may be put to any voter by the returning officer or his deputy, at the request of the candidate, at the time the voter tenders his vote; that is to say, before he has voted, and not afterwards. If the voter wilfully makes a false statement to either of these questions, he shall be deemed guilty of a misdemeanor.

The returning officer, or his deputy, or a commissioner or commissioners, to be for that purpose by law appointed, shall, if required on behalf of any candidate at the time aforesaid, administer an oath to any voter in the following form (6 & 7 Vic. c. 18, s. 81):—

You do swear [*or* affirm, *as the case may be*], that you are the same person whose name appears on the register of voters now in force for the county of [*or* for the riding, parts, *or* division of the county of *or* for the city *or* borough of *as the case may be*], so help you God.

By the 82d section it is enacted that, "save as aforesaid it shall not be lawful to require any voter, at any election whatever of a member or members to serve in parliament, to take any oath or affirmation, either in proof of his freehold, or of his residence, age, or other qualification or right to vote, any law or statute, local or general, to the contrary notwithstanding; nor to reject any vote tendered at such election by any person whose name shall be upon the register of voters in force for the time being, except by reason of its appearing to the returning officer or his deputy, upon putting such questions as aforesaid, or either of them, that the person so claiming to vote is not the same person whose name appears on such register as aforesaid, or that he had previously voted at the same election; or except by reason of such person refusing to answer the said questions, or either of them, or to take the said oath, or make the said affirmation, or to take or make the oaths or affirmations against bribery; and no scrutiny shall hereafter be allowed, by or before any returning officer, with regard to any vote given or tendered at any such election, any law, statute, or usage to the contrary notwithstanding." As to Ireland, *see* 13 & 14 Vic. c. 68, ss. 88, 89.

In addition to the inquiries as to the identity of the voter, and whether he has already voted, it is by virtue of the 2 & 3 Wm. 4, c. 65, s. 26, competent to inquire whether he is still possessed of the qualification recorded in the register, and this may be done by putting the following oath:—

I, A. B., solemnly swear [*or* affirm] that I am the individual described in the register for as A. B. of [*here insert description in the same words as contained in the register*]; that I am still the proprietor [*or* occupier] of the property for which I am so registered, and hold the same for my own benefit, and not in trust for or at the pleasure of any other person, and that I have not already voted at this election.

No oath against bribery is now required to be taken by any voter at any election in the United Kingdom; the statute to that effect being repealed by the Corrupt Practices Prevention Act, 1854.

By 24 & 25 Vic. c. 53, provision is made that votes at elections for the universities may be recorded by means of voting papers.

"No person having a right to vote at the election for any county, city, borough, or other place, shall be liable or compelled to serve as a special constable at or during any election for a member or members to serve in parliament for such county, city, borough, or other place, unless he shall consent so to act: And he shall not be liable to any fine, penalty, or punishment whatever for refusing so to act, any act, law, or usage to the contrary notwithstanding." 17 & 18 Vic. c. 102, s. 8; continued by 24 & 25 Vic. c. 122.

[1] Agents may be appointed by the candidates to detect personation at the time of polling. 6 & 7 Vic. c. 18, s. 85. And if, at the time, any person tenders his vote at such election, or after he has, and before he leaves the polling-booth, the agent declare his belief that the person is personating a voter, he may be given into custody; but the returning officer or his deputy cannot reject the vote of any person who answers in the affirmative the questions authorised by the act to be put to him at the time of polling, and who takes the oaths or makes the affirmations authorised and required of him: but the returning officer, or his deputy, shall cause the words, "protested against for personation," to be placed against the vote of the person so charged with personation when entered in the poll-book.

By the 87th section, "every constable or peace officer shall take the person so in his custody at the earliest convenient time before some two justices of the peace acting for the county, city, or borough within which the said person shall have so voted as aforesaid: Provided always, that in case the attendance of two such justices as aforesaid cannot be procured within the space of three hours after the close of the

poll on the same day on which such person shall have been so taken into custody, it shall be lawful for such constable or peace officer, and he is hereby required, at the request of such person so in custody, to take him before any one justice of the peace acting as aforesaid, and such justice is hereby authorised and required to liberate such person on his entering into a recognisance, with one sufficient surety, conditioned to appear before any two such justices at a time to be specified in such recognisance, to answer the charge; and if no such justice shall be found within four hours after the closing of the poll, then such person shall forthwith be discharged from custody: Provided always, that if, in consequence of the absence of such justices as aforesaid, or for any other cause, the said charge cannot be inquired into within the time aforesaid, it shall be lawful, nevertheless, for any two such justices as aforesaid to inquire into the same on the next or on some other subsequent day, and, if necessary, to issue their warrant for the apprehension of the person so charged."

If the justices are satisfied that the person charged has been guilty of personation, they are to commit him for trial (id. s. 88); but if satisfied that the charge is unfounded, they are to award compensation.

The 89th section enacts, "that if the said justices shall, on the hearing of the said charge, be satisfied that the said person so charged with personation is really and in truth the person in whose name he voted, and the charge of personation has been made against him without reasonable or just cause, or if the agent so declaring as aforesaid, or some one in his behalf, shall not appear to support such charge before the said justices, then it shall be lawful for the said justices, and they are hereby required, to make an order in writing under their hands on the said agent so declaring as aforesaid to pay to the person so falsely charged, if he shall consent to accept the same, any sum not exceeding the sum of 10*l.*, nor less than 5*l.*, by way of damages and costs; and if the said sum shall not be paid within twenty-four hours after such order shall have been made, then the same shall be levied by warrant under the hand and seal of any justice of the peace acting as aforesaid, by distress and sale of the goods and chattels of the said agent; and in case no sufficient goods or chattels of the said agent can be found on which such levy can be made, then the same shall be levied in like manner on the goods and chattels of the candidate by whom such agent was so appointed to act; and in case the said sum shall not be paid or levied in the manner aforesaid, then it shall be lawful for the said person to whom the said sum was so ordered to be paid and recover the same from the said agent or candidate, with full costs of suit, in an action of debt, to be brought in any one of her Majesty's superior courts of record at Westminster: Provided always, that if the person so falsely charged shall have declared to the said justices his consent to accept such sum as aforesaid by way of damages and costs, and if the whole amount of the sum so ordered to be paid shall have been paid or tendered to such person, in every such case, but not otherwise, the said agent, candidate, and every other person, shall be released from all actions or other proceedings, civil or criminal, for or in respect of the said charge and apprehension."

"In case the vote of any person shall have been received, and any other person shall afterwards tender his vote as being registered in respect to the same qualification, stating at the time the name or names of the candidate or candidates for whom he tenders such vote, the returning officer or his deputy shall enter upon the poll-book every vote so tendered, distinguishing them from the votes admitted and allowed at such election: Provided such person shall duly answer the questions hereinbefore authorised to be put to any voter at the time of tendering his vote." 6 & 7 Vic. c. 18, s. 91.

[1] Where, by a mistake, a vote is recorded for the wrong candidate, the rule appears to be this: — A voter who in the confusion of the moment has named a wrong candidate, may correct himself and name another if his vote has not already been recorded. If the poll-clerk has once entered the vote as being given for a particular candidate, it is then too late for the voter to say that he had intended to vote for some one else. Should the mistake, however, be clearly that of the poll-clerk, and be at once pointed out, it is the duty of the officer presiding at the poll-booth to correct the poll according to the truth. Clerk on Elections, p. 36. If the returning officer were to refuse to correct the mistake of the poll-clerk, the error would be rectified on a scrutiny before a committee of the House of Commons. Rogers, 229.

[2] By the 2 Wm. 4, c. 45, s. 58, it is provided, "that any person whose name shall have been omitted from any register of voters in consequence of the decision of the barrister who shall have revised the lists from which such register shall have been formed, may tender his vote at any election at which such register shall be in force, stating at the time the name or names of the candidate or candidates for whom he tenders such vote, and the returning officer or his deputy shall enter upon the poll-book every vote so tendered, distinguishing the same from the votes admitted and allowed at such election."

(4) *As to Proceedings upon Close of the Poll.*[1]

(*i*) *Return of the Writ.*[2]

(*j*) *As to the Custody of the Poll-Books.*[3]

The object of entering the vote as a tender is to facilitate the proof on a scrutiny, if it should afterwards become necessary to show that the vote was tendered at the election. If the poll-book, however, had no entry of the fact, it would not preclude the claimant from showing by other evidence that he did tender his vote at the election. Clerk on Elect. Com. 263.

[1] *As to English counties.*—The poll-clerks at the close of the day's poll are required to enclose and seal their several books, and publicly deliver them so enclosed and sealed to the the sheriff, under-sheriff, or sheriff's deputy, presiding at such poll, who must forthwith deliver or transmit the same so enclosed and sealed to the sheriff or his under-sheriff. The sheriff or under-sheriff must keep the poll-books unopened until the re-assembling of the court on the day next but one after the close of the poll, unless such day shall be Sunday, and then until the Monday following, when he openly breaks the seals, and casts up the number of votes as they appear on the several books, and openly declares the state of the poll; and he is required to make proclamation of the member or members chosen not later than two o'clock in the afternoon of the same day. 16 Vic. c. 15, s. 2.

In *English boroughs* the poll-clerks deliver their books in like manner enclosed and sealed to the returning officer, or to the deputies, who forthwith transmit or deliver them to the returning officer, who may, if he think fit, declare the final state of the poll and make the return immediately after the close of the poll; he may, however, wait till the next day, and then declare the numbers polled, and make the return. 2 Wm. 4, c. 45, s. 68.

As to Scotch elections, *see* 2 Wm. 4, c. 65, s. 33; 5 & 6 id. c. 78, ss. 5, 6; 16 Vic. c. 28, s. 8.

As to Irish elections, *see* 13 & 14 Vic. c. 68, ss. 4, 16.

[2] The return is made by indenture, and is in the same manner in boroughs as has been customary in English counties. The indenture, naming the person chosen, and signed and sealed, must be tacked to the writ itself, and returned to the Crown Office in Chancery. 16 & 17 Vic. c. 68. The writ now goes directly to the returning officer at all English elections, and no precept is now issued from the sheriff.

When, upon casting up the poll, it appears that there is an equal number of votes for two candidates, the returning officer in England and in Scotland ought to return them both by separate indentures. Knaresborough, 1852. Clerk on Elections, 50; *see* 11 & 12 Vic. c. 98, s. 21.

By id. c. 98, s. 103, "if any sheriff or other returning officer shall wilfully delay, neglect, or refuse duly to return any person who ought to be returned, such person may, in case it has been determined by a select committee that such person was entitled to have been returned, sue the sheriff or other officer, and is entitled to recover double the damages he has sustained by reason thereof, with costs of suit." Further, the 2 Wm. 4, c. 45, s. 76, imposes a penalty of 500*l.* on any returning officer wilfully disobeying the provisions of the act. *See* also 6 Vic. c. 18, s. 97; 13 & 14 id. c. 69, s. 103.

A return made by the proper officer, though defective in form, will be sustained. Orme, 103. And a return by an officer *de facto*, although he may not have complied with all the legal forms necessary to sustain his election to the office upon a *quo warranto*, is nevertheless a good return. Dougl. 568.

[3] By the 6 & 7 Vic. c. 18, s. 93, it is enacted, "that at every contested election of a member or members to serve in parliament for any county, riding, parts, or division of a county, or for any city or borough in England or Wales, or for the town of Berwick-upon-Tweed, the sheriff, under-sheriff, or returning officer, after having declared the state of the poll, and made proclamation of the member or members to serve in parliament, shall forthwith close and seal up the several poll-books, and tender the same to each of the candidates, to be sealed by them respectively; and in case any candidates shall neglect or refuse to seal the same, the sheriff, under-sheriff, or returning officer shall thereupon endorse on one of the said poll-books the fact of such neglect or refusal, and every such sheriff, under-sheriff, or other returning officer shall, by himself or his agent, as soon as possible after such such proclamation as aforesaid, deliver the same poll-books, so sealed as aforesaid, to the Clerk of the Crown in the High Court of Chancery, or his deputy, or deliver the same, directed to the said Clerk of the Crown, to the postmaster or deputy-postmaster of the city, town, or place, wherein such proclamation shall have been made as aforesaid, who, on receipt thereof, shall give an acknowledgment in writing of such receipt to such sheriff, under-sheriff, or returning-officer, expressing therein the time of such delivery, and shall keep a duplicate of such acknowledgment, signed by such sheriff or returning officer."

The postmaster is required to despatch the books by the first mail to the General Post Office, from whence they are at once conveyed to the Crown Office; the Clerk of the Crown gives a receipt for the books, stating the time of delivery, and then registers the receipt of the books in his office, and indorses on the poll-books the time when he received them. The returning officer must,

V. Of the Election Expenses.[1]

(A) *Of the Election Auditor.*[2]

(B) *Appointment of Agent for Election Expenses.*

17 & 18 Vic. c. 102, s. 31. "Every candidate shall, before or at the nomination, or as soon after as conveniently may be, declare to the election auditor in writing the name or names of his agent or agents for election expenses, who shall be appointed in writing, and that he has not appointed and will not appoint any other agent without in like manner declaring the same to the election auditor; and no other than such agents shall have authority to expend any money or incur any expenses of or relating to the election in the name or in the behalf of the candidate; and such agents may pay any of the current expenses of the election necessary to be paid in ready money, provided that such agents shall make out to the best of their ability, and render from time to time, true and particular accounts to the election auditor of all such payments, and every

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at the same time that he transmits the poll-books by the post, send a letter by the same mail to the Clerk of the Crown, informing him of the transmission, and giving the number and description of the books. 6 & 7 Vic. c. 18, s. 93.

The Clerk of the Crown retains custody of the poll-books, and delivers to any party applying for the same an office copy of all or any part of such books, on payment of a reasonable charge for writing the same, and also permits any person to inspect the poll-books. Id. s. 95.

An office copy is evidence. Id. s. 94.

[1] A candidate is liable only for such expenses of the election as are imposed upon him by statute, or which he has expressly or impliedly promised to pay. See *Morris v. Burdett*, 1 Camp. 218. It has been held that under the stat. 51 Geo. 3, c. 126, one of two candidates was only liable for a moiety of the expenses of the hustings (*Morris v. Lord Cochrane*, 1 M. & S. 283), and that a person who neither interferes by himself or his agents with the election, but who is returned as member, and takes his seat, was not chargeable under that act. *Morris v. Burdett*, 2 id. 212.

If the candidates at a county election jointly desire the sheriff to erect hustings, &c., they are jointly liable. *Watkin v. Sandys*, 2 Camp. 640. In an action to recover the expense of erecting hustings, it is not necessary to produce the Speaker's writ to the sheriff to show that the election was duly held; nor is it necessary for the high-bailiff to prove that he has taken the oath against bribery, nor to produce the appointment, if it be proved that he acted as high-bailiff; nor to produce the poll-book to prove the defendant to be a candidate, if he were at the hustings as such. *Morris v. Hunt*, 1 Chit. Rep. 453.

[2] Provision is made by the 17 & 18 Vic. c. 102, for the appointment of an election auditor.

By sect. 15, the returning officer for every county and borough is required to appoint a fit and proper person to be "election auditor," or "auditor of election expenses," for the ensuing year, giving public notice of such appointment. He may be re-appointed. Where the sheriff of the year had appointed an election auditor in August, 1854, and no other appointment was made till March, 1857, the court held the latter appointment was valid, though made in March, and that it superseded the former. *R. v. Griffiths*, 26 L. J. Q. B. 313. If in office on the day appointed for any election, he continues to act as such auditor until the business of such election is concluded, notwithstanding any fresh appointment. 17 & 18 Vic. c. 102, s. 15. Any wilful contravention of the act by the election auditor is a misdemeanor. (Id.) In case of the death, resignation, or incapacity of the election auditor before his duties are completed, the returning officer is empowered to appoint a fit person to act in his stead for the remainder of the current year. Id. ss. 29, 30.

The auditor's remuneration is 10*l.* from each candidate for a first fee, 2*l.* per cent on all payments made by him, and his expenses, which are to be deemed part of the election expenses, and paid rateably by the candidates. Id. s. 34. But the commission is payable only on any payment made by the candidate exceeding 200*l.*, and the election auditor must not receive on the whole from each candidate, both as first fee and commission, more than 20*l.* 21 & 22 Vic. c. 87, s. 2. In case of an absent candidate, nominated without his consent, his proposer and seconder are liable for the election auditor's fee. The election auditor, his partner or agent, "cannot act as election agent or as paid agent in any capacity, or canvasser for any candidate," &c. Id. s. 4.

Where A. was proposed and seconded, with his own consent, as a candidate at an election for a county, but withdrew before the show of hands, although no bills of charges or claims against him were sent to the election auditor, he was held nevertheless liable under the 17 & 18 Vic. c. 102, and 21 & 22 id. c. 87, to pay the election auditor the fee of 10*l.* *Edwards v. Whitehurst*, 5 H. & N. 131; 29 L. J. Ex. 329.

such agent shall, as soon as conveniently may be after his appointment as aforesaid, make and sign the following declaration:—

"'I, A. B., being appointed an agent for election expenses by X. Y., a candidate at this election, do hereby solemnly and sincerely declare that I have not knowingly made, authorised, or sanctioned, and that I will not knowingly make, authorise, or sanction, any payment on account of this election otherwise than through the election auditor, save as excepted and allowed by the Corrupt Practices Prevention Act, 1854.'"

(C) *All Payments must be made through the Election Auditor.*[1]

By sect. 18, "no payment of any bill, charge, or claim, or of any money whatever for or in respect of any election, or the expenses thereof (except as herein excepted), shall be made by or by the authority of any candidate except by or through such election auditor, and any payment made by or by the authority of any candidate otherwise than is herein provided shall be deemed and taken to be an illegal payment, and upon proof thereof such candidate shall forfeit the sum of 10*l.*, with double the amount of such illegal payment, and full costs of suit, to any person who shall sue for the same: Provided always, that it shall be lawful for any candidate, by himself or his agent, to name any banker through whom alone such bills, charges or claims, or money, as aforesaid, shall be paid by the election auditor, and in that case the election auditor shall pay such bills, charges and claims, by cheques drawn on such banker, to be countersigned by the candidate, or some person on his behalf specially appointed for that purpose."

(D) *Expenses of Elections must be Paid to Candidate or Election Auditor.*

By sect. 24, "no person shall pay, or agree to pay, any expenses of any election, or any sum of money whatever, in order or with a view to procure or

[1] Bills must be sent in to candidate within one month from the election.

By sect. 16, "all persons, as well agents as others, who shall have any bills, charges, or claims upon any candidate for or in respect of any election, shall send in such bills, charges, or claims within one month from the day of declaration of the election to such candidate, or to some authorised agent of such candidate acting on his behalf, otherwise such persons shall be barred of their right to recover such claims, and every or any part thereof: Provided always, that in case of the death within the said month of any person claiming the amount of such bill, charge, or claim, the legal representative of such person shall send in such bill, charge, or claim within one month after obtaining probate or letters of administration, or confirmation as executor, as the case may be, or the right to recover such claim shall be barred as aforesaid."

Bills received must be sent to election auditor for payment, the candidate or his agent stating to the election auditor whether he admits the whole amount, or, if not, how much of it he admits to be correct. In default of sending in the bills within the time prescribed for so doing, the candidate is liable to a penalty. Id. s. 17. A tender by the auditor, with the authority of the candidate, is the same in effect as a tender by the latter, and so is a payment of money into court in an action against the candidate for such bill, if made by the authority of the candidate, and with the leave of a judge. Id. s. 19. But, by the 20th section, "nothing in this act contained shall be taken to limit the right of any creditor to bring any action or otherwise to proceed against a candidate for or in respect of any expenses connected with the election; and if in any such action or proceeding final judgment be obtained against the candidate, such candidate shall forthwith send to the election auditor a copy or certificate of such judgment, and when and as the monies recovered by the said judgments, or any part thereof, shall be paid or satisfied by such candidate, or shall be obtained under or by virtue of any execution, the said candidate shall thereupon forward to the election auditor a statement of the monies so paid or obtained in respect of such judgment."

By sect. 22, the personal expenses of any candidate, and the expenses of advertising in newspapers with reference to any election, shall be defrayed by the candidate himself, or by his authority; but a full and a true account of them must be sent to the election auditor, by whom they will be inserted in the general account of election expenses."

If articles connected with a parliamentary election are supplied upon the orders of a candidate, given personally, the right of the creditor to maintain an action for the price is not affected by the 18th or 31st sections of the Corrupt Practices Prevention Act. *Nurton v. Dickson*, 5 Ex. 637; 29 L. J. Ex. 337.

promote the election of any person to serve in parliament, save to the candidate at such election, or to or under the authority of the election auditor, other than as excepted and allowed by this act; and every person who shall pay or agree to pay any such expenses or money as aforesaid, save as aforesaid, shall become liable to a penalty of 50*l.*, and of double the money so paid or agreed to be paid, to be recovered in an action of debt by any one who shall sue for the same: Provided that if, upon the trial of any action to recover any such penalty or penalties, it shall appear to the judge who shall try the same that any such payment shall have been made, or agreed to be made, without any corrupt or improper intention, such judge may, if he shall think fit, reduce such penalty or penalties to any sum not less than 40*s.*; and may also, if he think fit, direct that the plaintiff shall not be entitled to costs of such action: Provided also, that no expenses of or relating to the registration of electors, and no subscriptions or contributions *bonâ fide* made to or for any public or charitable purpose, shall be deemed election expenses within the meaning of this act: Provided also, that in any action to recover any penalty under this act it shall be lawful to the court in which such action shall be brought, or any judge thereof, if they or he shall think fit, to order that the plaintiff in such action shall give security for costs, or that all proceedings therein shall be stayed."

(E) *Payment of Expenses before the Day of Nomination.*

By sect. 25, "any candidate, and his agents by him appointed in writing, according to the provisions of this act, may, at any time before the day of nomination, pay any lawful and reasonable expenses in respect of the election which he or they shall *bonâ fide* believe fit and proper to be paid in ready money, and the payment of which cannot conveniently be postponed: Provided that the candidate and his agents shall, upon or before the day of nomination, make out to the best of his ability, and deliver to the election auditor, a full, true, and particular account of all such payments, with the names of the persons to whom they have been made, signed by such candidate or his agents respectively, and no payment so made shall be a legal payment within the act unless such account thereof shall be duly rendered to the election auditor."

(F) *Travelling Expenses.*[1]

(G) *Account of Election Expenses by Election Auditor.*[2]

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[1] By 21 & 22 Vic. c. 87, s. 1 (after reciting 17 & 18 Vic. c. 102), enacts, "that it shall be lawful for any candidate or his agent, by him appointed in writing, according to the provisions of the first-mentioned act, to provide conveyance for any voter for the purpose of polling at an election, and not otherwise; but it shall not be lawful to pay any money, or give any valuable consideration to a voter for or in respect of his travelling expenses for such purpose: Provided always, that a full, true, and particular account of all payments made for such conveyance, signed by the candidate or his agents, shall be delivered to the election auditor, with the names and addresses of the persons to whom such payments have been made; and the amount of such account shall be included in the general account of the expenses incurred at any election to be made out and kept by such election auditor."

[2] The election auditor is required, as soon as he conveniently can, to make out a full and true account of all the expenses incurred at the election, and, if necessary, supplementary accounts. Sect. 26. He is directed to keep all accounts which may come into his hands in some convenient place, and to allow the candidates and their agents to inspect them and take copies; and to allow all persons to inspect and take copies of his general account. After the business of the election he delivers over the accounts in his hands to the clerk of the peace in counties, and town-clerk or other officer performing his duties in towns and boroughs, in whose hands also they are open to inspection. Sect. 27. The election auditor is also required to publish an abstract of the general account, signed by him, as soon as he conveniently can, in some newspaper published or circulating in the county or place where such election is held.

VI. Corrupt Practices at Elections.

(A) *By Bribery.*

17 & 18 Vic. c. 102,[1] s. 2, enacts, that the following persons shall be deemed guilty of bribery, and shall be punishable accordingly:— Who are deemed guilty of bribery.

1. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to and for any other person, in order to induce any voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election.

2. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, or promise to procure, or endeavour to procure, any office, place, or employment, to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting at any election:

3. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid, to or for any person, in order to induce such person to procure, or endeavour to procure, the return of any person to serve in parliament, or the vote of any voter at an election:

4. Every person who shall upon, or in consequence of, any such gift, loan, offer, promise, procurement, or agreement to procure, or engage, promise, or endeavour to procure, the return of any person to serve in parliament, or the vote of any voter at any election:

5. Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election:

And any person so offending shall be guilty of a misdemeanor, and in Scotland of an offence punishable by fine and imprisonment, and shall also be liable to forfeit the sum of 100*l.* to any person who shall sue for the same, together with full costs of suit: Provided always, that the aforesaid enactment shall not extend or be construed to extend, to any money paid or agreed to be paid for or on account of any legal expenses *bonâ fide* incurred at or concerning any election.

By sect. 3. The following persons shall also be deemed guilty of bribery, and shall be punishable accordingly:—

1. Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for, any money, gift, loan, or valuable consideration, office, place, or employment, of himself or any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at any election:

2. Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or to refrain from voting at any election:

And any person so offending shall be guilty of a misdemeanor, and in Scotland of an offence punishable by fine and imprisonment, and shall also be

[1] This act has been renewed from time to time as the term of its operation has expired. *See* 24 & 25 Vic. c. 122.

liable to forfeit the sum of 10*l.* to any person who shall sue for the same, together with full costs of suits.

(B) *By Treating.*

By sect. 4, "every candidate at an election who shall corruptly by himself, or by or with any person, or by any other ways or means on his behalf, at any time either before, during, or after any election, directly or indirectly give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay, wholly or in part, any expenses incurred for any meat, drink, entertainment, or provision, to or for any person, in order to be elected, or for being elected, or for the purpose of corruptly influencing such person, or any other person, to give or refrain from giving his vote at such election, or on account of such person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be deemed guilty of the offence of treating, and shall forfeit the sum of 50*l.* to any person who shall sue for the same, with full costs of suit; and every voter who shall corruptly accept or take any such meat, drink, or entertainment, or provision, shall be incapable of voting at such election, and his vote, if given, shall be utterly void and of none effect."[1]

(C) *By Undue Influence.*

By sect. 5, "every person who shall, directly or indirectly, by himself or by any other person on his behalf, make use of or threaten to make use of any force, violence, or restraint, or inflict or threaten the infliction, by himself or by or through any other person, of any injury, damage, harm, or loss, or in any other manner practise intimidation upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall by abduction, duress, or any fraudulent device or contrivance, impede, prevent, or otherwise interfere with the free exercise of the franchise of any voter, who shall thereby compel, induce, or prevail upon any voter, either to give or to refrain from giving his vote at any election, shall be deemed to have committed the offence of undue influence, and shall be guilty of a misdemeanor, and in Scotland of an offence punishable by fine or imprisonment, and shall also be liable to forfeit the sum of 50*l.* to any person who shall sue for the same, together with full costs of suit."

(D) *The Names of Offenders are struck out of the Register, and inserted in a separate List.*[2]

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[1] The 23d section of the same act, reciting that doubts have also arisen as to whether the giving of refreshment to voters on the day of nomination, or day of polling, be or be not according to law, and it is expedient that such doubts should be removed, declares and enacts, "that the giving or causing to be given to any voter on the day of nomination or day of polling, on account of such voter having polled or being about to poll, any meat, drink, or entertainment, by way of refreshment, or any money or ticket to enable such voter to obtain refreshment, shall be deemed an illegal act, and the person so offending shall forfeit the sum of 40*s.* for each offence, to any person who shall sue for the same, together with full costs of suit."

[2] By 17 & 18 Vic. c. 102, s. 6, "whenever it shall be proved before the revising barrister that any person who is or claims to be placed on the list or register of voters for any county, city, or borough, has been convicted of bribery or undue influence at an election, or that judgment had been obtained against any such person for any penal sum hereby made recoverable in repect of the offences of bribery, treating, or undue influence, or either of them, then, and in that case, such revising barrister shall, in case the name of such person is on the list of voters, expunge the same therefrom, or shall, in case such person is claiming to have his name inserted therein, disallow such claim; and the names of all persons whose names shall be so expunged from the list of voters, and whose claims shall be disallowed, shall be thereupon inserted in a separate list, to be entitled, 'The List of Persons disqualified for

(E) *No Cockades or Ribbons must be given.*[1]

(F) *Action for Recovery of Penalties.*[2]

By sect. 9, "the pecuniary penalties hereby imposed for the offences of bribery, treating, or undue influence respectively, shall be recoverable by action or suit, by any person who shall sue for the same, in any of her Majesty's superior courts at Westminster, if the offences be committed in England or Wales; and in any of her Majesty's superior courts in Dublin, if the offences be committed in Ireland; and in or before the Court of Session if the offences be committed in Scotland, and not otherwise."

(G) *Prosecutions for Bribery.*[3]

(*a*) *Costs of Prosecutor.*

Prosecutor entitled to costs on conviction.

By sect. 10, "it shall be lawful for any criminal court before which any prosecution shall be instituted, for any offence against the provisions of this act, to order payment to the prosecutor of such costs and expenses as to the said court shall appear to have been reasonably incurred in and about the conduct of such prosecution: Provided always, that no indictment for bribery or undue influence shall be triable before any court of quarter sessions."

Bribery, Treating, or Undue Influence;' which last-mentioned list shall be appended to the list or register of voters, and shall be printed and published therewith, whenever the same shall be or is required to be printed or published."

[1] By sect. 7, "no candidate before, during, or after any election shall, in regard to such election, by himself or agent, directly or indirectly give or provide to or for any person having a vote at such election, or to or for any inhabitant of the county, city, borough, or place for which such election is had, any cockade, ribbon, or any other mark of distinction; and every person so giving or providing shall for every such offence forfeit the sum of 2*l.* to such person as shall sue for the same, together with full costs of suit; and all payments made for or on account of any chairing, or any such cockade, ribbon, or mark of distinction, as aforesaid, or of any bands of music, or flags, or banners, shall be deemed illegal payments within this act."

[2] By 17 & 18 Vic. c. 102, s. 35, "on the trial of any action for recovery of any pecuniary penalty under this act, the parties to such action, and the husbands and wives of such parties respectively, shall be competent and compellable to give evidence in the same manner as parties, and their husbands and wives are competent and compellable to give evidence in actions and suits under the act, 14 & 15 Vic. c. 99, and the Evidence Amendment Act, 1853, but subject to and with the exceptions contained in such several acts: Provided always, that any such evidence shall not thereafter be used in any indictment of criminal proceeding under this act against the party giving it."

[3] It is not enough on a prosecution for bribery to show that an election was held *de facto*, and that the defendant bribed a person who voted as an elector on that occasion; a regular election should be proved. *Reed v. Lamb*, 29 L. J. Ex. 452. *Reg. v. Clark*, 1 F. & F. 654.

It has been held, that a person who had been examined before the commissioners appointed under the 15 & 16 Vic. c. 57, and had when under examination referred to a document previously written by him, was not protected by the 8th section of that act from having the document afterwards produced in evidence against him. *Reg. v. Leatham*, 30 L. J. Q. B. 205.

In *Cooper v. Slade* (6 E. & B. 447, in House of Lords, 27 L. J. Q. B. 449), the question arose, Whether, where the candidate directed the words, "Your railway expenses will be paid," to be written at the bottom of a letter soliciting a voter's vote, and such expenses were afterwards paid, such payment was illegal within the act? "Upon the construction of this statute," said *Alderson, B.*, "we are of opinion that a promise to a voter of his travelling expenses conditionally on his coming and voting for the promisor is within the first-cited part of the enactment; but that a promise of travelling expenses not so conditioned is not. What the statute meant to prohibit was an act directly calculated to influence the vote; and it is impossible to say that a voter finding himself under the necessity of voting for a particular person or losing his travelling expenses which he has been promised if he does vote, is not under an inducement to vote. The statute cannot mean to regard the condition of the promisor's mind, otherwise such a promise made to A., who has clearly already determined to vote for the promisor, and whom the promisor did not intend in any respect to influence, would be out of the statute. While a promise made in the same words to B., who was not in the same situation, and whom it was intended to influence, would subject the promisor to the

(*b*) *Costs of Defendant.*

Defendant entitled to costs on acquittal in case of indictment by private prosecutor.

By sect. 12, "in case of any indictment or information by a private prosecutor for any offence against the provisions of this act, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information, such costs to be taxed by the proper officer of the court in which such judgment shall be given."

(*c*) *Recognisance of Prosecutor.*[1]

(*d*) *Action or Prosecution must be commenced within a Year.*[2]

(H) *Candidate Disqualified to Sit for the Place during that Parliament if declared by Committee guilty of Bribery, &c.*

Candidate declared by committee guilty of bribery, &c. incapable of sitting for that place during the then existing parliament.

By sect. 36, "if any candidate at any election for any county, city, or borough, shall be declared by any election committee guilty by himself or his agents of bribery, treating, or undue influence, at such election, such candidate shall be incapable of being elected or sitting in parliament for such county, city, or borough, during the parliament then in existence."

VII. Of the Election Petition.[3]

penalty. Nor can it be supposed to regard the voter's mind, as in like way the same promise might or might not be lawful according to the disposition of the different persons to whom it was made with the same intent. It is the act itself which the statute meant to prohibit. On the other hand, an unconditional promise of travelling expenses to a voter to go to the place of polling, with leave to him to vote or not, as and how he likes, seems to us certainly not a promise of money to induce the voter to vote, being neither a promise with that view, nor directly calculated to cause it." In the same case it was held that a payment of travelling expenses after the election was not unlawful, unless made pursuant to a prior promise. "The pravity or honesty of intention of the candidate," said the same learned judge, "is immaterial if he did the thing prohibited, but we think the word 'corruptly' has a definite meaning. If, for instance, there had been a previous unlawful promise conditional on the voter's voting, or if there had been a previous understanding to that effect, or a corrupt bargain for the future, we think the case would have been within the statute. But we are clearly of opinion that merely paying the travelling expenses honestly, with no previous engagement, is not prohibited." *See* also *Huntingtower v. Gardiner*, 1 B. & C. 297; 2 D. & R. 450.

[1] By 17 & 18 Vic. c. 102, s. 13, "it shall not be lawful for any court to order payment of the costs of a prosecution for any offence against the provisions of this act unless the prosecutor shall, before or upon the finding of the indictment, or the granting of the information, enter into a recognisance, with two sufficient sureties in the sum of 200*l.* (to be acknowledged in like manner as is now required in cases of writs of *certiorari* awarded at the instant of a defendant in an indictment), with the conditions following; (that is to say,) that the prosecutor shall conduct the prosecution with effect, and shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs."

[2] The 17 & 18 Vic. c. 102, s. 14, enacts, "no person shall be liable to any penalty or forfeiture hereby enacted or imposed, unless some prosecution, action, or suit, for the offence committed, shall be commenced against such person within the space of one year next after such offence against this act shall be committed, and unless such person shall be summoned, or otherwise served with a writ or process, within the same space of time, so as such summons, or service of writ or process, shall not be prevented by such person absconding or withdrawing out of the jurisdiction of the court out of which such writ and other process shall have issued; and in case of any such prosecution, suit, or process as aforesaid, the same shall be proceeded with and carried on without any wilful delay."

[3] There are six different sorts of petitions referred to a select committee:—1st. Against the election; 2nd. Against the return (10 Geo. 3, c. 16); 3d. Complaining that no return has been made; or, 4th. That an insufficient return has been made (25 Geo. 3, c. 84, s. 10); 5th. To oppose the right of election, or of appointing returning officers, determined by a select committee, and reported to the House; 6th. To defend such right (28 id. c. 52, ss. 26, 29). The first four may be subscribed by any person claiming to have a right to vote at the election, or to have been returned, or alleging himself to have been a candidate; the two last may be subscribed by all persons. Id. s. 1. There is also another kind of petition, which may be addressed to the House by one claiming a right to vote, but

(A) *By whom it may be Presented, and of what it may Complain.*

By whom the petition may be presented, and of what it may complain.

The 11 & 12 Vic. c. 98, s. 2, enacts, "that every petition presented to the House of Commons, within the time from time to time limited by the House for receiving election petitions, and complaining of an undue election or return of a member to serve in parliament, or complaining that no return has been made according to the requisition of any writ issued for the election of any member to serve in parliament, or complaining of the special matters contained in any such return, and which petition shall be subscribed by some person who voted or had a right to vote at the election to which the same relates, or by some person claiming to have had a right to be returned or elected thereat, or alleging himself to have been a candidate at the election, shall be deemed an election petition."

(B) *Form of.*[1]

(C) *Presentment of.*[2]

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is not referred to a committee; viz. to be admitted as a party in the room of the sitting member, or one returned upon a double return, who declines defending his election or return, or is prevented doing so by death, advancement to the peerage, or his seat being declared vacant. Id. ss. 18, 26, 29. If a petition presented to the House is not taken into consideration during the same session, a renewed petition, which must contain no new allegation, nor be signed by other parties than those who signed the first (3 Dougl. Pref. ix.), should be presented the next and every subsequent session till it is disposed of, within fourteen days from the commencement of the session. 28 Geo. 3, c. 52, s. 5; 34 id. c. 83.

[1] Although there are no technical forms necessary to be adhered to in framing a petition to the House of Commons, it is nevertheless requisite to state, with certainty, such facts as are intended to be relied on in evidence, in order that the party or parties whose interest it is to disprove such facts may have sufficient notice of the charges made against them. Thus, it is not competent to a petitioner to prove, as matter of complaint, such facts as are introduced into the petition as matter of recital; nor when specific charges are made against a returning officer is it competent to enter into evidence of other charges not alleged.

Although it is sufficient if a petition be drawn in general terms, yet the thing complained of must be stated in the form of a complaint. 3 Dougl. 3; 1 Peck. 285. It seems also, where there is a specific allegation that three votes had been improperly received, a committee will not receive evidence against a fourth under a general charge that the return was brought about by illegal and unwarrantable acts. 3 Luders. 405. Where the petition contains a statement of the facts intended to be proved, it is sufficient, although the ground of complaint, which is the natural result of the facts stated, be nowhere expressly alleged. 1 id. 415. It seems that it is advisable, even although the specific grounds of petition intended to be relied upon be expressly averred, to add also general words of complaint. Clifford, 354. In a petition of appeal it is not necessary to state any right of voting in opposition to that reported to the House by the previous committee; but if a petitioner chooses to do so, he is bound by the one stated, and is not at liberty afterwards, when called upon to deliver in his statement to the committee, to deliver one that varies from the right in his petition. 2 Peck. 278.

[2] A petition complaining of an undue election or return, or of an insufficient return, or of the omission of a return, must be presented within the time specified in the order of the House, which is passed on the first day of every session, which is limited to within fourteen days after the day of making the order—always the first day of meeting of parliament—or within fourteen days after a new return shall be brought in. *See* Rogers on Election, vol. ii. p. 36.

If parliament is sitting at the time the return is made, the petition must be presented within fourteen days after the return shall be brought in (1 Dougl. 84); but when the House has not sat on the fourteenth day, this rule has received an equitable construction, and petitions have been received on the next days of its sitting, although after the expiration of the fourteen days. 1 Dougl. 82; 8 Journ. 394. But where, in consequence of the fourteen days expiring during an adjournment, an application is made to the indulgence of the House to extend the time, and receive the petitions, such petitions must be presented on the first day of the meeting of the House after such adjournment. 38 Journ. 163. Petitions to oppose right are to be presented within six months. If six months expire during the intermediate time between dissolution of old and meeting of new parliaments, then within fourteen days of the day of meeting of new parliament. If they expire during recess, then within fourteen days after next session. If during adjournment of fourteen days, then within fourteen

(D) *Of the General Committee of Election Petitions.*[1]

The 22d sect. enacts, "that in the first session of every parliament, on the day after the last day allowed by the House of Commons for receiving election petitions, and in every subsequent session, as soon as convenient after the commencement of the session, the Speaker shall, by warrant under his hand, appoint six members of the House who are willing to serve, and against whose return no petition is then depending, and none of whom is a petitioner complaining of any election or return, to be members of a committee to be called 'The General Committee of Elections;' and every such warrant shall be laid on the table of the House, and if not disapproved by the House in the course of the three next days on which the House meets for the despatch, shall take effect as the appointment of such general committee."

(E) *The Select Committee.*[2]

By the 49th sect. "the General Committee of Elections shall choose the committees to try the election petitions standing in the said list of petitions, in the order in which such petitions stand in such list, and they shall from time to time determine how many committees shall be chosen in each week for trying such petitions, and the days on which they shall meet for choosing such committees,

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days of first day of meeting of the House. 53 Geo. 3. c. 71, s. 15.

There is, however, no provision contained in the above enactments for a case where the six months expire during an adjournment for a less period than fourteen days, and it is difficult to anticipate how the House would treat such a case. The provision for cases of adjournment for a period not less than fourteen days seems to exclude the House from extending their indulgence to other cases; care should therefore be taken to present the petition in good time; or, in case of difficulty, a previous application might be made to the House, and an opinion obtained as to the course which they would be likely to pursue. The time within which a petition may be presented, the prayer of which is to defend any right of election, or any right of choosing, nominating, or appointing returning officers, is almost unlimited. By the 29th sect. of the 28 Geo. 3, c. 52, it is enacted, "that it shall and may be lawful for any person or persons, at any time before the time appointed for taking such petition (the petition to oppose the right) into consideration, to petition the House to be admitted as a party or parties to defend such right of election, or of nominating, choosing, or appointing returning officers."

Petitions founded on the 5 & 6 Vic. c. 102, s. 20, alleging payment of sums of money to voters after the election, may, however, be presented after a more extended period. By a sessional order, passed every session since 1842, it is ordered, "that all persons who shall question any return of members to serve in the present parliament, upon any allegation of bribery and corruption, and who shall in their petition specifically allege any payment of money or other reward to have been made by any member, or on his account, or with his privity, since the time of such return, in pursuance or furtherance of such bribery and corruption, may question the same at any time within twenty-eight days after the date of such payment; or if this House be not sitting at the expiration of the twenty-eight days, then within fourteen days after the day when the House shall next meet." *See* Durham, B. & Arn. 201; 2 Athlone, id. 225.

[1] As to the mode of supplying vacancies, the meetings, proceedings, &c., of the general committee, *see* 23rd and ten subsequent sections.

All election petitions received by the House are referred by the House to the general committee, in order that select committees may be appointed to try them. Every report of the examiner of recognisances is communicated to the general committee as well as the House.

A list is made out by the general committee of all election petitions. 11 & 12 Vic. c. 98, s. 46.

[2] Every member more than sixty years old is wholly excused from serving on a select committee. 11 & 12 Vic. c. 98, s. 35. A member having leave of absence is excused during such leave (sect. 37), or who has already served on an election committee during the same session, and has given notice claiming exemption to the clerk of the general committee. (Id.) Members petitioners or petitioned against are temporarily disqualified. Sect. 38. A list of members liable to serve is made out by the clerk of the house. Ss. 39, 40. From this list the general committee select six, eight, ten, or twelve members to serve as chairmen of election committees (sect. 41); and they may add members to the chairman's panel, if it be too small, provided the number do not, except with leave of the House, exceed eighteen. Sect. 45.

having regard to the number of select committees which may then be sitting for the trial of election petitions, and to the whole number of such committees then to be appointed; and they shall report from time the days to be appointed by them for choosing such committees."

(F) *Of the Recognisance.*

Sect. 3 enacts, "that before any election petition shall be presented to the House, a recognisance shall be entered into by one, two, three, or four persons, as sureties for the person subscribing such petition, for the sum of one thousand pounds, in one sum, or in several sums of not less than two hundred and fifty pounds each, for the payment of all costs and expenses which under the provisions hereinafter contained shall become payable by the person subscribing the petition to any witness summoned on his behalf, or to the sitting member, or other the person complained of in such petition, or to any party who may be admitted to defend such petition as hereinafter provided."[1]

(G) *Indorsement by Examiner.*[2]

(H) *Voters becoming Parties to Oppose the Petition.*[3]

(I) *Notice that Member will not Defend.*[4]

(K) *Withdrawal of Petition.*[5]

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[1] The persons entering into the recognisance must make affidavit of their sufficiency in a form prescribed by the act (11 & 12 Vic. c. 98, ss. 4, 5); or the persons signing the election petition may, instead of providing the security, pay the same sum into the Bank of England. Sect. 6. As to the mode of objecting to recognisance, *see* id. ss. 13–17.

[2] The election petition must be indorsed by a certificate under the hands of the examiner of recognisances, that the required recognisance has been entered into and received by him, with the affidavit thereunto annexed; and if the recognisance has not been taken for the whole amount, that a bank receipt or certificate for so much money as the recognisance falls short of 1000*l.* has been delivered to him. 11 & 12 Vic. c. 98, s. 7.

[3] By sect. 19 of 11 & 12 Vic. c. 98, "at any time within fourteen days after the day on which any election petition was presented, or within twenty-one days after the day on which any notice was inserted in the *Gazette*, to the effect that the seat is vacant, or that the member returned, will not defend his election or return; or if either of the said periods expire during a prorogation of parliament, or during an adjournment of the House of Commons for the Easter or Christmas holidays, then, on or before the second day on which the House meets after such prorogation or adjournment, any person who voted, or had a right to vote at the election to which the petition relates, may petition the House of Commons, praying to be admitted as a party to defend such return, or to oppose the prayer of such petition; and such person shall thereupon be admitted as a party, together with the sitting member, if he be then a party against such petition, or in the room of such member, if he be not then a party against the petition; and every such petition shall be referred by the House to the general committee of elections hereinafter mentioned."

[4] By 11 & 12 Vic. c. 98, s. 20, "whenever the member whose election or return is so complained of in such petition has given notice of his intention not to defend the same, he shall not be afterwards allowed to appear or act as a party against such petition in any proceedings thereupon; and he shall also be restrained from sitting in the House of Commons, or voting on any question, until such petition has been decided upon." *See* also sect. 18.

In case of a double return, in case there is no petition against the other member returned on such double return, and the member complained of declines to defend, the other member, or the electors petitioning on his behalf, may withdraw their petition, whereupon all proceedings on the petition will cease, and the necessary directions will be given by the House for amending the return, by taking off the file the indenture by which the person declining to defend was returned. Sect. 21.

[5] By the 8th sect. of 11 & 12 Vic. c. 98, "the petitioner may, at any time after the presentation thereof, withdraw the same, upon giving notice in writing under his hand, or under the hand of his agent, to the Speaker, and also to the sitting member or his agent, and also to any party who may have been admitted to oppose the prayer of such petition, that it is not intended to proceed with the petition; and in such case the petitioner shall be liable to the payment of such costs and expenses as have been incurred by the sitting member or other person complained of in such petition, and also by any party admitted to oppose the prayer of such petition, to be taxed as hereinafter provided."

(L) *Proceedings upon the Hearing of the Petition.*[1]

(*a*) *Functions of the Committee.*

(*b*) *Preliminary Resolutions.*[2]

[1] The committee is never to sit until all the members not being excused are present. In case the members do not meet within one hour after the time appointed for the first meeting of the committee, or within one hour after the time to which the committee is adjourned, a further adjournment is to be made, and the chairman is to report the circumstance to the House. Sects, 75, 76. The committee cannot adjourn for a longer time than twenty-four hours' without leave first obtained. Clerk on Elect. Com. 40. Every select committee is attended by a shorthand-writer. 11 & 12 Vic. c. 98, s. 82.

All questions before the committee are decided by a majority of voices, and whenever the voices are equal the chairman has a casting vote. No member is allowed to refrain from voting on any division in the committee. Sect. 86. The committee may order the room to be cleared while they are deliberating, if they think it necessary. Sect. 79. The names of the members voting in the affirmative or negative are printed in the Minutes, and reported to the House with the final report. Sect. 81.

The committee has to try the merits of the return or election complained of in the petition referred to them; and they have to determine by a majority of voices, if consisting at the time of more than one member: —1. Whether the sitting members or either of them, or any and what other person, was duly returned or elected; 2. Whether the election be void; 3. Whether a new writ ought to issue. Their determination is final between the parties. Sect. 86.

If the committee come to any other resolution besides the determination before mentioned they may, if they think proper, report the same to the House for their opinion, at the same time that they report the determination, and the House may confirm or disagree with such resolution, and make such orders thereon as they shall think proper. Sect. 87.

The committee may, if they think fit, report that the petition, or the opposition to it, or that the objection taken to particular voters, was frivolous and vexatious, in which case the parties against whom such report is made will be liable to costs. Sect. 90.

[2] The committee, before proceeding to the hearing of the petition, are in the habit of laying down certain rules for the conduct of the case, which are in general as follows (*see* Rogers, Elections, p. 449):—

1. That counsel will not be allowed to go into matters not referred to in their opening statement without a special application to the committee for permission so to do.

2. That if costs be demanded by either party under the 11 & 12 Vic. c. 98, the question must be raised immediately after the decision on that particular case, unless the committee shall otherwise decide.

3. That the committee expect, that with respect to cases of bribery or offers or promises of money which it is intended to bring home to the other member or his agents, the counsel for the petitioner will now state the names of the electors bribed, or to whom such offers were so made, and those of the persons who actually gave the bribes, or offered so to do.

4. The committee, however, reserve to themselves a power, upon the special application of counsel, to proceed with any case which tends to inculpate any principal or agent, the knowledge of which case has been brought out before the committee in the progress of the investigation, with the circumstances of which the parties could not be reasonably supposed to be previously cognisant.

5. That with respect to treating, the committee will expect counsel to state the names and places where such treating is alleged to have taken place.

6. That with respect to undue influence, the committee will require to be furnished with a list of the persons who are alleged to have been subjected to such undue influence, and also with a list of those who are alleged to have exercised it.

7. The committee, however, reserve to themselves a discretionary power, as in cases of bribery (or generally upon any cases that may arise.)

8. That no person shall be examined as a witness who shall have been in the room during any part of the proceedings, with the exception of the agents, whose names shall be handed in, without the special leave of the committee.

9. That the committee will only allow one counsel to address them on opening the case, and one counsel on the summing up.

10. That if any point of law should arise requiring argument, the committee reserve to themselves the power of hearing only one counsel on either side.

11. That if the leading counsel be not prepared to sum up the case on either side when the evidence is terminated, the committee will not protract the proceedings for the convenience of counsel who may be absent.

And in scrutinies:—

12. That with respect to objected votes, the committee expect counsel to exhaust one class of objections before proceeding to another.

Sometimes the following are added:—

That counsel do confine themselves with reference to points as far as possible to the quotation of legal and not parliamentary decisions. Dartmouth, 2 Cor. & D. 152; Clare County, 16, 244.

(c) *Hearing of the Petition.*[1]

That inasmuch as the law applicable to the evidence necessary to establish a charge of treating differs from that applicable to bribery, the committee are of opinion that the part of the petition which relates to treating shall be proceeded with previous to any evidence being adduced with regard to bribery. They, therefore, request that counsel will confine themselves in the first instance to charges of treating. Gloucester, W. & D. 188; Maidstone, id. 103.

[1] By the 4 & 5 Vic. c. 57, the committee are required to receive evidence upon the whole matter whereon it is alleged that bribery has been committed; "neither shall it be necessary to prove agency in the first instance before giving evidence of those facts whereby the charge of bribery is to be sustained."

In case no party appears to oppose the petition, and the committee reports to the house that the election or return, or the omission or insufficiency of a return, complained of in such petition, was vexatious or corrupt, the costs of the petition may be recovered from the sitting member, he not having given notice of his intention not to defend the same. 11 & 12 Vic. c. 98, s. 91.

When the committee is assembled to proceed upon the trial of the case, the clerk reads the petition or petitions, the last determination upon the right of election, if there be any, and the standing order of the house, prohibiting the offer of evidence upon the legality of notes contrary to such determination. January 16, 1735–6. If there be a double return, the resolution of the House directing the counsel of the person first named in the return, or whose return shall be immediately annexed to the writ, to proceed in the first instance, is then read. March, 1727–8. If there be two persons claiming to be returning officers, the resolution of the House relating thereto, if any, is read. Orme, 359. If the case be within 28 Geo. 3, c. 52, s. 25, that in the opinion of the committee the merits of the petition turn wholly or in part upon the right of election, or the right of appointing the returning officer, written statements of such right of election or appointment must next be delivered to the clerk by the parties or their counsel. And although it cannot appear that such rights will be disputed by the sitting member till his case be opened, yet the statement must be delivered in the first instance (1 Peck, 111, a; *see* 2 id. 279, a); and a statement of the right should coincide with the claim of right in the petition (Liskeard, 2 Peck, 278); but if at variance with it, a new one may be substituted adapted to the claim in the petition. Id. 279. It seems, however, that the committee are not confined in their decision upon the right of election by the statements of the parties, who may determine the right according to the proof, though varying from that contained in either of the statements. Id. d. n. g. Where the statements turn upon the right to make the return conferred by different offices upon the respective holders, as whether the mayor or portreeve has the right of return, the question as to the legal mode of electing individuals to those offices is not raised. *See* Taunton, 1 Peck, 432; Shepherd on Elections, p. 87.

If the allegations in a petition raise various questions, the committee will sometimes try each question separately, instead of hearing the whole case opened and proved at once, arranging the order of trying the questions in the way most conducive to a speedy and correct determination of the case; and this mode has been followed, not only with consent of both parties (Bristol, 1 Dougl. 246, n.; Berwick, 2 Dougl. 426), but against the inclination of one (Seaford, 3 Lud. 35; Honiton, 3 id. 164), though in some instances, where the separate decision of one question would not have determined the cause, the committee have refused to separate the case contrary to the wishes of one of the parties. Downton, 3 id. 176; Steyning, 2 Fras. 403, 407. In controverted elections for counties in England and Wales, lists of voters intended to be objected to were required, by an annual resolution of the House, to be mutually delivered by the petitioners and sitting members against each other, giving the several heads of objection, and distinguishing the same against the names of the voters intended to be opposed; and now by stat. 53 Geo. 3, c. 71, it is required that in all controverted elections or returns for Great Britain, all the parties complaining or defending shall deliver such lists to the clerk of the House, to be kept in his office for the inspection of all parties concerned. Shepherd on Elections, p. 93.

The candidates at the election are not in all cases the only parties before the committee. When the petition contains matter of complaint against a returning officer, which may subject him to the censure of the House, he is allowed one counsel to attend on his behalf (1 Peck, 77, 146, 504); and where the rights of electors, not being parties to the petition, are unexpectedly put in jeopardy in the course of the trial, they may be heard upon the subject in which their interests are concerned. Shepherd on Elections, p. 95.

Not more than two counsel on each side are heard before the committee, but an additional one may be in attendance to act in the absence of either of the others. However numerous the petitions may be, if they are in substance the same, the petitioners are heard but by two counsel. But where separate petitions were presented by different electors against the right of election, determined by a former committee, as the object and interests of the different petitioners were the same, the committee resolved that counsel should be heard for one

(M) *Report of the Committee.*[1]

set of the petitioners only. Liskeard, Appeal, 2 Peck, 317.

The order of hearing the parties is commonly as follows:—1st, the petitioning candidates, as their petitions are classed in the House; next the electors, if the right of election is disputed; and upon double returns, the candidate whose name is first in the return, or is immediately annexed to the writ. But this mode is occasionally departed from where the necessity of justice requires it. *See* Shepherd on Elections, p. 96.

Of certain matters of evidence relating to election petitions.— The poll is the best evidence of an election, and what persons were candidates and voters (Limerick, Corb. Dan. 97), and should be produced, or the committee will refuse to proceed with a case (Newcastle-under-Lyne, 1 Peck, 492); but, like all other written instruments, it must be authenticated before it is received in evidence. But where the clerk of the peace produced twelve paper books, delivered to him by the under-sheriff as the poll-books, which were taken at different places, some by the sheriff's agents, and others by agents for the candidates, but he could not distinguish which of them made the sheriff's poll, and none of the books being either sworn to or attested by the sheriff, the committee did not think them sufficient to proceed upon. Bucks. 2 Journ. 80; 2 Peck, 271, a. So, where the poll was produced by the clerk of the peace, who stated he had received it from the assessor to the returning officer, the committee refused to receive it in evidence, as not properly authenticated. Dungarvon, 1 Roe, 711. When a poll has been taken at an election for a city or borough, that also, when authenticated, is the best evidence of the election, the candidates and voters; and there are several decisions as to the proof required to authenticate as polls certain papers which purport to be polls. So they received the copy of a former poll, found in the corporation chest, and indorsed by the town-clerk. Okehampton, 1 Fras. 129. But copies of polls at two contested elections, found amongst the papers of the member who sat in consequence of those elections, were not received. Harwich, 1 Peck, 380. So a paper entitled "A true copy of the poll," &c., to which the handwriting was not proved, found in a family repository of deeds and papers, was rejected. Downton, 1 Ludw. 276.

Although the polls are the best evidence of the matters they contain, yet the check-books have been admitted to correct and amend the poll-books (Gloucester, 162; Bedford, 1 Lud. 356); and parol evidence was held admissible to correct both, where notice of the mistake was given to the sheriff at the election.

The minutes of a former committee were offered to prove that there were such proceedings as the petition set forth; that the only evidence in those proceedings against A. B. was evidence of bribery and treating; that the committee declared A. B. not duly elected; and that such declaration, therefore, was, in fact, a determination that A. B. had been guilty of bribery and treating: the committee received the evidence (Norwich, 3 Lud. 459, 474, 477), and their decision was according to law; for the proceedings were not tendered as evidence that A. B. had been guilty of bribery and treating, but merely that he had been declared so by a committee. But the minutes of a former committee being tendered to prove that the premises granted to certain disputed voters were the same, and the conveyances of the same nature, and made under the same circumstances as in a former case, in which former case the committee had struck off the votes given in right of them, were rejected. Okehampton, 1 Peck, 375. Where a witness on a former petition has been shown to be dead, his evidence has been read from the minutes taken upon that petition. Steyning, 2 Fras. 335.

The Speaker is empowered to issue warrants from time to time for the attendance of witnesses. 11 & 12 Vic. c. 98, s. 83.

Every select committee may send for persons, papers, and records. They examine all the witnesses who come before them on oath, which the clerk attending the select committee is empowered to administer. (Id.) Witnesses giving false evidence are guilty of perjury. Id. s. 84. And in case a witness give false evidence or prevaricate, or otherwise misbehave in giving or refusing to give evidence, such conduct may be reported to the House for the interposition of its authority, and the offender committed to the custody of the serjeant-at-arms. Id. s. 83.

Under the authority of the statute, "to send for papers and records," the committee will neither compel nor allow the production of certain documents to impeach a voter's title without the consent of those interested in them; but evidence of the same facts which the document would have proved may be given by secondary means. 2 Peck, 133; 2 Lud. 568. But parol testimony, or writings with the consent of those interested in them, may supply the place of the proofs contained in the documents which are withholden. 2 Peck, 124, 129, 310.

[1] The committee in their report to the House of Commons are required separately and distinctly to report upon the fact or facts of bribery which shall have been proved before them, and also whether or not it shall have been proved that such bribery was committed with the knowledge and consent of any sitting member or candidate at the election. 4 & 5 Vic. c. 57.

When the committee report to the House their final determination on the merits of a petition (except in the case of a petition against the right of election, or of appointing returning officers), they are to report whether it was frivolous or vexatious; or, if

(N) *Costs of Petition.*[1]

no party opposes the petition, whether the election, &c. complained of was vexatious or corrupt. 28 Geo. 3, c. 50, s. 18; 55 id. c. 71. Whenever the petition or the opposition (28 id. c. 50, ss. 19, 20; 50 id. c. 71, s. 3), shall be reported frivolous or vexatious, the petitioners, or persons opposing the petition, as may be, are liable to the costs incurred by the other side. The amount of these costs, &c., is to be ascertained by the taxation of two persons appointed by the Speaker out of certain persons specified in the statutes, 28 id. c. 52, s. 22; 53 id. c. 71, s. 10, 11; and the Speaker will certify the amount of costs to be received according to their report (28 id. c. 52, s. 22; 53 id. c. 71, s. 7), which certificate will have the effect of a warrant of attorney to confess a judgment (53 id. c. 71, s. 13); also, the recognisance entered into by the petitioners for payment of the costs, &c., may be certified by the Speaker's warrant into the Court of Exchequer, as if it were estreated (id. s. 12), where the costs have been recovered against either of the parties, he or they may recover a proportion against others who are liable. 28 id. c. 52, s. 24. When the committee report to the House their final determination upon the merits of any petition, they are also to report their determination upon the right of election.

By 7 & 8 Wm. 3, c. 7, s. 1, returning officers are prohibited from making false returns, that is, such "as are contrary to the last determination of the House of Commons upon the right of election." By 2 Geo. 2, c. 24, s. 4, the last determination upon the legality of votes by the House was made final; but the statute did not extend to maiden boroughs, where no determination upon the right had been previously made. *See* note (8) in 4 Dougl. 78.

By an order of the House, Jan. 1735–6, the counsel at the bar, or before the Committee of Privileges, are restrained from offering evidence touching the legality of votes, &c., contrary to the last determination in the House, and the order refers to the stat. 2 Geo. 2, c. 24; 1 Dougl. 99; 22 Journ. 498, for the particular place to which the petition relates, or the right of choosing the returning officer, if the merits of the petition wholly or in part depend upon either of those rights; and for this purpose they are to require written statements of such rights from the respective parties. Their determination then being entered on the journals is conclusive as to those rights upon any future petition, unless appealed against within a year by petition to the House. 28 Geo. 3, c. 52, ss. 25, 26, 27. But this determination may be questioned within the year, not only by a petition of appeal, as mentioned in the statute, but a petition complaining of an undue election or return. Malmesbury, 2 Peck, 400. *See* Shepherd on Elections, p. 109.

[1] Where two several petitions, signed by different persons, were presented against the return of members, and referred to the same select committee, it was held that the costs could not be taxed jointly. *Strachey v. Turley*, 7 East, 507; 3 Smith's R. 560. In an action for the costs of a frivolous petition proof was adduced of the Speaker's certificate, and a copy of the entry on the journals of the House of Commons of the resolution of the select committee, it was held sufficient without proof of the defendant's having subscribed the petition, or of demand of the costs. *Cleveland v. Wilson*, Peake, N. P. C. 143. Any one properly appearing before the committee to oppose the petition is a party entitled to costs upon a vexatious petition under the 28 Geo. 3, c. 52. *See ante, Trueman v. Lambert*, 4 M. & S. 234.

In *Ranson v. Dundas* (3 Bing. N. S. 180; 3 Scott, 497), the court held—first, that the Speaker's certificate being conclusive as to the amount of costs, the court will not (all proceedings appearing in conformity with the act) inquire whether costs, not strictly and properly occasioned by the opposition of the sitting members against the petition, are included; and secondly, that, in the taxation, the court will not allow the defendants to enter a suggestion on the roll of the circumstances under which judgment has been allowed to be entered up for the plaintiffs, under the 63d section of 9 Geo. 4, c. 22, for the purpose of enabling the defendants to take the opinion of a court of error. *See* also *Fector v. Beacon*, 5 Bing. N. S. 302; 7 Dowl. 265. *Gordon v. Gurney*, 9 Bing. 37. But the Speaker's warrant cannot be enforced if the certificate be founded on proceedings not in compliance with the act. *Bruyeres v. Halcomb*, 3 Ad. & E. 381; 5 Nev. & M. 149. And on entering up judgment the statutory power must be strictly pursued, and be for the sum specified in the Speaker's certificate. *Ranson v. Dundas*, 5 Dowl. 489; 3 Bing. N. S. 556; 1 Scott, 429. Under the 9 Geo. 4, c. 22, s. 60, the Speaker may certify the recognisance forfeited if the parties do not appear. *In re Scott*, 4 Mee. & W. 257; 7 Dowl. 59.

In *Magrave v. White*, 8 B. & C. 412, the question was, whether, under the 53 Geo. 3, c. 71 (incorporated in 9 Geo. 4, c. 22), a witness summoned on behalf of the sitting member, before an election committee, is entitled to his expenses, and to enter up judgment on the Speaker's certificate, in the same manner as witnesses summoned on behalf of the petition are entitled under that act?

Per Cur. "We think the act of parliament intended to place the petitioner and the sitting members upon precisely the same footing. The object was to provide a remedy for a mischief which applied to one side as much as to the other—namely, the non-payment of the costs and fees, and of the expenses of the witnesses."

The rule for entering up judgment on the Speaker's certificate as to the costs of a petitioner is only *nisi* in the first instance. 8 Dowl. 119.

In debt for the costs of a frivolous pe-

ELECTRIC Telegraph,[1] Injuring.

The destruction or removal of any part of an electric telegraph, or the obstruction of messages, is a misdemeanor.

24 & 25 Vic. c. 97, s. 37, enacts, "Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveying, or delivering of any communication by any such telegraph, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided that if it shall appear to any justice, on the examination of any person charged with any offence against this section, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may proceed summarily to hear and determine the same, and the offender shall, on conviction thereof, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay such sum of money, not exceeding ten pounds, as to the justice shall seem meet."

And so is an attempt to injure such telegraphs.

By sect. 38, "whosoever shall unlawfully and maliciously, by any overt act, attempt to commit any of the offences in the last preceding section mentioned, shall, on conviction before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay such sum of money, not exceeding ten pounds, as to the justices shall seem meet."

ELEGIT.[2]

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V. Forms of Writs of Elegit, p. 227.

I. In what Cases Sued out, and against Whom it Lies.[3]

tition, it is not material that no notice was given to the returning officers to attend at the bar of the House, and the Speaker's certificate is conclusive as to the amount of costs. *Ranson v. Dundas*, 3 Bing. N. S. 123; 3 Scott, 429; 5 Dowl. 207.

[1] The 7 & 8 Vic. c. 85. s. 13, requires the electric telegraphs for the service of the public; and by s. 14 they are to be open to the public. As to right of placing pipes, &c., see *Reg. v. United Kingdom E. T. Co.* 31 L. J. M. C. 166, and 9 Ex. R. 363; 23 L. J. Ex. 113; and as to libel by, see *Whitfield v. S. E. Railway*, 27 L. J. Q. B. 229.

[2] From *eligere*, to choose. A writ of execution given by stat. 13 Edw. 1, c. 18, commanding the sheriff to deliver to the plaintiff all the defendant's goods and chattels, and if there be not sufficient, the defendant's lands to be held till the plaintiff be paid by receipt of rents and profits.

[3] The plaintiff may award upon the roll writs of *elegit* for the whole debt into as many different counties as he pleases, without being under the necessity of suing out *testatum* writs of *elegit*, and may execute all or any of them at his pleasure.

It is also said that the plaintiff may divide his execution into several sums; as when he recovers 30*l.* he may have an *elegit* into one county for 10*l.*, another *elegit* into another county for 8*l.*, and another for the residue into a third county: but an award of an *elegit* into several counties for the whole debt seems to be the most proper way, because the judgment is entire. If a writ of *elegit* be sued out, and the plaintiff extend the land upon it, and return and file the writ, it was long doubted whether he should afterwards have an *elegit* into another county, as for other lands in the same county; but it seems to be now settled, that on a suggestion that the defendant has more lands either in the same or another county, the plaintiff may have a new *elegit* for a moiety of the land in whatever county it lies. 2 Wms. Saund. 68, a. n.

II. Of the Operation of the Writ.

1 & 2 Vic. c. 110, s. 11, enacts, that "it shall be lawful for the sheriff or other officer to whom any writ of *elegit*, or any process in pursuance thereof, shall be directed at the suit of any person upon any judgment, which at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered, in any action in any of her Majesty's superior courts at Westminster, to make or deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him,

Under the writ the sheriff gives the execution creditor possession of the debtor's lands, to hold until the debt is levied.[1]

When the writ of *elegit* is sued out, engross it on a plain piece of parchment, write a *præcipe* for the same on paper, and get the writ stamped at the proper office. At the time the writ is sealed, you must produce to the sealer of the writs the *postea*, judgment paper, or inquisition. R. H. T. 1853, r. 71. Indorse it to levy the debt. *See post*, Execution.

The writ of *elegit* lies against the defendant in his lifetime, or his heir or terre-tenant (occupier) after his death. 2 Tidd. Prac. 1073. And it may be had against peers of the realm as well as others, and also against executors and administrators upon a *devastavit* returned. 1 Cromp. 346. But it lies not against an heir till his full age, and therefore on a *scire facias* brought against him (the infant) the *parol* shall demur, because he may have a good plea to bar the execution, which might be mispleaded. Gilb. Ex. 58.

If a writ of *elegit* be sued out in the lifetime of the defendant, it may be executed after his death; for there is a distinction between writs original and judicial, in respect of the abatement of the suit by the death of the defendant. The former generally abate if the defendant die before judgment, but the latter are not affected by it. O. Bridgm. 467. And though the statute giving the *elegit* has not made any express provision concerning the abatement of it by the death of the defendant, it ought to be construed in the same manner as other processes of execution, which do not abate by death, when the defendant has no day in court. Id. 464, 478; 2 Tidd's Pr. 1074.

If judgment be obtained against two, and one of them die before execution, the judgment survives as to the personalty, but not as to the realty; that is, the judgment binds the goods of the survivor only, but it binds the lands both of the survivor and of the deceased. Therefore, if you intend to proceed in the personalty, you must have your *fieri facias* executed upon the goods of the survivor alone; but if in the realty, then after a *scire facias* against the survivor, and the heir and terre-tenants of the deceased, the plaintiff may sue out an *elegit* against them (for he cannot proceed in the realty against the survivor alone), and thereupon extend the lands of the deceased as well as those of the survivor. 2 Saund. 50, a. n. 4. But it is said that if all the defendants die, and one leave lands and the others not, the plaintiff may sue out an *elegit* against the heir and terre-tenants of him who left the lands alone. 1 Chit. Arch. 646, 10th ed.

[1] The writ of *elegit* was first given by Stat. Westm. 2 (13 Edw. 1, c. 18), by which the sheriff was empowered to deliver to the judgment creditor "all the chattels of the debtor, saving only his oxen and beasts of the plough, and a moiety of his land, until the debt be levied by a reasonable price or extent." By the Statute of Frauds (29 Car. 2, c. 3, s. 10), the *elegit* is extended to estates held in trust for the creditor. It is still necessary to keep the provisions of the prior acts in view, as cases arise to which they alone apply.

There are three cases in which the *elegit* has no greater effect than it had before the passing of 1 & 2 Vic.: namely, first, as against mortgagees and creditors who were such before the 1st October, 1838 (sect. 11, *supra* in text); secondly, where the judgment is not registered (id. s. 11. *Hughes v. Lumley*, 4 E. & B. 274. *Westbrooke v. Blythe*, 3 id. 737); thirdly, as against purchasers and mortgagees without notice, although the judgment be duly registered, it being enacted by 2 & 3 Vic. c. 11, that as against purchasers and mortgagees without notice, no "judgment shall bind or affect any lands, tenements, or hereditaments, or any interest therein, further or otherwise, or more extensively in any respect, although duly registered, than a judgment of one of the superior courts aforesaid would have bound such purchaser or mortgagee before the said 1 & 2 Vic. c. 110, where it had been duly docketed according to the law then in force." 2 & 3 Vic. c. 11, s. 5.

The following are the distinctions between the operation of the writ of *elegit* prior and subsequent to the passing of the 1 & 2 Vic. 1st. Previous to that act only a moiety of the debtor's lands could be extended. *Fenny v. Durrant*, 1 B. & A. 40. *Doe d. Davies v. Creed*, 5 Bing. 327. Under the act the whole may be extended. 2dly. Under the act the debtor's customary and copyhold lands may be extended: they could not before the act. *Morris v. Jones*, 3 D. & R. 603. 3dly. The execution creditor may extend lands over which his debtor has any disposing power, which he may, without the assent of any other person, exercise for his own benefit. This could not be done before the act. *Doe v. Jones*, 10 B. & C. 459. 4thly. Trust estates are bound from the time of entering the judgment, and not

shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued, as a tenant in *elegit* is now subject to in a court of equity: Provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution shall be liable, is hereby required to make, perform, and render to the lord of the manor, or other person entitled, all such and the like payments and services as the person against whom such execution shall have been issued, would have been bound to make, perform, and tender in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: Provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the commencement of this act, such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case this act had not passed."

III. What Lands, &c. may be Extended.[1]

merely from the time of issuing the *elegit*, as was the case under the Statute of Frauds. *Hunt v. Coles*, Com. R. 226.

[1] It was held before the passing of 1 & 2 Vic. c. 100, that estates in reversion on leases for lives or years might be extended, and the execution creditor have the rent which falls due after the return of the inquisition. *Sharp v. Key*, 8 Mee. & W. 379. Rent-charges (*Martin v. Wilks*, Moore, 32); lands in ancient demesne (*Cox v. Barnsley*, Hob. 47); the wife's land, which the husband has during the coverture, and the land of a bishop, may be extended. Dalt, Sheriff, 136. A term for years may either be extended or treated as part of the personalty. *Fleetwood's case*, 8 Rep. 171. But an advowson in gross, the glebe belonging to an ecclesiastical benefice, or the churchyard (Gilb. Ex. 39, 40), a rent-seck, or any tenement which cannot be granted over, as the office of filacer or the like (*Anon.* Dyer, 7 c.), could not before, and probably cannot since the stat. 1 & 2 Vic., be extended.

It was held, that an equity of redemption was not within the language of the Statute of Frauds, and the words with reference to trust estates in the 1 & 2 Vic. c. 110, nearly resemble the language of that act. *Plunket v. Penson*, 2 Atk. 290. It seems doubtful whether the statute includes a mere equitable interest in a chattel. *Scott v. Scholey*, 8 East, 467. It does not extend to a trust created by the debtor in favour of himself and another person. *Doe d. Greenhill*, 4 B. & A. 684. Where lands are extended there is no interest in them left in the debtor which can be extended under a subsequent writ, nor is the sheriff entitled to poundage on such second writ. 27 L. J. Ex. 225; 2 H. & N. 171. Rent accruing between the delivery of the *elegit* to the sheriff and the taking of the inquisition therein does not belong to the judgment-creditor. *Sharp v. Key*, 8 Mee. & W. 379.

Lands of a municipal corporation are not, it seems, exempt from being extended under an *elegit*. *Doe d. Parr v. Roe*, 1 Q. B. 700. *See* Grant on Corp. 382, n. t, 489.

By the 18 & 19 Vic. c. 15, s. 11, after reciting that great expense and delay are occasioned upon purchases and mortgages of lands in consequence of judgments against mortgagees and crown debts, and liabilities to the Crown of mortgagees continuing to bind lands, although the mortgagees have been *bonâ fide* paid off, and the lands have been actually conveyed to purchasers or to other mortgagees, enacts for remedy thereof, that "where any legal or equitable estate, or interest, or any disposing power, in or over any lands, tenements, or hereditaments, shall, under any conveyance or other instrument executed after the passing of this act, become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, tenements, or hereditaments shall not be taken under any writ of *elegit* or other writ of execution to be sued on any judgment, or on any decree, order, or rule against any mortgagee or mortgagees thereof, who shall have been paid off prior to or at the time of the execution of such conveyance; nor shall any such judgment, decree, order, or rule, or the money thereby secured, be a charge upon such lands, tene-

IV. Proceedings in Executing the Writ.[1]

V. Forms of Writs of Elegit.[2]

ments, or hereditaments, so vested in purchasers or mortgagees; nor shall such lands, tenements, or hereditaments, so vested in purchasers or mortgagees, be extended or taken in execution, or rendered liable under any writ of extent, or writ of execution, or other process issued by or on behalf of her Majesty, her heirs and successors, in respect of any judgment, statute, or recognisance obtained against, or obligation or specialty made by, or acceptance of office by any mortgagee or mortgagees, whereby he or they hath or have become a debtor or accountant, or debtors or accountants, to the Crown, where such mortgagee or mortgagees shall have been paid off prior to or at the time of the execution of such conveyance as aforesaid."

In Middlesex and Yorkshire it is required that judgments and recognisances should be registered; and in those counties lands are not charged by a judgment or recognisance, as against purchasers, until the time of such registry. Execution, therefore, in those counties, only relates to and affects lands from the time of registering the judgment or recognisance.

[1] The sheriff is bound upon the receipt of the *elegit* to impannel a jury, who are to inquire of all the goods and chattels of the debtor, and appraise the same, and also to inquire as to his lands and tenements, and them value. Dalt, 134. After inquisition had, the sheriff delivers to the execution creditor all the goods and chattels of the debtor (except his oxen and beasts of the plough), at the value set upon them by the jury; if they be insufficient, he delivers also execution of the lands, and he then returns the writ, that it may be recorded in the court out of which the *elegit* issued. The sheriff delivers legal, not actual possession of the land: the execution creditor must therefore proceed by ejectment if he cannot obtain possession without force. *Taylor v. Cole*, 3 T. R. 295; but see *Rogers v. Pitcher*, 6 Taunt. 207. The inquisition must find the lands with certainty, the place and county where they lie, and where the inquisition is taken (*Raysig's case*, Dy. 208), the estate the defendant has in them (*Heard v. Baskerfield*, Brownl. 38), and their value. *Sparrow v. Mattersock*, Cro. Car. 319. Since the 1 & 2 Vic. c. 110, it is not necessary that the sheriff should set out the lands by metes and bounds; it is sufficient that he describe them with such a degree of accuracy that they may be readily identified. *Sherwood v. Clark*, 15 Mee. & W. 764. *Doe v. Parry*, 13 id. 356. The inquisition may be bad as to some lands, and good as to others. *Morris v. Jones*, 2 B. & C. 242. If lands have been extended, the inquisition must be returned and filed as well as the writ, otherwise not. *Stonehouse v. Ewen*, 2 Stra. 874. *Hoe's case*, 5 Rep. 90, a. The defendant may compel the plaintiff to enter the return on the roll. *Casseldine v. Munday*, 2 Dowl. 169.

The defendant is entitled to have his lands back as soon as the judgment is satisfied; and he may recover them by ejectment, by *sci. fa. ad rehabendam terram*, by bill in equity, or by application to the court. *Price v. Varney*, 5 D. & R. 612. But a mere agreement by the tenant by *elegit* to let, by which he gets nothing, is not a satisfaction. *See* 4 E. & B. 274. After lands have been extended no other writ of execution can issue, except another *elegit* to extend other lands. *See* 3 E. & B. 784.

[2] The following forms of writs of *elegit* are prescribed by Reg.-Gen. (Pr.) H. T. 1853, schedule, in which they are numbered as here:—

No. 9.— *Writ of Elegit on a Judgment for Plaintiff.*

Victoria, by the grace of God of the United Kindom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas A. B., lately in our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], by the judgment of the same court, recovered against C. D. £ [*the amount of all the monies recovered by the judgment*], whereof the said C. D. is convicted; and afterwards the said A. B. came into our said court, and according to the form of the statutes in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the day of in the year of our Lord [*the day on which the judgment was entered up*], on which day the judgment aforesaid was entered up, or at any time afterwards, or over which the said C. D. on that day or at any time afterwards had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments, respectively, according to the nature and tenure thereof, to him and to his assigns, according to the form of the said statutes, until the said sum, together with interest thereon at the rate of four pounds per centum per annum, from the day of in the year of our Lord [*the day on which the judgment was entered up*], shall have been levied:

Therefore we command you, that [*if sued out of the Court of Exchequer, say*, "Therefore we command you, that you omit not,

by reason of any liberty of your county, but that you enter the same, and"] without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of [*the day on which the judgment was entered*], or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments, respectively, according to the nature and tenure, to him and to his assigns, until the said £ together with interest as aforesaid, shall have been levied.

And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas*, to our justices; *or in the Exchequer*, to the barons of our Exchequer, *as the case may be*] at Westminster, immediately after the execution hereof, under your seals and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ.

Witness at Westminster, the day of in the year of our Lord

No. 10. — *Writ of Elegit on a Rule for Payment of Money.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas lately in our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], by a rule of the said court, dated the day of in the year of our Lord the sum of £ was ordered to be paid by C. D. to A. B., and afterwards the said A. B. came into our said court, and according to the form of the statutes in such case made and provided chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the day of in the year of our Lord [*the day on which the rule was made*], on which the said rule was made, or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments, respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum, together with interest upon the same, at the rate of four pounds per centum per annum, from the said day of in the year of our Lord [*the day on which the rule was made*], shall have been levied:

Therefore we command you, that [*if sued out of the Court of Exchequer, say*, "Therefore we command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"], without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of [*the day on which the rule was made*], or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments, respectively, according to the nature and tenure thereof, to him and to his assigns, until the said £ together with interest as aforesaid, shall have been levied.

And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas*, to our justices; *or in the Exchequer*, to the barons of our Exchequer, *as the case may be*], at Westminster, immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ.

Witness at Westminster, the day of in the year of our Lord

No. 11. — *Writ of Elegit on a rule for Payment of Money and Costs.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas lately in our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], by a rule of the said court, dated the day of in the year of our Lord the sum of £ was ordered to be paid by C. D. to A. B., together with certain costs in the said rule mentioned, which said costs were afterwards on the day of in the year of our Lord taxed and allowed by our said court at £ and afterwards the said A. B. came into our said court, and accord-

ing to the form of the statute in such case made and provided chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the day of in the year of our Lord [*the day on which the costs of the rule were taxed*], or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest upon the same at the rate of four pounds per centum per annum, from the said day of in the year of our Lord [*the day on which the costs of the rule were taxed*] shall have been levied:

Therefore we command you, that [*if sued out of the Court of Exchequer say*, "Therefore we command you that you omit not, by reason of any liberty of your county, but that you enter the same and"] without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of [*the day on which the costs of the rule were taxed*], or any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ together with interest as aforesaid, shall have been levied.

And in what manner you shall have executed this our writ make uppear to us [*or in the Common Pleas*, to our justices; *or in the Exchequer*, to the barons of our Exchequer, *as the case may be*] at Westminster, immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ.

Witness at Westminster, the day of in the year of our Lord

No. 12.—*Writ of Elegit on a Judgment of an Inferior Court removed into one of the Superior Courts.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas A. B., lately in [*insert the style of the court*], by the judgment of the said court recovered against C. D. £ whereof the said C. D. is convicted: And whereas the said judgment was afterwards, on the day of in the year of our Lord removed into our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], by virtue of an order of that our said court [*as the case may be*], in pursuance of the statute in that case made and provided; and the costs and charges attendant upon the application for the said order, and upon the said removal, were afterwards, on the day of in the year of our Lord taxed and allowed by our said Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] at £ and afterwards the said A. B. came into that our said court [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of in the year of our Lord aforesaid [*the day on which the costs of removing the judgment were taxed*], or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest upon the same at the rate of four pounds per centum per annum from the said day of in the year of our Lord [*the day on which the costs of removing the judgment were taxed*] shall have been levied:

Therefore we command you, that [*if sued out of the Court of Exchequer, say*, "Therefore we command you that you omit not, by reason of any liberty of your county, but that you enter the same and"] without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your

bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the said day of [*the day on which the costs of removing the judgment were taxed*], or at any time afterwards, or over which the said C. D. on that day, or any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ together with interest as aforesaid, shall have been levied.

And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas*, to our justices; *or in the Exchequer*, to the barons of our Exchequer, *as the case may be*] at Westminster, immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ.

Witness at Westminster, the day of in the year of our Lord

No. 13.—*Writ of Elegit on a Rule or Order for Payment of Money made in an Inferior Court, and Removed into one of the Superior Courts.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas lately in [*insert the style of the court*], by rule [*or* order] of the said court, entitled [*as the case may be*], the sum of £ was, by the said court, ordered to be paid by C. D. to A. B.: And whereas the said rule [*or* order] was afterwards, on the day of in the year of our Lord removed into our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], by virtue of an order of that our said court [*or* of one the justices of that our said court, *as the case may be*], in pursuance of the statute in in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order, and upon the said removal, were afterwards, on the day of in the year of our Lord taxed and allowed by our said Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] at £ and afterwards the said A. B. came into that our said court, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of in the year of our Lord [*the day on which the costs of removing the rule of the inferior court into the superior court were taxed*], or at any time afterwards, or over which the said C. D. on the said day of or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and his assigns, until the said two several sums, together with interest on the same at the rate of four pounds per centum per annum, from the said day of shall have been levied: Therefore we command you, that [*if sued out of the Court of Exchequer, say*, "Therefore we command you that you omit not, by reason of any liberty of your county, but that you enter the same, and"] without further delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen, beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the said day of or at any time afterwards, or over which the said C. D. on that day, or any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said several sums of £ and £ together with interest as aforesaid, shall have been levied.

And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas*, to our justices; *or in the Exchequer*, to the barons of our Exchequer, *as the case may be*] at Westminster immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ.

Witness at Westminster, the day of in the year of our Lord

No. 14.—*Writ of Elegit on a Rule or Order for Payment of Money and Costs, made in an Inferior Court, and removed into one of the Superior Courts.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

Whereas lately in [*insert the style of the court*] by a rule [*or* order] of the said

ELISORS. Neutral persons chosen to summon a jury when the sheriff or coroner is challenged for partiality. *See post*, Trial, Writ of.

EMBEZZLEMENT.

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III. Embezzlement by Officers of the Bank of England or Ireland, p. 236.

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court, entitled [*as the case may be*], the sum of £ was by the said court ordered to be paid by C. D. to A. B., together with the costs of the said rule [*or* order], which said costs were afterwards, on the day of in the year of our Lord, taxed and allowed by the said court at £

And whereas the said rule [*or* order] was afterwards, on the day of in the year of our Lord removed into our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], by virtue of an order of that our said court [*or* of one of the justices of that our said court, *as the case may be*], in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order, and upon the said removal were afterwards, on the day of in the year of our Lord taxed and allowed by our said Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], at £ and afterwards the said A. B. came into our said Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums, together with interest upon the same at the rate of four pounds per centum per annum, from the said day of shall have been levied: Therefore we command you that [*if issued out of the Court of Exchequer, say*, "Therefore we command you that you omit not, by reason of any liberty of your county, but that you enter the same, and"] without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of £ £ and £ together with interest as aforesaid, shall have been levied.

And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas*, to our justices; *or in the Exchequer*, to the barons of our Exchequer, *as the case may be*] at Westminster, immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ.

Witness at Westminster the day of in the year of our Lord

IV. Embezzlement by Agents, Bankers, or Factors, p. 236.

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(D) „ *publishing Fraudulent Statements, &c.*, p. 240.

VII. By Bankrupts. *See* vol. ii. p. 295.

I. Embezzlement by Clerks or Servants.

(A) *What constitutes.*

Embezzlement by clerks or servants.

By 24 & 25 Vic. c. 96, s. 68, "whosoever being a clerk or servant, or being employed for the purpose, or in the capacity of a clerk or servant,[1] shall fraudu-

[1] A female servant is within the act (*R. v. Smith*, R. & R. 267); so is an apprentice, although an infant. *Reg. v. Mellish*, id. 80. An accountant and treasurer to the overseers of the poor, whose duty it is to receive and pay monies on their behalf, is within the description of a clerk or servant. *R. v. Squire*, id. 349. See *Reg. v. Townsend*, 1 Den. C. C. 167; 2 C. & Kir. 168. *Reg. v. Adey*, 1 Den. C. C. 578. A collector of the poor and other rates was held rightly described as servant to the committee of management of the affairs of the parish, although he was elected by the vestry. *Reg. v. Calahan*, 8 Car. & P. 154. And a clerk of a savings' bank was held rightly described as clerk to the trustees, though elected by the managers. *R. v. Jenson*, 1 M. C. C. 434. *R. v. Proud*, 31 L. J. M. C. 71. A person may be a clerk or servant, though paid by a percentage upon the orders he gets (see *Reg. v. Wortley*, 2 Den. C. C. 333), as in the instance of a commercial traveller. *R. v. Carr*, R. & R. 198. *R. v. Hoggins*, id. 145. See *Reg. v. Tite*, 30 L. J. M. C. 142. *R. v. Macdonald*, 31 id. 67. *R. v. Hartley*, R. & R. 139. But a person who acts merely as an agent to procure orders for the sale of the prosecutor's goods, and no part of whose duty it is to receive money, is not his clerk or servant within the act. *Reg. v. May*, 30 L. J. M. C. 81. See *Reg. v. Walker*, 1 Dears. & B. 600.

The secretary to a society who fraudulently withheld money received from a member to be paid over to the trustees was held to be a servant to the trustees, although he was likewise a member of the society, and to have been properly convicted of embezzlement. *R. v. Hall*, 1 M. C. C. 474. *Reg. v. Miller*, 2 id. 249.

If the clerk or servant of several partners embezzle the private money of one of them, it is an embezzlement within the act, for he is the servant of each. *R. v. Leach*, 3 Stark. N. P. 70. See *R. v. Carr*, R. & R. 198. *Reg. v. Batty*, 2 M. C. C. 257. *Reg. v. White*, id. 91; 8 C. & P. 742. *Reg. v. Bayley*, 1 Dears. & B. 121.

The employment need not be permanent:

lently embezzle any chattel, money, or valuable security,[1] which shall be delivered to or received or taken into possession by him,[2] for or in the name or on the account of his master or employer,[3] or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money or security, was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

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it will be sufficient though only occasional. *R. v. Spencer*, R. & R. 299. *R. v. Smith*, id. 516. Where a drover who was employed to drive two cows to a purchaser, and receive the purchase-money, embezzled it, he was held to be a servant. *R. v. Hughes*, 1 M. C. C. 370. But where the treasurer of a charitable institution in his individual capacity directed the defendant (who was the schoolmaster of the charity school appointed by a committee, of which the treasurer was a member, and whose sole duty was confined to the instruction of the children) in one single instance to receive a voluntary contribution for which he was to have no remuneration, it was held that he was not a clerk or servant within the act. *R. v. Nettleton*, id. 259. So where a person, who at the time was not in the prosecutor's employment, was sent to the banker's with a cheque for payment, for which he was to receive sixpence, and embezzled the money, he was held not to be a clerk or servant within the meaning of the act. *R. v. Freeman*, 5 C. & P. 534. A person employed to collect the sacrament-money from the communicants is not the servant of the minister, churchwardens, or overseers of the poor. *R. v. Burton*, 1 M. C. C. 237.

[1] It is not necessary that the exact amount or value of the thing embezzled should be stated in the indictment. *R. v. Carson*, R. & R. 303. It must be alleged that it was the property of the master. *R. v. M'Gregor*, 3 B. & P. 106; R. & R. 23. *R. v. Beacall*, 1 M. C. C. 15), and that the defendant was his clerk or servant at the time. *R. v. Somerton*, 7 B. & C. 463: but see *Reg. v. Lovell*, 2 M. & Rob. 236. It need not be stated from whom the money or chattel was received (*R. v. Beacall*, 1 C. & P. 454); but the judge may order the prosecutor to furnish the prisoner with a particular of the charge. *R. v. Bootyman*, 5 id. 300. *R. v. Hodgson*, 3 id. 422.

The indictment will be sufficient, although it omit to state that the defendant feloniously did embezzle, if it conclude with a statement that he feloniously stole. *R. v. Crighton*, R. & R. 62.

In cases of embezzlement of money or bank-notes, the indictment will be sustained by proof that the defendant embezzled any piece of coin, or any bank-note, or any portion of the value thereof, although such piece of coin or such bank-note may have been delivered to him in order that some part of the value thereof should be retained to the party delivering the same, or to any other person, and such part has been returned accordingly. *See* 14 & 15 Vic. c. 100, s. 18. A variance between the evidence and the indictment as to the amount received is immaterial. *R. v. Carson*, R. & R. 303.

[2] The 7 & 8 Geo 4, c. 29, s. 47, and 9 Geo. 4, c. 55, s. 40, the earlier enactments on this subject, contained the words "shall by virtue of such employment receive," &c. By the omission of these words a question is avoided, upon which several decisions arose under the repealed acts. See *Rex v. Thorley*, R. & M. C. C. 343. *Crowe's case*, 1 Lev. 88. *Rex v. Smedley*, 4 C. & P. 390. *Rex v. Hawtin*, 7 id. 281.

[3] If money received from a fellow-servant to give to the master is fraudulently appropriated, it is embezzlement. *Reg. v. Masters*, 1 Den. C. C. 332; 2 C. & Kir. 930. But money received from the master himself for the purpose of being paid to a third person is not within the act, for it is not received in the name of or on account of his master. *R. v. Peck*, 2 Russ. 180. *R. v. Smith*, 2 R. & R. 267. *Reg. v. Hawkins*, 1 Den. C. C. 584. *Reg. v. Goodenough*, Dears. C. C. 210. Neither is money constructively in the possession of the master by the hands of another servant. Therefore, where one clerk gave to another clerk money of the master, to be paid to a third person, and he fraudulently appropriated a part of it, it was held not to be embezzlement within the act. *Rex v. Murray*, 1 M. C. C. 276; 5 C. & P. 146. See *Reg. v. Watts*, 2 Den. C. C. 15. *Reg. v. Reed*, Dears. C. C. 210. *Reg. v. Wright*, 1 Dears. & B. 431. Where the master gave to a stranger marked money for the purpose of purchasing goods of the master's shopman with a view to test his fidelity, and the shopman appropriated the money, it was held to be embezzlement. *R. v. Headge*, 2 Leach, 1033; R. & R. 160. *Reg. v. Gill*, Dears, C. C. 289. Where it was the duty of the defendant to sell his master's goods, entering the sales in a book, and settling accounts with his master weekly, and the defendant omitted any entry of certain sales, and fraudulently appropriated the money, it was held to be embezzlement. *Reg. v. Betts*, 1 Bell, C. C. 90. See *R. v. Hoggins*, R. & R. 145. Where the defendant's master was agent for a railway company for delivering

(B) *Indictment.*

(*a*) *Distinct Acts of Embezzlement may be charged in the Indictment.*

Distinct acts of embezzlement may be charged in the same indictment.[1]

By sect. 71, "for preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition, hereinbefore mentioned, it shall be lawful to charge in the indictment, and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against her Majesty, or against the same master or employer, within the space of six months from the first to the last of such acts; and in every such indictment, where the offence shall relate to any money or valuable security, it shall be sufficient to allege the embezzlement or fraudulent application or disposition to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled or fraudulently applied or disposed of any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled or fraudulently applied or disposed of any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly."

(*b*) *Form of Indictment for Embezzlement.*[2]

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goods: he employed his own servants, and used his own drays and horses, and was answerable to the company for monies collected by his servants for carriage. The defendant went out with a dray in the course of his duty, and received the amount of carriage specified in a delivery-book handed to him by a clerk of the company, and received the amount of carriage therein specified as due to the company, and accounted for the sums so received with the company's clerk. The defendant appropriated certain sums so received for carriage and entered in the delivery-book. It was held that he was properly convicted of embezzlement, as, although the prisoner received the money in the name of the company, he received it "on account" of his master. *Reg. v. Thorpe*, 1 Dears. & B. 562. A miller in a county gaol, paid by a weekly salary, whose duty it was to grind grain only upon a ticket being produced, specifying the quantity, &c. and to account for the money received with the governor of the gaol, received grain without a ticket, and applied the money for grinding to his own use, it was held that he could not be convicted of embezzlement, as the facts showed an improper use of the mill, but not a receipt of money for or on account of his master. *Reg. v. Harris*, Dears. C. C. 344.

[1] The proper course is to charge the separate acts in distinct counts. *Reg. v. Purchase*, Car. & M. 617. The indictment must show that the different sums were embezzled within the six months. *Reg. v. Noake*, 2 C. & Kir. 620. *Reg. v. Purchase*, *supra*.

[2] *Form of Indictment for Embezzlement.*

Central Criminal Court } The jurors of our
to wit. } Lady the Queen,
upon their oath, present that A. M. on the
day of in the year of our Lord
being then employed as clerk [*or* servant] to J. T., did then, and whilst he was so employed as aforesaid, receive and take into his possession certain money [chattel *or* valuable security] to a large amount, to wit, to the amount of
pounds, for and in the name and on the account of the said J. T. his master [*or* employer], and the said money then fraudulently and feloniously did embezzle; and so the jurors aforesaid, on their oath aforesaid, do say that the said A. M., in manner and form aforesaid, the said money, the property of the said J. T. his said master, from the said J. T. feloniously did steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Additional Count, charging other Acts of Embezzlement within Six Months.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. M. afterwards, and within six months from the time of committing the said offence in the first count of this indictment charged and stated; to wit, on the, &c. being then employed as clerk to the said J. T., did then, and whilst he was so employed as aforesaid, receive and take into his possession certain other money to a

(C) *Evidence.*[1]

(D) *Persons Indicted for Embezzlement may be Convicted of Larceny.*

Persons indicted for embezzlement, as a clerk, &c. are not to be acquitted if the offence turn out to be larceny, but to be convicted of larceny, and *vice versâ*.

By sect. 72, "if upon the trial of any person indicted for embezzlement or fraudulent application or disposition, as aforesaid, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, or fraudulent application or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or fraudulent application, or disposition, as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, or fraudulent application or disposition, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application, or disposition; and no person so tried for embezzlement, fraudulent application, or disposition, or larceny, as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application, or disposition, or embezzlement, upon the same facts."

II. Embezzlement by Persons in the Queen's Service, or by the Police.

Embezzlement by per-

By 24 & 25 Vic. c. 96, s. 70, "whosoever, being employed in the public service of her Majesty, or being a constable or other person employed in the

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large amount; to wit, to the amount of pounds, for and in the name and on the account of the said A. M. his master, and the said last-mentioned money then and within the said six months fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid, do say that the said A. M., in manner and form aforesaid, &c. [*as in the first count to the end*].

It is proper to add a count for larceny by the defendant as clerk, and for a simple larceny. See *R. v. Johnson*, 3 M. & S. 549. *R. v. Purchase*, Car. & M. 617.

[1] Embezzlement necessarily involves secrecy and concealment. If, therefore, instead of denying the appropriation of property, the prisoner, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offence in taking and keeping it is not embezzlement. *Reg. v. Norman*, Car. & M. 501. *Reg. v. Creed*, 1 C. & Kir. 63. But where it is the servant's duty to account for and pay over the monies received by him at stated times, his not doing so wilfully is an embezzlement, although he do not actually deny the receipt of them. *Reg. v. Jackson*, 1 C. & Kir. 384. But see *Reg. v. Jones*, 7 C. & P. 833. And notwithstanding no time can be fixed at which it was his duty to pay the monies over, yet if it be found by the jury that his omission to account was done fraudulently, it is embezzlement. *Reg. v. Welch*, 1 Den. C. C. 199; 2 C. & Kir. 296. See *Reg. v. Wortley*, 2 Den. C. C. 333. *Reg. v. Murdock*, id. 298. *R. v. Hall*, 3 Stark. 67; R. & R. 463.

Where the defendant charged himself in his master's book with money received by him, it was held that an embezzlement was not proved merely by his not paying it over to the master. *R. v. Hodson*, 3 C. & P. 422. But the defendant is not exempt from the operation of the statute *merely* by entering the receipt of the money correctly in his master's book. *Reg. v. Lister*, 1 Dears. & B. 119. *Reg. v. Guelder*, 1 Bell, C. C. 284.

It seems that since the statute an indictment for embezzlement may be supported by proof of a general deficiency of monies that ought to be forthcoming, without showing any particular sum received and not accounted for. *R. v. Grove*, 1 M. C. C. 447; 7 C. & P. 635. *Reg. v. Lambert*, 2 Cox, C. C. 309. *Reg. v. Chapman*, 1 C. & Kir. 119. *Reg. v. Moah*, Dears. C. C. 626. But see *Reg. v. Lloyd Jones*, 8 C. & P. 288.

If the indictment contain only one count, charging the receipt of a gross sum on a particular day, and it appear in evidence that the money was received in different sums on different days, the prosecutor will be put to his election, and must confine himself to one sum and one day. *R. v. Williams*, 6 C. & P. 626.

son in the Queen's service, or by the police.[1]

police of any county, city, borough, district, or place whatsoever, and intrusted, by virtue of such employment, with the receipt, custody, and management or control of any chattel, money, or valuable security, shall embezzle any chattel, money, or valuable security, which shall be intrusted to or received or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently apply or dispose of the same or any part thereof to his own use or benefit, or for any purpose whatsoever except for the public service, shall be deemed to have feloniously stolen the same from her Majesty, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and every offender against this or the last preceding section may be dealt with, indicted, tried, and punished, either in the county or place in which he shall be apprehended or be in custody, or in which he shall have committed the offence; and in every case of larceny, embezzlement, or fraudulent application or disposition of any chattel, money, or valuable security, in this and the last preceding section mentioned, it shall be lawful in the warrant of commitment by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security in her Majesty."

III. Embezzlement by Officers of the Bank of England or Ireland.[2]

By 24 & 25 Vic. c. 96, s. 73, "whosoever being an officer or servant of the Governor and Company of the Bank of England, or of the Bank of Ireland, and being intrusted with any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or with any security money or other effects of or belonging to the said governor and company, and having any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or any security money, or other effects of any other person, body politic or corporate, lodged or deposited with the said governor and company, or with him as an officer or servant of the said governor and company, shall secrete, embezzle, or run away with any such bond, deed, note, bill, dividend or other warrant, security money or other effects, as aforesaid, or any part thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

IV. Embezzlement by Agents, Bankers, or Factors.[3]

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[1] See *Reg. v. Lovell*, 2 M. & Rob. 236. *Reg. v. Mouh*, Dears. C. C. 626.

As to embezzlement of letters, &c., by servants of the Post Office, *see post*, Larceny; 1 Wm. 4; and 1 Vic. c. 36, s. 26.

[2] See *R. v. Aslett*, R. & R. 67. *R. v. Bakewell*, id. 35.

[3] The terms in the sections in the text are defined by the 79th section. "Any factor or agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such factor or agent having been intrusted with the possession of the goods, or of any other document of title as aforesaid, shall be deemed to have been intrusted with the possession of the goods represented by such document of title; and every contract pledging or giving a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates; and such factor or agent shall be deemed to be possessed of such goods or document, whether the same shall be in his actual custody or shall be held by any other person subject to his control, or for him or on his behalf; and where any loan or advances shall be *bonâ fide* made to any factor or agent intrusted with and in possession of any such goods or document of title, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or document of title, and such goods

(A) *Agent, Banker, &c. Embezzling Money, or Selling Securities, &c. intrusted to him, or Goods, &c. intrusted to him for Safe Custody.*

Agent, banker, &c. embezzling money, or selling securities, &c. intrusted to him, or goods, &c. intrusted to him for safe custody.

By 24 & 25 Vic. c. 96, s. 75, "whosoever, having been intrusted either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money, or security for the payment of money, with any direction in writing to apply,[1] pay, or deliver such money or security, or any part thereof respectively, or the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in any wise convert to his own use and benefit, or to the use and benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively; and whosoever, having been intrusted either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company or society, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement: but nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in

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or document of title shall actually be received by the person making such loan or advance, without notice that such factor or agent was not authorised to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods and document of title within the meaning of the last preceding section, though such goods or document of title shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement with such factor or agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent; and any payment made, whether by money or bill of exchange, or other negotiable security, shall be deemed an advance within the meaning of the last preceding section; and a factor or agent in possession as aforesaid of such goods or document shall be taken, for the purposes of the last preceding section, to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence."

With respect to the class of sections of the 24 & 25 Vic. c. 96, relating to embezzlement by agents, trustees, and directors and officers of public companies (given in the text), it is by sect. 86 of the same act provided as follows:—"Nothing in any of the last eleven preceding sections of this act contained, or in any preceding conviction or judgment to be had or taken thereon against any person under any of the said sections, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any offence against any of the said sections might have had if this act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him, and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated."

And further, it is by sect. 87 enacted, "no misdemeanor against any of the last preceding sections shall be prosecuted or tried at any court of general or quarter sessions of the peace."

[1] An allegation of a specific direction to invest the proceeds of valuable securities in the funds, is not supported by evidence of a direction to invest in the funds in the event of any unexpected accident occurring. *R. v. White*, 4 C. & P. 46.

respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession upon which he shall have any lien, claim or demand, entitling him by law so to do, unless such sale, transfer or other disposal, shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand."

(B) *Bankers, &c. fraudulently Selling, &c. Property intrusted to their care.*

Bankers, &c. fraudulently selling, &c. property intrusted to their care.[1]

By sect. 76, "whosoever being a banker, merchant, broker, attorney, or agent, and being intrusted, either solely, or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same, or any part thereof, to or for his own use and benefit, or the use and benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

(C) *Persons under Powers of Attorney fraudulently Selling Property.*

Persons under powers of attorney fraudulently selling property.

By sect. 77, "whosoever being intrusted, either solely, or jointly with any other person, with any power of attorney for the sale or transfer of any property, shall fraudulently sell or transfer, or otherwise convert the same, or any part thereof, to his own use or benefit, or the use and benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

(D) *Factors obtaining Advances on the Property of their Principals.*

Factors obtaining advances on the property of their principals.

By sect. 78, "whosoever being a factor or agent intrusted, either solely, or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods, shall, contrary to, or without the authority of his principal in that behalf, for his own use or benefit, or for the use or benefit of any other person than the person by whom he was so intrusted, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien, or security for any money or valuable security borrowed or received, or shall, contrary to or without such authority, for his own use or benefit, or the use and benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver, any such goods or documents of title, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned; and every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion

[1] See *Thompson v. Giles*, 2 B. & C. 422.

of the court, to any of the same punishments: Provided that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for, or subject to, the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery, was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by such factor or agent."

(*a*) *Form of Indictment.*[1]

(E) *Liability to Indictment does not protect Witness against being compellable to Answer.*[2]

V. Embezzlement by Trustees.[3]

(A) *Trustees fraudulently Disposing of Property guilty of a Misdemeanor.*

Trustees fraudulently disposing of property guilty of a misdemeanor; no prosecution shall be commenced without the sanc-

By 24 & 25 Vic. c. 96, s. 80, "whosoever being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same, or any part thereof, to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of

[1] *Form of Indictment against a Factor for unlawfully pledging Goods of the Principal.*

Middlesex } The jurors of our Lady the
to wit. } Queen, upon their oath, present that on the day of in the year of our Lord A. B. did intrust to C. D., the said C. D. then being a factor and agent of him the said A. B., fifteen chests of tea, and that the said C. D., factor and agent as aforesaid, on the day and year aforesaid, contrary to, and without the authority of, the said A. B., for his own use and benefit, and in violation of good faith, unlawfully did make a deposit of the said fifteen chests of tea with one J. S., as and by way of a pledge, lien, and security for a certain sum of money, to wit, the sum of one hundred pounds, then advanced by the said J. S. to him the said C. D., against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

[2] No protection is afforded against the obligation to disclose transactions as to which the party may be interrogated in a court of justice, by the liability to indictment created by the preceding sections relating to agents, bankers, &c., nor by those which follow as to embezzlement by trustees and by directors of public companies. The 85th sect. of the 24 & 25 Vic. c. 96, enacts, that "nothing in the last two preceding sections of this act contained shall enable or entitle any person to refuse to make a full and complete discovery, by answer, to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned, by any evidence whatever, in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court, upon the hearing of any matter in bankruptcy or insolvency." See *Reg. v. Skeen*, 1 Bell, C. C. 97.

[3] By sect. 1 of the act the term "trustee" shall mean a trustee on some express trust, created by some will, deed, or instrument in writing, and shall also include the heir or personal representative of any such trustee, and any other person to whom the duty of such trust shall have devolved or come, and also an executor or administrator of joint-stock companies, bankruptcy, or insolvency. It has been held that the trustee of a savings' bank, who was also their treasurer and secretary, and was directed by printed regulations as to the disposal of the funds, and who misappropriated them, was a trustee under a trust created by an instrument in writing, within the meaning of the section, and was guilty of embezzlement. *Reg. v. Fletcher*, 6 L. T. (N. S.) 545.

tion of some judge or the attorney-general.

the court, to any of the punishments which the court may award as hereinbefore last mentioned: Provided that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of her Majesty's Attorney-General, or in case that office be vacant, of her Majesty's Solicitor-General: Provided also, that where any civil proceeding shall have been taken against any person to whom the provisions of this section may apply, no person who shall have taken such civil proceeding shall commence any prosecution under this section without the sanction of the court or judge before whom such civil proceeding shall have been had, or shall be pending."

VI. By Directors and Officers of Public Companies.

(A) *Directors, &c. of any Body Corporate, or Public Company, fraudulently appropriating Property.*

Directors, &c. of any body corporate or public company fraudulently appropriating property.

By 24 & 25 Vic. c. 96, s. 81, "whosoever being a director, member, or public officer, of any body corporate or public company, shall fraudulently take or apply for his own use or benefit, or for any use or purpose other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

(B) *Or keeping Fraudulent Accounts.*

Or keeping fraudulent accounts.

By sect. 82, "whosoever being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make, or concur in the making of, any false entry, or omit, or concur in omitting, any material particular in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

(C) *Or wilfully Destroying Books, &c.*

Or wilfully destroying books, &c.

By sect. 83, "whosoever being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make, or concur in the making of, any false entry, or omit, or concur in omitting, any material particular in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

(D) *Or publishing Fraudulent Statements.*

Or publishing *fraudulent* statements.

By sect. 84, "whosoever being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

VII. By Bankrupts. *See* 24 & 25 Vic. c. 134, ss. 221–4; vol. ii. p. 295.

EMBLEMENTS. Fr. *Emblavance de bled.* Corn and other growth of the earth which are produced annually, not spontaneously, but by labour and industry, and thence are called *fructus industriales.* These, although they are annexed to, and growing upon the land at the time of the occupier's death, yet, as between the executor or administrator of the person seised of the inheritance and the heir, in some cases, and between the executor or administrator of the tenant for life, and the remainderman or reversioner, in others, are considered by the law as chattels, and will pass as such. *See post,* Executors and Administrators. *See* 1 Wms. on Executors, 493. Grady on Fixtures, 172, tit. Fixtures.

On determination of leases under tenant for life, instead of emblements. tenant to hold until expiration of current year, &c.[1]

By 14 & 15 Vic. c. 25, s. 1, "where the lease or tenancy of any farm or lands held by a tenant at rack-rent shall determine by the death or cesser of the estate of any landlord entitled for his life, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living, or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor, to the time of the tenant so quitting; and the succeeding landlord or owner, and the tenant respectively, shall, as between themselves, and as against each other, be entitled to all the benefits and advantages, and be subject to all the terms, conditions, and restrictions to which the preceding landlord or lessor, and such tenant respectively, would have been entitled and subject, in case the lease or tenancy had determined in manner aforesaid, at the expiration of such current year: Provided always, that no notice to quit shall be necessary or required from either party to determine any such holding and occupation as aforesaid."

EMBRACERY. An attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like. 1 Hawk. P. C. 259. The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, is perpetual infamy, imprisonment for a year, and forfeiture of tenfold the value. 5 Edw. 3, c. 10; 34 id. c. 8; 38 id. c. 12.

EMULATIO Vicini. A term in the Scottish law for the act of one who uses his property so as to annoy his neighbour.

ENCROACHMENT.[2]

ENFRANCHISEMENT. *See* Copyhold, vol. iii. p. 232.

ENGINE, Destruction of by Rioters. *See* 24 & 25 Vic. c. 97, s. 11; *post,* Malicious Injury; Riot.

Maliciously Destroying or Injuring in Mines. *See* id. s. 29.

in Manufactory. *See* id. s. 14.

for Agriculture. *See* id. s. 15; *post,* Malicious Injury.

Obstructing on Railway. *See* id. s. 35; *post,* Railways.

[1] A tenant for life, or his representative, is not to be prejudiced by the determination of his estate, except by his own act; so that if he sow or plant the land, and die before harvest, his executor is entitled to the emblements. So if a life estate is determined by act of law, but not by act of tenant. *See post,* Rent.

[2] If a tenant make an encroachment adjoining to the farm he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly from some act done at the time that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm. *Doe v. Rees,* 6 Car. & P. 610. *See* Common, vol. iii. p. 146, 147.

ENGINE-House, Setting Fire to. *See* 24 & 25 Vic. c. 97, s. 4; *post*, Railways.

ENGRAVING Plates to make Bank-Notes. *See* 24 & 25 Vic. c. 98, ss. 16, 17; *post*, Forgery.

ENGRAVINGS, Copyright in. *See* 8 Geo. 2, c. 13; 1 Geo. 3, c. 38; 17 Geo. 3, c. 57; Copyright, vol. iii. p. 251.

ENTAIL. *See* Tail, Tenant in.

ENTRY. *See post*, Estate, p. 270, n.

I. Of Legal Proceedings.[1]

II. On Land.[2]

III. For Breach of a Condition. *See* Conditions, vol. iii. p. 164.

IV. Assignment of Right of.[3]

V. In Burglary. *See* Burglary, vol. iii. p. 2.

ENTRY, Writ of. Abolished by 3 & 4 Wm. 4, c. 27, s. 37.

EPISCOPAL and Capitular Estates.[4]

EQUITABLE Pleas and Replication.[5]

I. Equitable Pleas, p. 243.

(A) *The Defendant may plead Matter on Equitable Grounds which would entitle him to Relief in Equity against the Judgment*, p. 243.

(B) *And such Matter may be set up by way of* Auditâ Querelâ, p. 245.

II. Equitable Replications, p. 245.

(A) *The Plaintiff may reply Facts which would avoid the Plea on Equitable Grounds*, p. 245.

III. Striking out Equitable Pleadings, p. 246.

(A) *The Court or a Judge may order Equitable Pleadings to be struck out, if it appear that Court is incompetent to do Justice*, p. 246.

[1] The putting a proceeding on record in proper technical language and order. A judgment record is composed of entries of the various proceedings in the action, actual or formal, in a certain order.

[2] The taking possession of lands or tenements, by entering into, or setting foot upon the same — an extra-judicial and summary remedy, used by the legal owner when another person who has no right has previously taken possession of lands or tenements. 3 Bl. Com. 5, 174; 1 Steph. Com. 469, 470. It must be peaceable and without force. 3 3 Bl. Com. *ubi supra*.

Rights of entry are of two kinds: — 1st. The right of immediate entry incident to a present vested interest, where the actual seisin or possession has never been acquired, as in the case of an heir-at-law before entry, if the land is not out on lease for years; 2d. The right of immediate entry which is incident to a vested interest, where the actual seisin or possession has been lost, but not the right of possession.

[3] Stat. 32 Hen. 8, c. 9, prohibits the sale of any right or title to hereditaments, unless the seller or his ancestor have been in possession, or of the rents and profits thereof, for one year next before the sale. And the rule of the common law is, that no possibility, right, title, or thing in action, entry, or re-entry, can be granted to third persons, except in the case of the Crown. But now, by 8 & 9 Vic. c. 106, s. 6, it is enacted, that "after the 1st day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, may be disposed of by deed, and that every such disposition by a married woman shall be made conformably to the provisions relative to dispositions by married women." This section does not relate to a right of entry for a condition broken. Shelf. R. P. Acts, 597.

[4] *See* 24 & 25 Vic. c. 131, which continues the 14 & 15 Vic. c. 104, as amended by 17 & 18 Vic. c. 116, and 23 & 24 Vic. c. 124, for the management and improvement of episcopal and capitular estates in England.

[5] The equitable jurisdiction of common-law courts was further extended by the

I. Equitable Pleas.

(A) *The Defendant may plead Matter on Equitable Grounds which would afford a Title for Relief against the Judgment in Equity.*

17 & 18 Vic. c. 125, s. 83, enacts, "that it shall be lawful for the defendant or plaintiff in replevin, in any cause in any of the superior courts in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and the said courts are hereby empowered to receive such defence by way of plea, provided that such plea shall begin with the words, 'For defence on equitable grounds,' or words to the like effect."[1]

The defendant may plead on equitable grounds matter which would afford a title for relief against the judgment in equity.

Common-Law Procedure Act, 1860 (23 & 24 Vic. c. 126), by which the courts of common law are empowered to relieve against forfeitures for nonpayment of rent, or neglect to insure the premises, in an action of ejectment, a jurisdiction previously confined to courts of equity. *See ante*, Ejectment, p. 169.

[1] The construction placed upon the sections of the Common-Law Procedure Act, 1854, allowing equitable pleadings, limits their application to such cases only in which the matter set up by way of equitable defence makes a case upon which a court of equity would act, by decreeing a perpetual injunction: and it is not competent to a defendant in a suit at law to set up by way of answer matter which would in equity afford ground for a temporary or for conditional relief alone. "The very important question arises," said *Lord Campbell, C. J.*, in a case which occurred shortly after the passing of the act, "whether, where a defendant would only be entitled to relief against a judgment to the extent of a temporary or conditional injunction, he is entitled to set up his equitable grounds of relief by way of defence in a court of law. We are of opinion that as yet the legislature has authorised us to receive a plea disclosing equitable grounds of relief only where the facts would entitle the defendant to an absolute and perpetual injunction against the judgment. In this last case we should have no difficulty, for the plea is a simple bar to the action, and we should only have to pronounce the common-law judgment, 'That the plaintiff take nothing by his writ, and that the defendant go thereof without day.' But if the injunction is to be temporary or conditional in equity, at common law we have no such judgment; and we have no analogous judgment. We could not attempt to do justice between the parties without pronouncing instead of a common-law judgment an equitable decree. If upon such a plea we were to endeavour to give judgment in bar of the action, all legal liability would be gone, although the defendant confesses his liability to pay the sums which this action seeks to recover. It is said that the plaintiffs might afterwards have relief in equity, or might, perhaps, bring another action when they have transferred the policy to the defendant; but we think that it was intended to admit a plea on equitable grounds only where final justice may be done by the court of law in the pending suit. This could only be by pronouncing an equitable decree. But we have no warrant to pronounce such a decree. Where the ground for equitable relief is not a complete bar to any proceedings upon the judgment, and is not, if offered by plea, a complete bar to the action, we are not furnished with any means of doing justice between the parties. We cannot enter into equities and cross-equities; we should often be without means to determine what are the fit conditions on which the relief should be given: no power is conferred upon us to pronounce a conditional judgment; no process is provided by which we could enforce performance of the condition: there are no writs of execution against persons or goods adapted to such a judgment, and no one can conjecture what remedy it would give against the lands of the debtor. In short, we think, that a plea on equitable grounds is to prevail only where, followed by a common-law judgment, it will do complete and final justice between the parties." *Woodhouse v. Farebrother*, 5 E. & B. 277. See *Mines' Royal Society v. Magnay*, 10 Ex. 489. *Wood v. Copper-miners' Co.* 17 C. B. 592.

Where a defendant has an equitable defence he is not compelled to plead it, but may proceed in equity to restrain the plaintiff from prosecuting his action. *Kingsford v. Swinford*, 28 L. J. Ch. 413; 5 Jur. N. S. 261.

And a court of law will not allow a plea on equitable grounds where the defendant has filed a bill in equity for relief on the same ground. *Schlumberger v. Lister*, 29 L. J. Q. B. 157; 6 Jur. N. S. 729.

The following have been held to be available as equitable defences:—A plea to detinue for a lease that it was deposited to secure payment to the defendants of 150*l.* and interest by way of equitable mortgage, upon the terms of an agreement in writing, that the 150*l.* was still due, and that after the commencement of this action the defendant tendered and offered to deliver up the lease on payment of the 150*l.*, with costs of the action up to the time, which offer was refused. *Chilton v. Carrington*, 16 C. B. 206.

In trover for goods, an equitable defence was allowed, that the plaintiff was the owner of premises, and that the goods were the stock-in-trade thereon, which were purchased by the defendants; but, owing to a mistake of the broker in drawing up the

bought and sold notes, the goods in question were omitted; and that possession of the goods and premises had been delivered to the defendants, and the purchase completed. *Steele v. Haddock*, 10 Ex. 952.

In action on a covenant binding the defendant not to practise as a surgeon at S., the court allowed an equitable plea, that as between the plaintiff and defendant the part of S. in which the defendant practised had always been treated as being in S. M., and that it was not intended by the parties to restrain the defendant from practising in the part of S. in question, and that the covenant, as set forth in the declaration, was so framed by mistake. *Luce v. Izod*, 1 H. & N. 245.

To an action on a charter-party, a plea on equitable grounds that it was mutually agreed at the time of its execution that the defendants, who signed as agents, should not be personally liable, was held good, notwithstanding by the terms of the charter-party the defendants bound themselves. *Wake v. Harrop*, 30 L. J. Ex. 273; 7 Jur. N. S. 710; 9 W. R. 788.

Action on a covenant by a debtor to pay the premiums on a policy of insurance on the life of the debtor, which was assigned by the plaintiff as a security for his debt. *Plea*, bankruptcy and certificate of defendant. *New assignment*, that the action was for non-payment of a premium due after the certificate. *Plea* to the new assignment on equitable grounds, that the plaintiff proved part of the debt under the bankruptcy, and elected to take the benefit of the petition in respect of the whole debt. Demurrer and issue. On the trial the plaintiff proved the balance of the debt, but expressly reserved the sum secured on the policy. *Held*, that the election to take the benefit of the petition for the whole debt was not an inference of law from the proof of part, that the averment in the plea must be understood as of an inference in fact; therefore the plea was good, but not proved. *Elder v. Beaumont*, 8 E. & B. 353; 27 L. J. Q. B. 25.

When in an action on a written contract a defendant pleads matter which he is in equity precluded from setting up by a term of the contract not stated in the written instrument, a court of law may give equitable relief without the instrument being first reformed. *Wood v. Dwarris*, 11 Ex. 493.

The courts have refused to allow the following matters to be set up as equitable pleas:—Where the plea disclosed circumstances in which a court of equity would only restrain the action on terms and conditions, the plea amounting merely to a pending arbitration. *Wood v. Copper-miners' Co.* 17 C. B. 561. Where the action was on a bond for 4000*l.*, conditioned to indemnify the obligees against the defaults in observance by one C. of the covenants in an indenture referred to as the condition, whereby C. covenanted with the obligees of this bond to repay 2000*l.* lent him on mortgage of a policy of insurance, to keep the policy up, pay the premiums, and pay the interest on the 2000*l.* Breaches of this condition were assigned, inasmuch as C. had not paid interest, and had not paid premiums, and defendant had not indemnified. It was held, that a plea by way of equitable defence, that the defendant was only surety for C., and that he had offered, and was still ready to pay, all that was in equity due to the obligees on receiving an assignment of the securities, was a bad plea. *Woodhouse v. Farebrother*, 5 E. & B. 277.

In an action for the non-performance of an alleged agreement to load a ship for a particular voyage, with a guaranteed freight of not less than 5500*l.*, the court refused to allow an equitable plea that the real contract was, that the ship should earn freight at such a rate per ton that, if filled, she would obtain 5500*l.*, and that by mistake of the person who reduced the contract into writing in the Spanish language, which he imperfectly understood, it was described as an absolute guarantee that the ship should have 5500*l.*; such a plea merely disclosing ground for a court of equity reforming the contract. *Perez v. Oleager*, 11 Ex. 506. *See* also *Burgoyne v. Cottrell*, 24 L. J. Q. B. 28.

In an action of covenant for rent, the court refused to allow an equitable plea that the defendant agreed with the plaintiff that the defendant's tenants should attorn to the plaintiff, and that the defendant should pay a sum of money in satisfaction of the covenants, and the lease should be cancelled, and that the defendant had paid the sum accordingly, and done everything on his part, but the plaintiff had refused to perform his agreement. *Mines' Royal Society v. Magnay*, 10 Ex. 489. *See* also *Teed v. Johnson*, 25 L. J. Ex. 110.

In an action by a wife's trustees against a banker for dividends, which the latter had paid over to a third party pursuant to the plaintiff's power of attorney, it was held that the defendant could not plead an equitable plea that the wife had obtained prepayment of her dividends by means of the power of attorney, which she had revoked before the defendant had received the dividends. *Clarke v. Laurie*, 1 H. & N. 452; 26 L. J. Ex. 36.

The court, on allowing an equitable plea, has given the plaintiff the option of having the issue raised thereby tried by the court, where the nature of the question was such that the court was a more satisfactory tribunal. *Luce v. Izod*, 1 H. & N. 245.

On the ground that the plea did not show matter which would entitle the defendant to unconditional relief in equity, the court refused to allow a plea to an action on a bill of exchange against the acceptor; that the bill was a renewal of a former bill, which had been accepted on a distinct understanding that it was to be renewed from time to time until the defendant should be of ability to meet it, he paying in the meantime interest at 10 per cent; that the defendant had always performed his part of the agreement, but that the plaintiff had refused to

(B) *And such Matter may be set up by way of* Auditâ Querelâ.

By sect. 84, "any such matter which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *auditâ querelâ*." And such matter may be set up by way of *auditâ querelâ*.

II. Equitable Replications.

(A) *The Plaintiff may reply Facts which would avoid the Plea on Equitable Grounds.*

By 17 & 18 Vic. c. 125, s. 85, "the plaintiff may reply in answer to any plea of the defendant facts which avoid such plea on equitable grounds; provided that such replication shall begin with the words 'For replication on equitable grounds,' or words to the like effect." The plaintiff may reply facts which avoid the plea on equitable grounds.[1]

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renew the bill upon application for that purpose, although he well knew that the defendant was not of ability to pay it. *Flight v. Gray*, 3 C. B. (N. S.) 320; 27 L. J. C. P. 13.

To an action for non-delivery of 100 chests of tea, ex the ship S., and sold by the defendant to the plaintiff at a fixed price, the defendant pleaded on equitable grounds that the tea was bought and sold upon a sample which the defendant believed to be a sample ex the ship, and that by the contract he agreed that the tea in the 100 chests should be equal to the sample; that the sample was not a sample at all of the chests, but was a sample of a totally different tea; and that he afterwards discovered that there had been a mistake about the sample, and forthwith, and before the plaintiff had in any respect altered his position on account of the contract having been made, gave notice of such mistake to the plaintiff, and that the defendant would, on account of the mistake, treat the contract as void; and that the contract was entered into solely through the mistaken belief of both parties that the sample was a sample of the 100 chests, and would not have been entered into but for the mistake. The court held the plea bad, on the ground that it failed to show that a court of equity would have granted a simple relief in favour of the defendant, and against their liability to deliver the tea ex the ship. *Scott v. Littledale*, 8 E. & B. 815; 27 L. J. Q. B. 201.

It seems that it is no answer, even by way of equitable defence, to an action for compensation in damages, that a court of equity has given judgment against the plaintiff on a bill filed by him against the defendant and a third party for relief upon the same matters; for it may be that the bill may have been dismissed on the ground that the remedy of the plaintiff was at law. *Collins v. Cave*, 27 L. J. Ex. 146; 4 Jur. N. S. 31.

It was held to be no plea on equitable grounds to an action by lessor against assignee of a lease for not repairing and yielding up the premises in repair, that while the defendant was assignee he demised the premises to the plaintiff for a term short of thirty days of his own, the plaintiff covenanting to repair and yield up in repair, the defendant finding timber and iron work, and alleging that the want of repair complained of was caused by the plaintiff's default, and was a breach of his covenant, and that the defendant was ready to find the timber and iron work, and was entitled to recover from the plaintiff the amount of damage he sought to recover. *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J. Ex. 194.

[1] In an action on a policy of assurance, the defendants pleaded that the policy was made on the terms of a previous proposal being true, and that a statement therein was untrue. An equitable replication was held good, that before the policy was made the defendants issued a prospectus stating that all policies effected by them should be indisputable, except in cases of fraud, on the faith of which representation the defendant effected the policy. *Wood v. Dwarris*, 11 Ex. 493.

The following replication was held good: The action was for freight due under a charter-party. The defendant pleaded payment, and on equitable grounds a plea setting up a release after cause of action accrued. Replication on equitable grounds, that before action accrued, and before release, or discharge, or payment, all the right, title, and interest of the plaintiff in the ship and in the charter-party were assigned to S., and became and were vested in him, of which the defendant had notice before the release, or discharge, or payment; that the plaintiff released and discharged the defendant, and made the payment without the authority, knowledge, or consent of S.; that the release and discharge were given by the plaintiff to the defendant, and obtained by the defendant from the plaintiff, and the payment made fraudulently and with the intent to defraud S., and prevent him from recovering in respect of the causes of action; and that the action was brought by S. in the name of the plaintiff on behalf of S.; that the plaintiff had no interest in the action, and that it had been commenced and carried on for the sole use and benefit and at the sole expense and cost of S. *De Pothomer v. De Mattos*, E. B. & E. 461.

In an action of account upon the stat. 4 Anne, c. 16, s. 27, by one tenant in common against another for not accounting for rents received, the defendant pleaded that, before the receipt of the rents, the plaintiff and

III. Striking out Equitable Pleadings.[1]

(A) *The Court or a Judge may order Equitable Pleadings to be struck out, if it appear that the Court is incompetent to do Justice.*

The court or a judge may order equitable pleadings to be struck out if it appear that the court is incompetent to do justice.

17 & 18 Vic. c. 125, s. 86, enacts, "provided always, that in case it shall appear to the court, or any judge thereof, that any such equitable plea or equitable replication cannot be dealt with by a court of law so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out, on such terms as to costs and otherwise as to such court or judge may seem reasonable."

See *Scott v. Littledale*, 8 E. & B. 815; 29 L. J. Q. B. 201.

ERROR.

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(A) *In what cases Error lies*, p. 248.

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defendant by indenture demised the premises to D. for a term of 500 years, which term, after divers assignments, vested in the defendants. An equitable replication, that the said indenture was a mortgage to secure a sum of money, and that the defendant had received more than sufficient to pay the mortgage debt, was struck out, because the court could not order a re-conveyance. *Gorely v. Gorely*, 1 H. & N. 144.

In an action against an executor for goods sold, &c. to the testator, the defendant pleaded the Statute of Limitations: an equitable replication that the testator bequeathed his property in trust to pay his creditors was held bad. *Gulliver v. Gulliver*, 1 H. & N. 174.

In an action against an executor to a plea of set-off of money due to the defendant's testator for use and acceptation, an equitable replication that the testator by his will directed all sums of money and effects already advanced to plaintiff (of which the sum set off was one) should be deemed an advancement, was held bad. *Perez v. Oleager*, 11 Ex. 556; 25 L. J. Ex. 65.

Where a husband sued for money had and received, and the defendant pleaded on equitable grounds that the money was assigned by the wife to him as trustee for her separate use, an equitable replication setting forth a prior assignment to the plaintiff, and that the defendant could not object that the plaintiff's title was a mere equitable title, was held to be good. *Sloper v. Cotterill*, 26 L. J. Q. B. 7.

Declaration for obstructing the plaintiff's lights and depriving him of support to his buildings. *Plea*, on equitable grounds, that the grievances complained of were occasioned by the defendant pulling down a house and erecting another in its place, which he did with the acquiescence and consent of the plaintiff; that he incurred expense on the faith of such acquiescence and consent. *Replication* on equitable grounds that the plaintiff acquiesced and consented on the faith of false representation of the defendant—namely, that the grievances complained of would not result from his works. Both plea and replication were held good. *Davis v. Marshall*, 7 Jur. N. S. 1247; 9 W. R. 866.

It is not a good replication on equitable grounds to a plea of the Statute of Limitations pleaded to an action for breaking the plaintiff's close, taking and converting his coal, that the cause of action was fraudulently concealed from the plaintiff until within six years before the action; and it seems that such a replication would be bad in any case. *Hunter v. Gibbons*, 1 H. & N. 459; 26 L. J. Ex. 1.

[1] In the following cases the court has ordered equitable pleas to be struck out:—Where to an action by a drawer against an acceptor of a bill of exchange the plea on equitable grounds was that the bill was of a later date than it purported, and was so represented by the plaintiff, and that the action was commenced before the bill would have been due if properly dated. *Drain v. Harvey*, 17 C. B. 257.

Where an action was brought on a joint and several promissory note of the defendant and one S., payable to the plaintiff at six months, and the defendant pleaded on equitable grounds that he made the note without consideration and as surety for S. to secure a debt due to the plaintiffs, who took the note from him as such surety, and that the plaintiffs afterwards, without the defendant's consent, and for a good consideration, gave time to S., and had funds to his credit, which they did not apply in payment; this was held not to amount to any equitable defence. *Strony v. Foster*, 7 C.B.201.

The defendant, after pleading an equitable defence which has been demurred to, may file a bill in equity for an injunction. *Phelps v. Protheroe*, 25 L. J. Ch. 105.

After the allowance of an equitable plea by a judge at chambers, the plaintiff has a right to apply to the court for a rule to strike it out; and this is not by way of appeal from the judge, but is in the nature of an original application. *Wood v. Copperminers' Co.* 26 L. T. 91.

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I. In what cases Error lies, by and against Whom, and in what Court it may be brought.

(A) *In what cases Error lies.*[1]

(B) *By and against whom Error may be brought.*[2]

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[1] Error lies where a person is aggrieved by an error in the foundation preceding judgment or execution of a suit, provided the error be in substance, and be not aided at common law, or by some of the statutes of feofails, and the judgment be final and not interlocutory, and be given in a court of record acting according to the course of the common law. *Groenvelt v. Burwell*, 1 Salk. 263. *Samuel v. Judin*, 6 East, 333; Co. Litt. 289, c. In no case, however, can error be brought for an error in a judgment with respect to costs, but the error, if any in that respect, may be amended by the court in which such judgment may have been given on the application of either party. Reg. Gen. H. T. 1853, r. 27. Upon an award of a trial *de novo* by any one of the superior courts, or by the courts of error, *upon matter appearing upon the record*, error may at once be brought. 17 & 18 Vic. c. 125, s. 43. "Error may be brought upon a judgment upon a special case, in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary," and the proceedings for bringing a special case before the Court of Error, are, as nearly as may be, the same as in the case of a special verdict. 17 & 18 Vic. c. 125, s. 32. See *Hughes v. Lumley*, 3 E. & B. 358. And error may be brought in like manner as in other actions upon any judgment in ejectment, after a special verdict found by a jury, or a bill of exceptions, or by consent after a special case stated. 15 & 16 Vic. c. 76, s. 208.

Error does not lie on a judgment of nonsuit, unless it be for some error subsequent to the nonsuit. *Corsar v. Reed*, 17 Q. B. 540. *Evans v. Swete*, 2 Bing. 326: but see *Strother v. Hutchinson*, 4 Bing. N. C. 83. And where the court acts in a summary manner, or in a new course different from the common law, error will not lie unless the statute say that it shall. 2 Ld. Raym. 213, 252, 454. Thus in the case of an interpleader issue (*King v. Simmonds*, 7 Q. B. (N. S.) 289. *Snook v. Mattock*, 5 Ad. & E. 239), or a feigned issue under the provisions of the Tithe Commutation Act (6 & 7 Wm. 4, c. 71, s. 46), *Thorpe v. Plowden*, 2 Ex. 387, error will not lie. And although interlocutory rules for the payment of money and costs have, by force of the 1 & 2 Vic. c. 110, s. 18, the effect of judgments, error will not lie upon them. *Newton v. Boodle*, 6 C. B. 532.

It appears that error will not lie on a judgment in a criminal information in the Exchequer for penalties for an offence against the revenue laws. *See per Pollock, C. B., Attorney-General v. Otto Radloff*, 23 L. J. Ex. 247. But it lies from the decision of the court on a petition of right. *Baron de Bode v. The Queen*, 13 Q. B. 36; 23 & 24 Vic. c. 34, s. 11.

In *Apothecaries' Co. v. Harrison*, 4 Per. & D. 292, the defendant, in an action for penalties, consented that a verdict should be taken for one penalty; it was held that he could not afterwards bring error. And where the parties agreed to abide by the decision of the court on a demurrer, it was held that they had precluded themselves from bringing error. *Brown v. Lord Granville*, 2 Dowl. 796; 4 M. & Scott, 333.

[2] Error may be brought by a party to the record, or by his heirs, executors, or ad-

(C) *Within what time Error must be brought.*

Error must be brought within six years after judgment;[1]

15 & 16 Vic. c. 76, s. 146, enacts, "no judgment in any cause shall be reversed or avoided for any error or defect therein, unless error be commenced, or brought and prosecuted with effect, within six years after such judgment signed or entered of record."

Unless the person entitled to bring error is under disability.

By sect. 147, "if any person that is or shall be entitled to bring error as aforesaid is, or shall be, at the time of such title accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person shall be at liberty to bring error as aforesaid, so as such person commences, or brings and prosecutes the same with effect, within six years after coming to or being of full age, discovert, of sound memory, or return from beyond the seas; and if the opposite party shall, at the time of the judgment signed or entered of record, be beyond the seas, then error may be brought, provided the proceedings be commenced and prosecuted with effect within six years after the return of such party from beyond the seas."

(D) *In what Court Error must be brought.*[2]

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ministrators, or by one of several parties, or by a person injured by the judgment. Roll. Abr. 747; 1 Leon. 261. *Randel's case*, 2 Mod. 308. Thus, if lessee for life loses his land by an erroneous judgment, the immediate remainderman or reversioner may bring error. 9 R. 2, c. 3. *Anon.* 5 Mod. 397. And if tenant in tail lose his estate, and die without issue, error may be brought by the immediate remainderman or reversioner. *Sheepshanks v. Lucas*, 1 Burr. 410. *Lloyd v. Vaughan*, 2 Stra. 1257. Administrator *de bonis non* may bring error on a judgment obtained against the original administrator, because he is in his representative character injured by such judgment. *Curlewis v. Earl of Mornington*, 22 Jur. 535. But where there is one judgment against the principal and another against the bail, the one cannot maintain error on the judgment against the other (*Bushell v. Yaller*, Cro. Car. 408); neither can they join in error. *Lancaster v. Keyleigh*, id. 300. A plaintiff may bring error to reverse a judgment in his favour if he is dissatisfied with it. *Johnson v. Jebb*, 3 Burr. 1772.

All the parties to the judgment must join. *Cowper v. Ginger*, 8 Mod. 317. *Miles v. Ginger*, id. 316. *Ratcliff v. Burton*, Hard. 135. *Turner v. Brewer*, 11 Mod. 321. It is a general rule, that no person can bring a writ of error who was not a party to the record. *See* Bac. Abr. 195.

If an action be brought against a *feme covert*, as *feme sole*, and she plead to issue as a *feme sole*, and judgment be given against her, upon which she is taken in execution, she and her husband must join in bringing a writ of error; for otherwise the husband might be prejudiced by losing the society of his wife and her care in his domestic concerns, and he hath no other means to help himself. *See* 1 Roll. Abr. 748. So, if an action be brought against a *feme covert* and others, they may all join with the husband in bringing error (id.), provided they are all living and aggrieved by the judgment; for otherwise this inconvenience would ensue, that every defendant might bring error by himself, and by that means delay the plaintiff from his execution for a long time (*see* Carth. 8); but where the judgment is against several, and one or more die, error may be sustained by the survivors. *See* Barnes, 202.

Error can only be brought by a party or privy to the judgment, or his heirs, executors, or administrators. Bro. Abr. Error, 9.

[1] Error may be brought even before judgment is signed. *Baker v. Bulstrode*, 1 Vent. 255. *Emanuel v. Martin*, 2 M. & S. 334.

[2] If the error be in fact, it lies in the same court (*Castledine v. Mundy*, 4 B. & Adol. 97); if in the judgment itself, and not in the process, it must be brought in another and superior court. 1 Roll. Abr. 749. From a judgment of the Queen's Bench, Common Pleas, or Exchequer, error lies to the Exchequer Chamber (a court which, according to its constitution, consists of the judges of the two superior courts, other than that in which the original judgment was given), and thence to the House of Lords. 11 Geo. 4, and 1 Wm. 4, c. 70, s. 8.

The Court of Queen's Bench is the court of error from the Court of Common Pleas at Lancaster and Court of Pleas at Durham. Either party may allege error in the judgment in the Court of Queen's Bench, and proceed thereon as in the case of errors alleged in actions depending in that court. 15 & 16 Vic. c. 76, s. 233.

In the case of other inferior courts of record, with a few exceptions, error lies primarily to the Court of Queen's Bench. 1 Roll. Abr. 745.

By sect. 228 of the 15 & 16 Vic. c. 76, it is enacted, that an order in council may from time to time direct that all or any of its provisions, or of the rules made in pursuance thereof, shall apply to all or any court or courts of record in England or Wales. The practice in such inferior courts to which the act has not been extended is

II. Proceedings where the Error is in Law.

(A) *Of the Memorandum of Error, and Service of Copy of Master's Note, and Statement of Grounds of Error.*

The party alleging error may deliver a memorandum to that effect to one of the masters, who gives a note of the receipt, a copy of which, and a statement of the grounds of error, must be served on the opposite party.[1]

By 15 & 16 Vic. c. 76, s. 149, "either party alleging error in law may deliver to one of the masters of the court a memorandum in writing, in the form contained in the Schedule (A) to this act annexed, marked No. 10, or to the like effect, entitled in the court and cause, and signed by the party or his attorney, alleging that there is error in law in the record and proceedings; whereupon the master shall file such memorandum, and deliver to the party lodging the same a note of the receipt thereof; and a copy of such note, together with a statement of the grounds of error intended to be argued, may be served on the opposite party or his attorney."

(*a*) *Form of Memorandum.*[2]

(B) *Where Error is alleged by one of several Parties.*

If error is brought by one of several persons, the memorandum, &c. must state his name.

By sect. 154, "in case error be brought on a judgment given against several persons, and one or some only shall proceed in error, the memorandum alleging error, and the note of the receipt of such memorandum, shall state the names of the persons by whom the proceedings are taken; and in case the other persons, against whom judgment has been given, decline to join in the proceedings in error, the same may be continued, and the suggestion last aforesaid entered, stating the persons by whom the proceedings are brought, without any summons and severance, or if such other persons elect to join, then the suggestion shall state them to be, and they shall be deemed as plaintiffs in error, although not mentioned as such in the previous proceedings."

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regulated by the 19 Geo. 3, c. 70, s. 5, and 7 & 8 Geo. 4, c. 71, s. 6, which provide that no execution shall be stayed or delayed upon or by proceedings in error, or supersedeas thereon for the reversing of any judgment given, or to be given, in any inferior court of record where the damages are under 20*l.*, unless security be given by two sufficient sureties, in double the amount of the judgment, to prosecute the proceedings in error with effect, &c. After the transmission of the record, the proceedings are the same as in the case of error on a judgment in one of the superior courts. Execution is issued out of the Court of Queen's Bench as if the action had been originally commenced there. *Spencer v. Haggiadur*, 5 D. & C. 66.

From the judgment of the Queen's Bench error lies to the Exchequer Chamber, and ultimately to the House of Lords. *Nesbit v. Rishton*, 9 Ad. & E. 426.

[1] By sect. 148, "a writ of error shall not be necessary or used in any cause, and the proceeding to error shall be a step in the cause, and shall be taken in manner hereinafter mentioned; but nothing in this act contained shall invalidate any proceedings already taken, or to be taken, by reason of any writ of error issued before the commencement of this act."

The cases under the former practice with respect to the assignment of error afford, by analogy, a guide as to the particularity with which the grounds of error must be stated. It was held, that if the errors appeared on the face of the record they may be assigned generally; *i. e.* that the declaration was insufficient in law to maintain the action, and that the judgment in the original action was given for the wrong party. *Far v. Denn*, 1 Burr. 363; 2 Saund. 110; 9 Roll. Abr. 761.

Nothing could be assigned which contradicted the record (*Helbut v. Held*, 1 Stra. 685. *Bradburn v. Taylor*, 1 Wils. 85), or which might have been pleaded by the plaintiff in error in abatement (*Coan v. Bowles*, Carth. 124. *De Tastet v. Racket*, 3 B. & B. 65), or in bar of the action (21 Edw. 4, c. 38). Several errors in law might be assigned, but no error in fact could be assigned with them. *Fishmongers' Co. v. Dimsdale*, 1 C. B. 896; F. N. B. 20, e. *Burdett v. Wheatley*, 2 Ld. Raym. 883. *Jeffrey v. Wood*, 1 Stra. 439.

[2] The following is the form of the memorandum: —

In the Queen's Bench.

The day of in the year of our Lord [*the day of lodging note of error.*]

A. B. and C. D.

The plaintiff [*or* the defendant] says that there is error in law in the record and proceedings in this action; and the defendant [*or* plaintiff] says that there is no error therein.

(Signed) A. B. plaintiff,
[*or* C. D. defendant.]
[*or* E. F. attorney for plaintiff *or* defendant.]

(C) *Supersedeas of Execution.*

Proceedings in error operate as a supersedeas of execution from the service of the master's note.

By sect. 150, "proceedings in error in law shall be deemed a supersedeas of execution from the time of the service of a copy of such note, together with the statement of the grounds of error intended to be argued, until default in putting bail, or an affirmance of the judgment, or discontinuance of the proceedings in error, or until the proceedings in error shall be otherwise disposed of without a reversal of the judgment: Provided always, that if the ground of error shall appear to be frivolous, the court or a judge, upon summons, may order execution to issue."[1]

(D) *Of the Suggestion of Error alleged and denied.*

Error is alleged by entering a suggestion of error on the record.

Sect. 152 enacts, "the assignment of and joinder in error in law shall not be necessary or used, and instead thereof, a suggestion to the effect that error is alleged by the one party and denied by the other, may be entered on the judgment-roll, in the form contained in the Schedule (A) to this act annexed, marked No. 11, or to the like effect: Provided that, in case the defendant in error intends to rely upon the proceeding in error being barred by lapse of time, or by release of error, or other like matter of fact, he may give four days' written notice to the plaintiff in error to assign as heretofore, instead of entering the suggestion; and he shall, within eight days, plead thereto the bar, by lapse of time, or release of error, or other like matter of fact; and thereupon such proceedings may be as heretofore."

(*a*) *Form of Suggestion of Error.*[2]

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[1] The power of ordering execution to issue, notwithstanding the allegation of error, was exercised under the old practice, where the grounds of error specified in the notice of allowance were frivolous; and probably the same practice will now be pursued where the statement of the grounds of error served on the opposite party is frivolous; but to induce the court to order execution to issue, notwithstanding the assignment of error, the grounds of error alleged must be so frivolous as clearly to be incapable of being sustained on argument. *Hall v. Conder*, 2 C. B. (N. S.) 49; 26 L. J. C. P. 251. And if there is any statement, however frivolous or insufficient, it cannot be treated as a nullity, and execution issued. Application may, however, be made to the court, or a judge, for a rule *nisi*, or a summons, to show cause why execution should not issue. 1 Burr. 340; Bagley's Prac. 344.

A statement of the grounds of error in an action of slander, that the declaration was bad, the words not being actionable without special damage, and that the inuendoes were bad in law, was considered a sufficient statement of the grounds of error. *Robinson v. Day*, 2 Dowl. 501.

Where the ground stated was upon a point which had been argued and decided on a rule granted to arrest the judgment, the Court of Exchequer refused to allow execution to issue as upon a frivolous ground of error. *Gardner v. Williams*, 3 Dowl. 796. So where the question involved a point of practice, and individual judges had acted differently with respect to it. *Newton v. Conyngham*, 5 D. & L. 762; 6 C. B. 749.

Formerly, if it were made to appear that error was brought for delay, the court allowed execution to issue (*Bygrove v. Bolland*, 2 Chit. R. 193. *Miller v. Cousins*, 2 B. & P. 329); but since the enactment in the text, it is doubtful whether this would afford any ground.

If execution should be issued after the proceedings have operated as a supersedeas, without leave of the court or a judge, the court will set it aside. *Somerville v. White*, 5 East, 145.

As to bail in error, *see post*, p. 261.

[2] *Form of Suggestion prescribed by the Statute.*

The day of in the year of our Lord [*the day of making the entry on the roll.*]

The plaintiff [*or* defendant] says that there is error in the above record and proceedings, and the defendant [*or* plaintiff] says that there is no error therein.

Where error has been brought by one of several persons, if the other persons against whom judgment has been given decline to join in the proceedings in error, the same may be continued, and the suggestion that error is alleged by the one part and denied by the other, entered, stating the parties by whom the proceedings are brought, without any summons and severance; or if such other persons elect to join, then the suggestions shall state them to be, and they shall be deemed as plaintiffs in error, although not mentioned as such in the previous proceedings. 15 & 16 Vic. c. 76, s. 154; *see ante*, p. 250.

(E) *Making up Roll.*

The plaintiff in error must make up the roll and enter the suggestion within ten days after service of the memorandum alleging error.

By sect. 153, "the roll shall be made up, and the suggestion last aforesaid entered by the plaintiff in error, within ten days after the service of the note of the receipt of the memorandum alleging error, within such other time as the court or a judge may order; and in default thereof (as of assignment of error in cases where an assignment is required), the defendant in error, his executors or administrators, shall be at liberty to sign judgment of *non pros.*"

(F) *Setting down Case for Argument.*

Either party may set down the case for argument, giving notice to the opposite party.[1]

By Reg. Gen. (Pr.) H. T. 1853, r. 67, "after the suggestion of error in law, alleged and denied as prescribed by the Common Law Procedure Act, 1852, is entered, either party may set down the case for argument, and forthwith give notice in writing to the opposite party, and proceed to the argument thereof as on a demurrer, without any rule or motion for a *concilium.*"

(*a*) *Delivery of Copies of Judgment-Roll to Judges.*

The parties must each deliver copies of the roll to the judges of the Exchequer Chamber.[2]

Reg. Gen. H. T. 1853, r. 68. "Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment-roll of the court below to the judges of the Queen's Bench on error from the Common Pleas or Exchequer, and to the judges of the Common Pleas on error from the Queen's Bench; and the defendant in error shall deliver copies thereof to the other judges of the Court of Exchequer Chamber before whom the case is to be heard; and in default by either party, the other party may, on the following day, deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the master a sufficient sum to pay for such copies."

(*b*) *Bringing Judgment-Roll into Court of Error.*

The judgment-roll is brought into the Court of Error by a master of the court in which the judgment was given.[3]

15 & 16 Vic. c. 76, s. 155. "Upon such suggestion of error alleged and denied being entered, the cause may be set down for argument in the Court of Error in the manner heretofore used; and the judgment-roll shall, without any writ or return, be brought by the master into the Court of Error in the Exchequer Chamber before the justices, or justices and barons, as the case may be, of the other two superior courts of common law, on the day of its sitting, at such time as the judges shall appoint, either in term or in vacation; or if the proceedings in error be before the High Court of Parliament, then before the High Court of Parliament before or at the time of its sitting; and the Court of Error shall and may thereupon review the proceedings, and give judgment as they shall be advised thereon; and such proceedings and judgment, as altered or affirmed, shall be entered on the original record; and such further proceedings

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[1] The case must be entered for argument with one of the masters of the court in which the original judgment was given. It may be entered four clear days before the first day appointed for hearing arguments in the Exchequer Chamber, whether in term or vacation. *South-Eastern Railway Co. v. South-Western Railway Co.* 8 Ex. 367.

Regularly the plaintiff in error should set down the case for argument, but if he do not the defendant may. Care should be taken that it be set down in time for copies of the roll to be delivered to the judges.

[2] Where a day was appointed for hearing errors, on the 24th May for the 28th inst., it was held that the plaintiff in error could not object that he had delivered books for the defendant, who had not paid for them, as there were not four clear days before the day appointed for argument. *Kernot v. Pittis*, 17 Jur. 932.

[3] The judgment-roll is left in the Court of Error, and remains there until judgment is either reversed or affirmed: it is then returned to the court in which the original judgment was given. *Lane v. Hooper*, 3 E. & B. 731; 23 L. J. Q. B. 272.

Where the error is from the Court of Common Pleas at Lancaster, or Court of Pleas at Durham, a transcript of the record of the judgment or proceedings in those courts on which error is alleged is transmitted to the Court of Queen's Bench. 15 & 16 Vic. c. 76, s. 233.

as may be necessary thereon shall be awarded by the court in which the original judgment was given."

(G) *The Argument.*[1]

(H) *The Judgment.*

By sect. 157, "courts of error shall, in all cases, have power to give such judgment and award such process as the court from which error is brought ought to have done, without regard to the party alleging error."

The Court of Error may give the judgment which ought to have been given in the court below.[2]

(*a*) *Entry of Judgment.*

By sect. 155, "such proceedings and judgment, as altered or affirmed, shall be entered on the original record, and such further proceedings as may be necessary thereon shall be awarded by the court in which the original judgment was given."

The judgment is entered on the record.[3]

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[1] On the argument, the counsel for the plaintiff in error is first heard, then the counsel for the defendant in error, and the counsel for the plaintiff in error replies. Only one counsel is heard on each side. *Doe v. Burdett*, 9 Ad. & E. 939, n. a. *Watts v. Shuttleworth*, 7 Jur. N. S. 945; 10 W. R. 132.

Where there was a mistake as to the entry of the verdict, the court said they should adjourn the argument unless the party consented to argue as if the records had been amended. *Hawkey v. Borwick*, 1 Y. & J. 377. The judges deliver their opinions *seriatim*, and the judgment is reversed or affirmed according to the opinion of the majority; but if the court be equally divided, the judgment is affirmed. *Thornbey v. Fleetwood*, 1 Stra. 381. If there be no argument, counsel must move for the affirmance or reversal. Counsel may take advantage of any error appearing on the face of the record. *Weedon v. Woodbridge*, 13 Jur. 627. *Faor v. Dann*, 13 Burr. 363.

[2] The court of error reviews the proceedings, and gives such judgment as they are advised thereon. 15 & 16 Vic. c. 76, s. 155. They may award a repleader, or direct a trial *de novo*. Reg. Gen. (Pl.) H. T. 1853, r. 24. They have probably power under the 157th sect. of the 15 & 16 Vic. c. 76, to direct a writ of inquiry, although previously to this enactment they had not authority to do so. *Phillips v. Jones*, 15 Q. B. 859. They may quash the proceedings in error. 15 & 16 Vic. c. 76, s. 156. The 157th section, giving the court power to give such judgment as the court below ought to have given without regard to the party alleging error, has abolished a distinction which existed under the old practice between cases where the error was brought by the defendant below, and cases where it was brought by the plaintiff below. In the former case, if the judgment was in favour of the plaintiff in error, the judgment was simply *quod judicium reversatur;* in the latter, the Court of Error gave such judgment as the court below ought to have given. *Grey v. Friar*, 15 Q. B. 912. *Phillips v. Jones*, id. 859. *Gregory v. Duke of Brunswick*, 3 C. B. 481. But, in either case, the judgment which ought to have been given below may now be awarded by the Court of Error.

Further, there was a class of cases founded upon the doctrine that a judgment, being an entire thing, could not be affirmed in part, or reversed in part, and, therefore, if one part was bad, and another good, unless the parts were distinct and independent, the Court of Error could only reverse the judgment (*Parker v. Harris*, Carth. 234. *Cutting v. Williams*, 1 Salk. 24. *Nesbitt v. Rishton*, 11 Ad. & E. 244); but the authority of those cases, together with the rule upon which they were founded, is now abolished by the same enactment of the 157th sect., and the Court of Error may now reverse a judgment in part, and affirm it as to the other part. *Kernot v. Pittis*, 33 L. J. Q. B. 33.

Where error is brought on a special case, the Court of Error either affirms the judgment or gives the same judgment which ought to have been given in the court in which it was originally decided; the court being required to draw any inferences of fact from the facts stated in such special case, which the court where it was originally decided ought to have done. 17 & 18 Vic. c. 125, s. 32.

The common judgment for the plaintiff in error is that the judgment be reversed; for the defendant, that it be affirmed.

[3] Where error has been brought in the Court of Queen's Bench from the Court of Common Pleas at Lancaster, or Pleas at Durham, the proceedings are brought into the Court of Error by transmission of a transcript of the record. The judgment of the Court of Queen's Bench thereon is certified by one of the masters of the Queen's Bench on the transcript, or by rule of court, as the court may direct; and thereupon such judgment must be entered on the original record in the respective courts of Common Pleas at Lancaster, and Pleas at Durham, and such further proceedings as may be necessary thereon shall be awarded by the said respective courts. 15 & 16 Vic. c. 76, s. 233.

(b) Interest, Allowance of.

Interest may be allowed for delay of execution.[1]

Reg. Gen. (Pl.) H. T. 1853, r. 26. "On error from one of the superior courts, such court shall have power to allow interest for such time as execution has been delayed by the proceeding in error, and for the delaying thereof, and the master, on taxing the costs, may compute such interest without any rule of court or order of a judge for that purpose."

(c) Mesne Profits, Damages, and Costs in Ejectment.

In ejectment on judgment of affirmance for claimant, a writ may issue to inquire of the mesne profits and damages which have accrued pending the proceedings in error.

Where error is brought upon a judgment in ejectment, and the judgment is affirmed, or proceedings in error discontinued, the court in which execution ought to be issued may, upon the application of the claimant, issue a writ to inquire if the mesne profits, as of the damage by any waste committed after the first judgment in ejectment, which writ may be tested on the day on which it shall issue, and be returnable immediately after the execution thereof; and upon the return thereof, judgment shall be given and execution awarded for such mesne profits and damages, and also for costs of suit. 15 & 16 Vic. c. 76, s. 208; *see post*, p. 262.

(d) Form of Judgment.[2]

(e) Costs of Taxation.

(1) *Costs.*

Where the judgment affirmed, Court of Error may adjudge costs to the defendant in error.[3]

17 & 18 Vic. c. 125, s. 43. "If the judgment be affirmed in error, it shall be lawful for the court of error to adjudge costs to the defendant in error."

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[1] By the 3 & 4 Wm. 4, c. 42, s. 30, interest is given to the defendant in error, where the judgment is in his favour, for such time as the execution has been delayed, where the suit of error is "upon any judgment whatsoever given in any court in any action personal."

[2] The following forms are prescribed by Reg. Gen. M. V. 1854, Schedule, where they are numbered respectively 19 & 20:—

Judgment of Affirmance by Court of Error in Exchequer Chamber on a Special Case.

[*Copy to the end of the judgment on the roll in the action, and then proceed thus:*] Afterwards on [*the day of lodging the note of error*] the defendant [*or* plaintiff] deliver to one of the masters of the court here a memorandum in writing, in the form required by and according to the statute in that case made and provided, alleging that there was error in law in the record and proceedings as aforesaid; and afterwards on [*the day of making the entry of the suggestion on the roll*] the defendant [*or* plaintiff] said that there was no error therein: And thereupon, afterwards, on [*the day of giving judgment in the Exchequer Chamber*] in the Court of our Exchequer Chamber of our lady the Queen, before the justices of the Common Bench of our said lady the Queen, and the barons of our Exchequer [*or if the error be on a judgment of Common Pleas, say*, "before the justices of our lady the Queen assigned to hold pleas in the court of our said lady the Queen, before the Queen herself, and the barons of her Exchequer;" *or if the error be on a judgment of the Exchequer, say*, "before the justices of our lady the Queen assigned to hold pleas in the court of our lady the Queen, before the Queen herself, and the justices of the Common Bench of our said lady the Queen"] come as well the plaintiff as the defendant, by their respective attornies aforesaid.* And it appears to the said Court of Error in the Exchequer Chamber that there is no error in the record and proceedings aforesaid, or in giving the judgment aforesaid: Therefore it is considered by the said Court of Error that the judgment aforesaid be in all things affirmed, and stand in full force and effect, the said causes above for error suggested in any wise notwithstanding: And it is further considered by the same court, that the plaintiff do recover against the defendant for his damages and costs which he has sustained and expended by reason of the delay of execution of the judgment aforesaid, on pretence of the prosecution of the said proceedings in error, and the plaintiff have execution thereof.

Judgment of Reversal in the like case.

[*The same as the preceding form to the asterisk, and then thus:*] And it appears to the said Court of Error that there is manifest error in the record and proceedings aforesaid, and in giving the judgment aforesaid:

Therefore it is considered by the said Court of Error that the judgment aforesaid, for the errors aforesaid, be revised, annulled, and altogether holden for naught; and that the said defendant be restored to all things which he has lost by occasion of the said judgment, &c.

[3] As to costs, where error is brought to reverse a judgment for the plaintiff, if the

(2) *Taxation of Costs.*[1]

By Reg. Gen. (Pr.) H. T. 1853, r. 69, "the costs of proceedings in error shall be taxed and allowed as costs in the cause." *See* same rule, Reg. Gen. (Plead.) H. T. 1853, r. 25.

(*f*) *Restitution.*[2]

III. Proceedings where the Error is in Fact, and where Matter of Fact is relied on as a Defence to Error in Law.

(A) *Error in Fact, what it is.*[3]

By 15 & 16 Vic. c. 76, s. 139, "the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict."

The death of a party after verdict, and before judgment, is no longer ground of error in fact.

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defendant bring it before execution had (*Newlands v. Holmes*, 4 Q. B. 858. *R. v. Inhabitants of Madley*, 2 Stra. 1198), and the judgment be in favour of the defendant in error, he shall, at the discretion of the court, recover his costs and damages for the delay. 3 Hen. 7, c. 10; 19 Hen. 7, c. 20. But if before bringing error he pay the debt and costs to the plaintiff in the original action, the latter is not entitled to his costs in error under this statute. *Sutherland v. Mills*, 5 Ex. 980. An avowant in replevin is not a plaintiff within the act. *Golding v. Dias*, 10 East, 2.

By 13 Car. 2, stat. 2, c. 2, s. 10, if a judgment given after verdict be affirmed in error, the defendant in error shall have double costs. But double costs in error are now abolished. Reg. Gen. (Pl.) H. T. 1853, r. 25.

Costs of settling a bill of exceptions are costs in error, and within the meaning of costs in the act. *Francis v. Harvey*, 5 Mee. & W. 272.

The 8 & 9 Wm. 3, c. 11, s. 2, entitles a defendant in error, who was the plaintiff below, to his costs upon affirmance of the judgment discontinuance or nonsuit. If the judgment below be reversed, each party pays his own costs in error; but the prevailing party has his costs in the original action. *Gildard v. Gladstone*, 12 East, 668. *Adams v. Meredew*, 3 Y. & J. 419. *Reg. v. Sheriff of Middlesex*, 5 Q. B. 365. This was the rule before the change of practice, and it still prevails. *Fisher v. Bridges*, 4 E. & B. 666; 24 L. J. Q. B. 165. *Marshall v. Jackson*, 24 id. 166, n. 3.

[1] The above rules do not alter the law with respect to the allowance of costs, which is restricted to cases in which the judgment is affirmed (*see supra*); and it means only that, "where the costs are allowable, they shall be so taxed. They are regulations as to the mode in which the amount of costs shall be ascertained where by law they may be claimed, not affecting the liability to costs." *Per Lord Campbell, C. J.*: *Fisher v. Bridges*, 4 E. & B. 666. *See* also *Marshall v. Jackson*, 4 id. 669, n. a.

Four days, exclusive after the judgment delivered, the costs may be taxed, interest when recoverable computed, and judgment signed, by one of the masters of the court in which the original judgment was given, as in ordinary cases. *See* 7 Wm. 4 & 1 Vic. c. 30, ss. 22, 23. No double costs in error are allowed to either party. Reg. Gen. (Pl.) H. T. 1853, r. 25.

[2] If the judgment below be reversed, the plaintiff in error may have a writ of restitution, that he may be restored to all that he has lost by the judgment (*Sympson v. Juxon*, Cro. Jac. 290; 2 Bac. Abr. Error, (M.) 3; 2 Saund. 101 y, 69); or he may obtain redress by application for that purpose to the court or a judge.

If a man recover damages, and has execution by *fieri facias*, and on the *fieri facias* the sheriff sells to a stranger for a term of years, and afterwards the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself (*see* 2 Bac. Abr. 505); but, if the goods of an outlaw are sold under a *capias utlagatum*, and afterwards the outlawry, by writ of error, is reversed, he shall be restored to the goods themselves. Id.; and *see* Cro. Jac. 699. And where personal goods are delivered to the party for *rationabile pretium extentum*, upon the reversal of the judgment he shall be restored to the goods themselves. *See* Roll. Abr. 778. It seems that a collateral judgment shall not be reversed, though the principal one be; for if, after judgment on a *scire facias* against bail, the judgment against the principal be reversed, this is no revival of the judgment against the bail. *See* 2 Bac. Abr. 506.

[3] Matters of fact which may be assigned for error are such as, if they had appeared upon the record, would have proved it to be erroneous. Thus, it is ground of error that the defendant, or one of several defendants, being under age, appeared by attorney. *Bird v. Pegg*, 5 B. & A. 418. *Castledine v. Mundy*, 4 B. & Adol. 90. *Foxwist v. Tremaine*, 2 Wms. Saund. 212, a, n. 4); or by *prochein amy*, and not by guardian. *Simpson v. Jackson*, Cro. Jac. 640. But a defendant in ejectment could not assign this for error. *Goodright v. Wright*, 1 Stra. 33. So it is ground of error that the plaintiff or defend-

(B) *Lies in Court in which Process is.*[1]

(C) *The Party alleging Error delivers a Memorandum to one of the Masters, with an Affidavit of the Fact.*

The party alleging error delivers a memorandum to one of the masters, with an affidavit of the fact.

By sect. 158, "either party alleging error in fact may deliver to one of the masters of the court a memorandum in writing, in the form contained in the Schedule (A) to this act annexed, marked No. 12, or to the like effect, entitled in the court and cause, and signed by the party or his attorney, alleging that there is error in fact in the proceeding, together with an affidavit of the matter of fact in which the alleged error consists; whereupon the master shall file such memorandum and affidavit,[2] and deliver to the party lodging the same a note of the receipt thereof; and a copy of such note and affidavit may be served on the opposite party or his attorney; and such service shall have the same effect, and the same proceeding may be had thereafter as heretofore had after the service of the rule for allowance of a writ of error in fact."[3]

(*a*) *Form of Memorandum.*[4]

(D) *And assigns Error within Eight Days thereafter.*

By Reg. Gen. (Pr.) H. T. 1853, r. 64, "within eight days after the filing with the master of the memorandum of error in fact, required by the Common-Law Procedure Act, 1852, the plaintiff in error shall assign error; and in default, the defendant in error, or his executors or administrators, shall be entitled to assign judgment of *non pros.*"

(*a*) *Form of Assignment of Error in Fact.*[5]

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ant, or one of several defendants, was a married woman at the commencement of the suit. Roll. Abr. 761. *Coan v. Bowles*, 1 Show. 165. Only one error in fact can be assigned. F. N. B. 45, e.

Where the error in fact was the appearance of the defendant, an infant, by attorney, and not by guardian, the court held they could not amend the record by striking out the appearance, and entering an appearance by guardian. *Carr v. Cooper*, 4 L. T. (N. S.) 323.

[1] Error in fact cannot be brought in the Exchequer Chamber or House of Lords, but it lies in the same court in which the process is. *Roe v. More*, 2 Com. R. 597. *Castledine v. Mundy*, 4 B. & Adol. 97.

[2] As to the affidavit under the old practice, *see Birch v. Triste*, 8 East, 415. *Ridout v. Wheeler*, Say. 166.

[3] After the opposite party has thus notice of error being brought, he cannot, it seems, sue out execution on the judgment without leave of the court or a judge; that being the effect of service of the rule for allowance of the writ under the old practice. *Semple v. Turner*, 6 Mee. & W. 152. *Knight v. Thynne*, 9 Dowl. 984. *Levy v. Price*, 2 Mee. & W. 533. *Alstrop v. Sexton*, 1 Dowl. N. S. 33. No bail in error is necessary. *Alstrop v. Sexton*, *supra*.

[4] *Form of Memorandum of Error in Fact prescribed by the Act.*

In the Queen's Bench.

The day of in the year of our Lord 18 [*the day of lodging note of error*].

A. B. and C. D. in error.

The plaintiff [*or* defendant] says, that there is error in fact in the record and proceedings in this action, in the particulars specified in the affidavit hereunto annexed.

(Signed) A. B. plaintiff,
[*or* C. D. defendant],
[*or* E. F. attorney for plaintiff *or* defendant].

[5] *The following Form assigns as Error in Fact the Coverture of the Defendant at the time of the bringing of the Action.*

In the Q. B. [C. P. *or* Exch. of P.]

On the day of A.D. 18

C. D. and wife } Afterwards, to wit, on the
v. } day of A.D.
A. B. } come here, C. D. and E. his wife, which said E. was and is impleaded in this suit by the name of E. F., in their proper persons, and say, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this; to wit, that before the day of the commencement of the said suit of the said A. B. against the said E. by the name of E. F., and before the giving of the judgment aforesaid, to wit, on the day of A.D. at the said E. intermarried with and took to husband the said C. D., and that she the said E., at the time of the commencement of the said suit, and also at the time of the giving of the judgment aforesaid, was and yet is covert of the said C. D., then and yet her husband, to wit, at aforesaid:

(E) *Proceedings where Matter of Fact relied on as a Defence to Error in Law.*

(*a*) *What Facts afford such a Defence.*[1]

(*b*) *The Defendant in Error must give Notice to the Plaintiff in Error, requiring him to assign Error and Plead to the Assignment within Eight Days.*

In certain cases the defendant in error must give notice to the plaintiff in error, requiring him to assign error and plead to the assignment within eight days.

The 15 & 16 Vic. c. 76, s. 152, enacts that assignment of and joinder in error in law shall not be necessary or used, and instead thereof a suggestion to the effect that error is alleged by the one party and denied by the other may be entered on the judgment-roll:[2] "Provided that in case the defendant in error intends to rely on the proceedings in error being barred by lapse of time, or by release of error, or other like matter of fact, he may give four days' written notice to the plaintiff to assign error as heretofore, instead of entering the suggestion, and he shall within eight days plead thereto the bar by lapse of time, or release of error, or other like matter of fact, and thereupon such proceedings may be as heretofore."

(*c*) *Of the Assignment of Error in Law.*[3]

(*d*) *Pleas to Assignment of Error in Law, and subsequent Proceedings.*[4]

Therefore, in that there is manifest error, and this the said C. D. and E. his wife are ready to verify: Wherefore they pray that the judgment aforesaid for the error aforesaid may be revoked, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgment aforesaid, &c.

[1] Error in law may have been truly alleged, and yet the opposite party may be at liberty to set up some fact as a bar. There may, for example, have been a release of errors (Roll. Abr. 788. *Davenant v. Rafter*, 2 Ld. Raym. 1046. *Solomon v. Graham*, 25 L. J. Q. B. 332); or there may have been a release of all suits of a like nature with that in which error is brought (Co. Litt. 228, b); or of all suits between the parties (*Coles' case*, Latch. 110); and where there is such a release, it affords a good answer to proceedings in error. In case, however, there are several plaintiffs in error, a release by one is no bar against the others. *Razing v. Ruddock*, 6 Co. 25, a. *Hacket v. Herne*, 3 Mod. 135. *See* 1 D. & L. 676; 13 L. J. Q. B. 24.

The Statute of Limitations affords a good answer. *Street v. Hopkinson*, 2 Stra. 1055. *See* Blanchard on Stat. Limitations, pp. 22, 78. And it is a bar that the plaintiff in error has granted to another his right in the thing in dispute. 9 Hen. 6, c. 48; Roll. Abr. 788.

[2] *See ante*, p. 251.

[3] The plaintiff in error must, within the four days after the service of the notice, assign error, or in default thereof the defendant in error, his executors or administrators, are at liberty to sign judgment of *non pros.* 15 & 16 Vic. c. 76, s. 153. *St. Katharine's Dock Co. v. Higgs*, 10 Q. B. 652.

The proceedings where error in law is assigned are in the Exchequer Chamber. Several errors in law may be assigned, but no error in fact can be assigned with them. *Fishmongers' Co. v. Dimsdale*, 6 C. B. 896. *Jeffrey v. Wood*, 1 Stra. 439.

If the errors appear on the face of the record they may be assigned generally, *i.e.* that the declaration is insufficient in law to maintain the action, and that the judgment on the original action was given for the wrong party. *Farr v. Denn*, 1 Burr. 363; 2 Saund. 110, q; Roll. Abr. 761.

Where the error is in an outbranch of the record, as where no appearance has been entered, it must be assigned specially, termed "alleging diminution," and verified upon *certiorari*, which is a judicial writ issued out of the Exchequer Chamber, tested in the name of the chief judge of the court below. *Graddell v. Tyson*, 2 Ld. Raym. 1441. *Bowers v. Mann*, 2 Stra. 319.

The assignment must be properly entitled in the cause. *Sparding v. Greville*, 2 D. & L. 721. If plaintiff in error be an infant should assign by guardian.

[4] The defendant in error must plead to the assignment of error in law within eight days, the bar by lapse of time, release of error, or other like matter. 15 & 16 Vic. c. 76, s. 152. To the plea the plaintiff in error may reply, and the defendant in error rejoin. Either party is at liberty to give to the opposite party a notice to answer the previous pleading in "four days, otherwise judgment," which notice may either be delivered separately or indorsed on the pleading. Reg. Gen. (Pr.) H. T. 1853, r. 65, *post*, 258.

The issue is made up, and the cause carried down to trial, as in ordinary cases, except that the defendant may carry it down without waiting for the plaintiff making default. Tidd, Pr. 175.

If the pleadings to the assignment should

(F) *Pleas, &c. to Assignment.*

Four days' notice to plead may be given.[1]

By Reg. Gen. (Pr.) H. T. 1853, r. 65, "no rule to plead to assignment of error in fact, or any other pleadings in error, shall be necessary, but either party may give to the opposite party a notice to answer such pleading within four days, otherwise judgment; which notice may be delivered separately, or indorsed on the pleading."

(*a*) *Form of Plea to Assignment of Error in Fact.*[2]

(G) *Notice of Trial and subsequent Proceedings.*

Notice of trial and other proceedings same as in ordinary action.

By rule 66, "notice of trial, and all other proceedings thereon, shall be the same as in issues joined in an ordinary action."

(H) *Judgment.*[3]

IV. Of Error to the House of Lords.[4]

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terminate in an issue of law, it is determined in the same way as an ordinary demurrer. Lush. Pr. 512, 2d ed.

After verdict, the proper mode of proceeding is to put the cause in the paper for argument, and four days thereafter move the court for a reversal or affirmance of the judgment according to the finding. *Jackson v. Marshall*, 3 Com. Law R. 292. *Sexton v. Astop*, 1 Dowl. N. S. 14.

[1] If the notice to plead be disregarded, the court upon motion will reverse the judgment. *Thatcher v. Stephenson*, 1 Stra. 144. *Walmsley v. Roson*, 2 id. 1210.

The defendant in error may plead specially, confessing and avoiding the fact assigned, and concluding with a verification; or generally denying, and concluding to the country; or in *nullo est erratum*, which confesses the fact assigned, but denies that it is error; or he may demur. See *Grell v. Richards*, 1 Lev. 294. *Sheepshanks v. Lucas*, 1 Burr. 410. *Okeover v. Overbury*, 1 T. Raym. 231. *Evans v. Roberts*, 3 Salk. 147. Pleas setting up a release of errors (*Davenant v. Rafter*, 2 Ld. Raym. 1046. *Hacket v. Herne*, 3 Mod. 135. *Cole's case*, Latch. 110), or the bar by lapse of time (*Street v. Hopkinson*, 2 Stra. 1055), should conclude by praying that the plaintiff may be barred of his error, and not that the judgment be affirmed. *Cunningham v. Houston*, 1 Stra. 127. *Qu.* whether s. 67, 15 & 16 Vic. c. 76, as to conclusion of pleas, applies to cases in error.

[2] The following plea is to the above assignment of error that the defendant was a married woman:—

A. B. } The day of A.D. 18
ats. } And hereupon the said A. B. by
C. D. } X. Y. his attorney, freely here in court comes and says that, by reason of anything above for error assigned, the judgment aforesaid ought not to be reversed, annulled, or held for nothing, because he says that the said E. at the time of the commencement of the said suit aforesaid was not nor is covert of the said C. D. in manner and form as the said C. D. and E. have above alleged; and of this he the said A. B. puts himself upon the country, &c.

[3] The common judgment for the defendant in error is, that the judgment be affirmed; and it is the same on a demurrer to an assignment of error. *Jeffrey v. Wood*, 1 Stra. 439. But if on a plea of the lapse of time (*Street v. Hopkinson*, 2 id. 1055), or a release of errors (*Dent v. Lingood*, 1 Stra. 683. *Kirle v. Clifton*, 3 Salk. 215), it is that the plaintiff be barred of his error.

[4] Where error is brought from the judgment of the Exchequer Chamber to the House of Lords, the same proceedings are taken as in the case of error to the Exchequer Chamber. The Exchequer Chamber and the House of Lords have the same powers of affirmance, reversal, or varying of the judgment below. The judgment-roll is, without any writ or return, brought by the master into the High Court of Parliament, before or at the time of its sitting; and the proceedings and judgment as altered or affirmed are entered on the original record (15 & 16 Vic. c. 76, s. 155), and the judgment-roll is then returned to the court in which the original judgment was given. *Lane v. Hooper*, 3 E. & B. 73.

To allow the setting down of the cause for hearing, a motion must be made for that purpose by a peer, and it will be set down in the list of causes, and taken in its turn. But to procure its being taken out of its turn, a petition must be presented to the House, of which two days' previous notice must be given to the opposite party. The motion is, that it be referred to a committee, and the House acts upon the report of the committee so appointed. Ord. D. P. 22d Dec. 1703.

The case must be drawn up and signed either by the counsel engaged below, or those who are to argue it in parliament (Ord. D. P. 19th April, 1698), and each side must deliver one hundred printed copies at the Parliament Office for the use of the peers, at least four days before the hearing. Lords' S. O. cxv.

On the argument two counsel are heard on each side. Those for the plaintiff begin, and the senior counsel for the plaintiff is heard in reply. *See* Ord. D. P. 2d March, 1727. After the argument, the Lord Chan-

V. Of Proceedings in case of Marriage or Death of Party pending the Error.

(A) *Death of Plaintiff, or of one of several Plaintiffs.*

By 15 & 16 Vic. c. 76, s. 161, "the death of a plaintiff in error, after service of the note of the receipt of the memorandum alleging error, with a statement of grounds of error, shall not cause the proceedings to abate, but they may be continued as hereinafter mentioned."

Death of plaintiff in error does not cause abatement;

By sect. 162, "in case of the death of one of several plaintiffs in error, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the proceedings may be thereupon continued at the suit and against the surviving plaintiff in error, as if he were the sole plaintiff."

but a suggestion of the death may be made if there are several plaintiffs in error, and the suit continued by surviving plaintiffs.

By sect. 163, "in case of the death of a sole plaintiff, or of several plaintiffs in error, the legal representative of such plaintiff, or of the surviving plaintiff, may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the proceedings may thereupon be continued at the suit of and against such legal representative as the plaintiff in error; and if no such suggestion shall be made, the defendant in error may proceed to an affirmance of the judgment according to the practice of the court, or take such other proceedings thereupon as he may be entitled to."

Or in the case of a sole plaintiff, his executor may enter a suggestion with leave of the court.

(B) *Death of Defendant, or of one of several Defendants.*

By sect. 164, "the death of a defendant in error shall not cause the proceedings to abate, but they may be continued as hereinafter mentioned."

Death of defendant in error does not cause abatement of suit;

By sect. 165, "in case of the death of one of several defendants in error, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the proceedings may be continued against the surviving defendant."

but if one of several defendants die, suggestion may be made of the death, and the suit continued against the survivors.

By sect. 166, "in case of the death of a sole defendant, or of all the defendants in error, the plaintiff in error may proceed upon giving ten days' notice of the proceedings in error, and of his intention to continue the same, to the representatives of the deceased defendants, or if no such notice can be given, then by leave of the court or a judge, upon giving such notice to the parties interested as he or they may direct."

Or if a sole defendant die, the proceedings may, upon giving notice, &c., be continued against his personal representatives.

(C) *Marriage of Female Party.*

By sect. 167, "the marriage of a woman, plaintiff or defendant in error,

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cellor delivers his opinion, and moves that the judgment be either affirmed or reversed. The other peers then deliver their opinion if they wish. The affirmance or reversal is decided by the votes of the peers present, no proxies being allowed; and if the votes be equal, the judgment is affirmed. *Thornby v. Fleetwood*, 1 Stra. 381.

As a general rule, no costs are given to the plaintiff in error. Macq. Pr. H. of L. p. 420. But the defendant in error succeeding in the House of Lords is ordinarily entitled to the costs reasonably and properly incurred in supporting the judgment in his favour, which is by the judgment of the House affirmed to be right. Macq. Pr. 226. Where the judgment of the court below is reversed in the House of Lords, the plaintiff in error is not entitled to the costs of the proceedings in error in the House of Lords, unless they are given by an order to that effect, and the House will not in general make such an order. (Id.) But where the judgment of the court below is reversed in the House of Lords, and the House pronounces the judgment, which ought to have been given in the court below, the effect of such judgment is to give the plaintiff in error, or the appellant, the costs of the suit in the court below, which he would have had there had the proper judgment been given in that court. *Mackersey v. Ramsays*, 9 Clark & Fin. 818.

The court in which the action is pending has no power to give the costs of the proceedings in the House of Lords. *Beale v. Thompson*, 2 M. & S. 249.

Where the House orders the costs to be paid by either party, the clerk of the parliament, or clerk assistant, will, upon application, appoint a person to tax the costs. Lords' S. O. No. cxxxviii. *See* also Order, 4 March, 1851.

Marriage of female party does not cause abatement.

shall not abate the proceedings in error, but the same may be continued in like manner as hereinbefore provided with reference to the continuance of an action after marriage."

See vol. i. p. 17; *post*, Husband and Wife.

VI. Of Discontinuance of Error.

The plaintiff in error may, by giving notice to the defendant in error, discontinue the proceedings.

By 15 & 16 Vic. c. 76, s. 159, "the plaintiff in error, whether in fact or law, shall be at liberty to discontinue his proceedings by giving to the defendant in error a notice headed in the court and cause, and signed by the plaintiff in error or his attorney, stating that he discontinues such proceedings; and thereupon the defendant in error may sign judgment for the costs of and occasioned by the proceedings in error, and may proceed upon the judgment on which the error was brought."

VII. Confession of Error.

The defendant in error may confess error by giving notice to that effect to the plaintiff in error.

By 15 & 16 Vic. c. 76, s. 160, "the defendant in error, whether in fact or law, shall be at liberty to confess error, and consent to the reversal of the judgment, by giving to the plaintiff in error a notice headed in the court and cause, and signed by the defendant in error or his attorney, stating that he confesses the error and consents to the reversal of the judgment; and thereupon the plaintiff in error shall be entitled to and may forthwith sign a judgment of reversal."

VIII. Of Quashing Proceedings in Error.

The Court of Error may quash the proceedings.[1]

By 15 & 16 Vic. c. 76, s. 156, "courts of error shall have power to quash the proceedings in error in all cases in which error does not lie, or where they are taken against good faith, or in any case in which proceedings in error might heretofore have been quashed by such courts; and such courts shall in all respects have such jurisdiction over the proceedings as over the proceedings in error commenced by writ of error."

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[1] The power of quashing the proceedings was exercised before the passing of the 15 & 16 Vic. c. 76. *Snook v. Mattock*, 5 Ad. & E. 239. The Court of Error, however, had no jurisdiction to quash the proceedings on the ground that they were taken against good faith. *Garrard v. Tuck*, 8 C. B. 258. But the court below was in the habit of doing so, and a power to quash the proceedings on this ground is expressly given to the Court of Error by the 156th sect. of the act (*supra*, in text). As to the cases in which the proceedings will be quashed on the ground that they are against good faith it has been held, that where a party or his attorney have entered into an agreement not to bring error he is precluded from bringing it, although there be manifest error on the record. *Brown v. Lord Granville*, 2 Dowl. 796. *Baddeley v. Shafto*, 8 Taunt. 438. Where the defendant's attorney agreed not to bring error in the action, it was held that the defendant's executors could not bring error on a judgment on a *scire facias*, which was brought against them to revive the judgment upon the death of the defendant. *Wright v. Nutt*, 1 T. R. 388.

If a defendant obtain time to plead upon condition of giving judgment of the term, as this must be deemed an undertaking to give an available judgment, if the defendant bring error the court will quash the proceedings. *Cave v. Massey*, 3 B. & C. 735. *See* also *Apothecaries' Co. v. Harrison*, 12 Ad. & E. 642.

The power of courts of error before the new practice to quash the writ of error was limited to cases where some defect was apparent on the face of the writ, or where the record brought up was inconsistent with it (*Garrard v. Tuck*, 8 C. B. 258); as where there was no judgment when the writ of error was returnable (*King v. Simmonds*, 7 Q. B. 289. *Wilson v. Ingoldsby*, 2 Ld. Raym. 1179. *Rejindoz v. Randolph*, 2 Stra. 834); or no final judgment upon the whole record returned, and so nothing for the writ to operate upon. *Jobson v. Kaye*, 6 Man. & G. 536. The power of the courts of error to quash proceedings is confined to cases *in which they may have done so before the act*, such as the above, and a court of error cannot, therefore, quash the proceedings on the ground that they have been taken for the purpose of delay, or for any defect not apparent on the face of the proceedings, except that error does not lie, nor that proceedings are taken against good faith. But the court below seems still to have jurisdiction in such a case. See *Reg. v. Broom*, 4 D. & L. 607. *Reg. v. Alleyne*, 4 E. & B. 186.

In *Burr v. Attwood* (Carth. 447; 1 Ld.

IX. Bail in Error.

By 15 & 16 Vic. c. 76, s. 151, "upon any judgment hereafter to be given in any of the said superior courts of common law in any action, execution shall not be stayed or delayed by proceedings in error or supersedeas thereupon, without the special order of the court or a judge, unless the person in whose name such proceedings in error be brought with two, or, by leave of a court or judge, more than two sufficient sureties, such as the court (wherein such judgment is or shall be given) or a judge shall allow of, shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the party for whom any such is or shall be given, by recognisance to be acknowledged in the same court, in double the sum adjudged to be recovered by the said judgment, except in case of a penalty; and in case of a penalty, in double the sum really due, and double the costs, to prosecute the proceedings in error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the proceedings in error discontinued by the plaintiff therein) all and singular the sum and sums of money and costs adjudged or to be adjudged upon the former judgment, and all costs and damages to be also awarded for the delaying of execution, and shall give notice thereof to the defendant in error or his attorney."

Bail in error must be put in by the plaintiff in error to secure the amount of the debt and costs.[1]

Raym. 328) the proceedings were quashed, so far as they related to the original judgment, and were ruled to stand good, *quoad* a judgment on *scire facias* against the bail in it, both judgments being impeached by the error.

[1] Where the plaintiff in error was defendant below; in other words, when the plaintiff recovers and the defendant alleges error, the latter must, in order to stay execution, put in bail, in accordance with the 151st section. For the section does not apply where error is brought to reverse a judgment for the defendant; and in such a case it is not required that the plaintiff in error should put in bail. *James v. Cochrane*, 9 Ex. 552. Bail must be put in notwithstanding there be manifest error on the record. *Wadsworth v. Gibson*, 1 M. & P. 501.

No bail need be given where the error is in fact, and the proceedings in the court in which the original judgment was given (*Levy v. Price*, 2 Mee. & W. 533), unless required by the court or a judge. *Birch v. Triste*, 8 East, 412.

The application to dispense with bail must be founded on a special affidavit of facts, showing not only that the proceedings in error have been taken *bonâ fide*, and not merely for the purpose of delay, but also that it is for the furtherance of justice that the security of bail should not be insisted on. *Williams v. Dowman*, 2 D. & L. 131. *Duvergier v. Fellows*, 1 Dowl. 224. *Freeman v. Gardner*, 1 D. & R. 184.

Money cannot be paid into court in lieu of bail in error, unless by consent. *Collins v. Gwynne*, 9 Dowl. 70; 2 Scott, N. R. 85.

If bail be not put in where necessary within the time specified by the act, namely, four clear days after lodging the memorandum alleging error, or after the signing of judgment, whichever shall last happen, the defendant in error may immediately sue out execution. —— *v. Nichols*, 2 Ch. R. 106. *Incledon v. Clarke*, Barnes, 212.

The court or a judge may, but will not in general, extend the time for putting in bail. *Pigott v. Dunn*, 1 D. & R. 9; 1 Dowl. 32. *Handasyde v. Morgan*, 2 Wils. 144.

Bail in the original action may be bail in error. *Martin v. Justice*, 8 T. R. 639.

Members of a corporation may be bail in error for the corporation. *Henley v. Mayor of Lynn Regis*, 6 Bing. 195.

It is not necessary for the plaintiff in error to join in the recognisance. *Dixon v. Dixon*, 2 B. & P. 443.

Bail in error cannot, it seems, be put in before a commissioner in the country. *Williams v. Panton*, 8 Dowl. 701.

Notice of more bail than two is deemed irregular, unless by order of the court or a judge; and the bail of whom notice is given cannot be changed without leave of the court or a judge. Reg. Gen. (Pr.) H. T. 1853, rr. 98, 99. The notice of bail must, in addition to the descriptions of the bail, mention the street or place, and number if any, in which each of them has been resident at any time within the last six months, and whether he is a householder or a freeholder. Id. r. 97. *See* vol. i. p. 86, *et seq.*

The bail must be excepted to within twenty days next after the putting in of the bail, and the notice in writing given to the defendant in error or his attorney; and no exception to bail is admitted after that time. Id. r. 100. The bail is justified when required within four days after exception before a judge at chambers, both in term and vacation (id. r. 103); otherwise execution may be issued. *Gould v. Holmstrom*, 7 East, 580.

If either of the sureties do not justify,

(A) *Bond in Ejectment.*

If plaintiff in error, must give a bond to answer for the mesne profits, damages, and costs.

Sect. 208 enacts, "error may be brought in like manner as in other actions upon a judgment in ejectment, after a special verdict found by the jury, or a bill of exceptions, or by consent after a special case stated, but except in the case of such consent as aforesaid execution shall not be thereby stayed, unless the plaintiff in error shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the claimant, who shall have recovered judgment in such action of ejectment, in double the yearly value of the property, and double the costs recovered by the judgment, with condition that if the judgment shall be affirmed by the Court of Error, or the proceedings in error be discontinued by the plaintiff therein, then the plaintiff in error shall pay such costs, damages, and sum or sums of money as shall be awarded upon or after such judgment affirmed or discontinuance; and it shall be lawful for the court wherein execution ought to be granted, upon such affirmance or discontinuance, to issue a writ to inquire as well of the mesne profits as of the damage by any waste committed after the first judgment in ejectment, which writ may be tested on the day on which it shall issue, and be returnable immediately after the execution thereof; and upon the return thereof judgment shall be given, and execution awarded for such mesne profits and damages, and also for costs of suit."

X. Error in Criminal Cases.

The 11 & 12 Vic. c. 78, s. 5, enacts, "whenever any writ of error shall be brought on any judgment in any indictment, information, presentment, or inquisition, in any criminal case, and the Court of Error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition."

Wright v. Rex, 3 Nev. & M. 892; 1 Ad. & E. 434.

The Court of Exchequer Chamber has jurisdiction over judgments in the Queen's Bench in criminal matters.[1]

In an indictment for a nuisance, it was alleged that the defendant, at the township of W., encroached upon a highway there (*i. e.* at the township of W.), leading from a highway in the said township, leading from the village of W. toward C., to another highway in the said township, from the village of W. to the township of X., by a certain wall there extending into the said highway, and erected by the defendant. After judgment on error,—

The Court held, that the Court of Exchequer Chamber has jurisdiction under 11 Geo. 4, and 1 Wm. 4, c. 70, s. 8, to correct errors in judgments in the Queen's Bench in criminal cases.

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his name may be struck out on application to a judge. *Jones v. Tubb*, 1 Wils. 337. They are considered, however, as bail, and may be proceeded against as such until they are exonerated. *Adnam v. Wilks*, 6 B. & C. 237. *Dickenson v. Heseltine*, 2 M. & S. 210.

For a form of affidavit justifying bail, *see* vol. i. p. 87; and as to liability of bail, and mode of proceeding against them, &c. *see* id.

In *Castrique v. Imrie* (10 C. B., N. S., 340; 7 Jur. N. S. 998) the plaintiff had judgment. The amount of damages being referred, the defendant brought error, and it was agreed that a sum of money should be paid into court to cover damages and costs; and in lieu of bail in error (which was done), the agreement mentioning nothing of error to the House of Lords. The defendant was held entitled to have the sum paid out to him, on recovering judgment in the Exchequer Chamber, notwithstanding the plaintiff had brought error in the House of Lords. *Castrique v. Imrie*, *supra*.

[1] A writ of error to reverse a judgment in criminal cases lies from all inferior jurisdictions to the Court of Queen's Bench, and from that court to the House of Lords. 2 Hawk. c. 50, s. 17; 4 Bl. Com. 392; Co. Litt. 13, n. 1.

A writ of error is not merely of grace, but ought to be granted. It is not a writ of course, but where there is probable error it ought not to be denied. *Reg. v. Paty*, 2 Salk. 503; 5 Mod. 311. In cases of treason or felony it

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I. From Custody on Civil Process.

(A) *What is an Escape on Final Process.*[1]

rests, in strict law, entirely with the Crown whether the writ shall or shall not issue. The course is to address a petition to the Crown for leave to sue out a writ of error, accompanied by a certificate of counsel that there is ground of error; which petition is referred by the Secretary of State to the Attorney-General, who, if he sees that there is probable cause of error, grants his fiat for the issuing of the writ. *See* 4 Bl. Com. 392; 2 Hawk. c. 50, s. 11; 4 Burr. 2551. In misdemeanors also the writ does not issue as a matter of course, but under the like fiat. But in the case of misdemeanors the Attorney-General is bound to grant the fiat whenever probable grounds are laid; and the Court of Queen's Bench will order him to do so if he refuse. 4 Burr. 2551.

A writ of error lies for every defect in the indictment which would have been fatal on demurrer, and which has not been used by the verdict, or which might be urged in arrest of judgment. It lies also for any irregularity in the awarding of the jury process (see *Mansell v. Reg.* 26 L. J. M. C. 137); for any material defect in the caption; for any irregularity in the verdict or judgment; or other irregularity appearing on any part of the record. Arch. Cr. L. 110. But 15 & 16 Vic. c. 100, s. 25, provides that any *formal defect* appearing on the face of the indictment, shall be taken before the jury are sworn, and not afterwards.

In cases where a writ of error is allowed for any misawarding of the jury process, the proper course is for the Court of Error to award, or (in the case of a writ of error from the quarter sessions) direct the sessions to award a *venire de novo*. *Arundel's case*, 6 Co. 14, a. *R. v. Hayes*, 2 Ld. Raym. 1521. *R. v. Trafford*, 1 B. & Adol. 874. *Gray v. Reg.* 11 Clark & Fin. 427. *Campbell v. Reg.* 2 Cox Cr. Ca. 463. It seems doubtful whether this can be done in the case of a writ of error grounded on a *defective* verdict. 1 Ld. Raym. 138; 5 Mod. 288; 3 P. Wms. 499.

During the pendency of the writ of error, the defendant, in cases of treason or felony, remains in custody, being in execution on the judgment. But in cases of misdemeanor the execution may be stayed until the writ of error is finally determined; and the defendant is entitled, in the meantime, to be discharged from imprisonment, and to receive back the amount of any fine levied on the judgment, on his entering into a recognisance, with two sufficient sureties, to be approved of by a judge of the Court of Queen's Bench, or a commissioner for taking special bail in actions depending in the superior courts, to prosecute the writ of error with effect, and in case the judgment be affirmed, to render the defendant forthwith (8 & 9 Vic. c. 68, s. 1); in which case he is liable to be imprisoned for such further period as, with the time during which he may have already been imprisoned before his discharge on bail, shall be equal to the period for which he was adjudged to be imprisoned (id. s. 83), or until the fine be again paid. Id. s. 4.

The court in which the writ of error is pending has power to quash the writ, in case of wilful delay or neglect to prosecute it; and thereupon the defendant is liable to execution upon the judgment.

[1] Being at large for the shortest interval, either before or after the return of the writ, is an escape. 2 W. Black. 1048; 27 L. J. Ch. 387. It is the duty of the sheriff to carry

(B) *Action for Escape on Final Process.*

(*a*) *Is on the Case for Damages.*

The remedy is only for damages really sustained.

5 & 6 Vic. c. 98, s. 31. "If any debtor in execution shall escape out of legal custody after the passing of this act, the sheriff, bailiff, or other person having the custody of such person, shall be liable only to an action upon the case for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape." See *Arden v. Goodacre*, 11 C. B. 371.

(C) *Action for Escape on Mesne Process.*[1]

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the prisoner to the county gaol after he has been arrested under a *ca. sa.*; and when once in gaol the debtor must be kept there, and cannot be allowed to go out, though with a keeper or sheriff's officer. If, therefore, after having been taken in execution, the prisoner is seen at large for ever so short a time, either before or after the return of the writ on which he has been arrested, the sheriff is responsible for an escape. *Williams v. Mostyn*, 4 Mee. & W. 152. *Moore v. Moore*, 27 L. J. Ch. 387. *Hawkins v. Plomer*, 2 W. Black. 1048.

It is the duty of an officer going to make an arrest in the execution of legal process to take with him a force sufficient to repel opposition. If, having got the debtor into his custody, he fails to keep him for want of sufficient force, he will be responsible for a breach of duty. *Nicholl v. Darley*, 2 Y. & J. 403.

The sheriff is not responsible for an escape effected in consequence of the prison being burnt or being broken by the queen's enemies; but he is answerable if the breaking open was by rioters. *Southcote's case*, 4 Co. 84.

By the 8 & 9 Wm. 3, c. 27, s. 8, "if the keeper of any prison shall, after one day's notice in writing given for that purpose, refuse to show any prisoner committed in execution to the creditor at whose suit he was committed, or to his attorney, every such refusal shall be adjudged an escape in law."

If the sheriff's officer permits the defendant to go at large on paying to him the sum mentioned in the writ, the sheriff would be liable for an escape, for it is a neglect of duty by the officer, seeing that the writ commands the sheriff to have the body of the debtor at the return, to satisfy the plaintiff, and not to pay the debt to the sheriff; and in that respect his duty upon the *ca. sa.* differs from that under a *fi. fa.*, by which the sheriff is directed to make a sum out of the goods and chattels of the defendant, and himself to have that money at the return: so that in the latter case the defendant is discharged by payment to the sheriff, and the sheriff becomes debtor to the plaintiff; in the former he is discharged by payment to the plaintiff alone; and the sheriff, by recovering the money, has no right to substitute his responsibility for that of the debtor, whose body the creditor has a right by law to keep until the debt is paid to him. *Wood v. Timms*, 7 Ex. 363: *per Parke, B.*

Where the arrest was made by a sheriff's officer chosen by the plaintiff's attorney, who was present and controlling the officer at the arrest, it was held that the sheriff was not liable for an escape. *Doe v. Tyre*, 5 N. C. 573.

[1] The action for an escape on mesne process is not maintainable unless some damage has been sustained. *Williams v. Mostyn*, 4 Mee. & W. 145. *See* 11 C. B. 371.

In such an action, the plaintiff must prove that the person arrested was at the time indebted to him. *Alexander v. Macaulay*, 4 T. R. 611. *White v. Jones*, 5 Esp. 160. *Parker v. Fenn*, 2 id. 477. The debt is proved by the same evidence which would have been necessary or available in an action against the debtor himself. It has therefore been held, that an admission of the debt by the debtor at any time before the escape is good evidence against the sheriff. *Williams v. Bridges*, 2 Stark. 42. *Rogers v. Jones*, 7 B. & C. 89. The issuing of the process, and the delivery of it to the under-sheriff, must be proved. A delivery to a country sheriff's deputy in London is a delivery to the sheriff. *Woodland v. Fuller*, 11 Ad. & E. 859. Evidence must be given of the arrest. If arrested in one action, a debtor is in custody under all writs afterwards delivered to the sheriff, unless the first arrest was illegal. *Collins v. Yewens*, 10 Ad. & E. 570. The sheriff is bound by his return both as to the fact and time of the arrest. *Cook v. Round*, 1 M. & Rob. 512. Where, in an action for an escape on mesne process, the plaintiff gave in evidence the sheriff's return of *cepi corpus* to the writ, and proved that the defendant in the former action did not put in bail above, and was not in the sheriff's custody on the return of the writ, *Lord Ellenborough* held that the arrest and escape, and non-appearance of the party, according to the exigency of the writ, were sufficiently proved. *Fairlie v. Birch*, 3 Camp. 397.

In an action for an escape on mesne process, the return of *cepi corpus*, coupled with an answer given at the sheriff's office that "no bail-bond was executed in evidence of an escape, though the return included the words *paratum habeo*." *Neck v. Humphrey*, 3 Ad. & E. 133.

On a count against the sheriff for a voluntary escape, the plaintiff may prove a negligent one. *Banafous v. Walker*, 2 T. R. 126.

(*a*) *Pleas and Evidence for the Defendant.*

Reg. Gen. (Pl.) H. T. 1853, r. 16. "In actions for an escape, the plea of not guilty will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings."[1]

The general issue denies only the default of the sheriff.

(*b*) *Measure of Damages in.*[2]

II. Escape from Custody for an Offence.

(A) *Indictment for Escape, or aiding Escape of Prisoner.*[3]

(B) *Escape.*

By 4 Geo. 4, c. 64, s. 44, "to the intent that prosecutions for escapes, breaches of prison, and rescues may be carried on with as little trouble and expense as is possible, be it enacted that any offender escaping, breaking prison, or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he or she shall be apprehended and retaken; and in case of any prosecution for any such escape, attempt to escape, breach of prison, or rescue, either against the offender escaping or attempting to escape, or having broken prison, or having been rescued, or against any other person or persons

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[1] By the 8 & 9 Wm. 3, c. 27, s. 6, no retaking or fresh pursuit shall be given as evidence on the trial of any issue in an action of escape, unless the same be specially pleaded; nor shall any special plea be allowed without an oath by the defendant that the prisoner escaped without his consent, privity, or knowledge.

If the defendant merely plead a denial of the escape, he cannot give evidence of no arrest, for he admits it by his plea. Bull. N. P. 67.

It is no defence that the prisoner paid the debt to the defendant, unless before action the defendant has paid the money to the plaintiff. *Slackford v. Austen*, 14 East, 468. Where the defendant pleaded that the prisoner returned into his custody, and that he did thereupon then and afterwards keep and detain the said prisoner in his custody, &c., and the plaintiff traversed that, after the prisoner's return, the defendant did keep and detain him in custody in manner and form, &c., it was held that the plea was negatived by evidence that after the prisoner's return he again escaped and died out of custody. *Chambers v. Jones*, 11 East, 406.

The defendant may show in answer that the escape was by the fraud and covin of the party really interested in the judgment. *Hiscocks v. Jones*, M. & M. 269.

The defendant may show that the judgment against the prisoner was void, but not that it was erroneous. Bull. N. P. 65; Watson, Sher. 54. And if the writ of execution be absolutely void, the sheriff will not be liable for an escape; but it is otherwise if it is only erroneous. *Weaver v. Clifford*, Cro. Jac. 3. *Burton v. Eyre*, id. 288. He may show that the plaintiff authorised the prisoner's release. *Connop v. Challis*, 2 Ex. 484.

The sheriff is justified in discharging a prisoner upon the written order to that effect of the attorney by whom the writ of *ca. sa.* was issued, unless the person for whom the attorney professed to act has given written notice to the contrary. 15 & 16 Vic. c. 76, s. 126.

[2] In an action for an escape on final process it seems that, if no actual damage is proved, the plaintiff will nevertheless be entitled to a verdict for nominal damages. *Clifton v. Hooper*, 6 Q. B. 468. The true measure of damages since the 5 & 6 Vic. c. 98, is the value of the custody of the debtor at the moment of the escape, and no deduction ought to be made on account of anything which might have been obtained by the plaintiff if he had, after the escape, exercised diligence; unless, indeed, he has done anything to aggravate the loss or prevent re-caption. *Arden v. Goodacre*, 11 C. B. 371; 20 L. J. C. P. 184.

The plaintiff is entitled to recover only such damages as he has sustained. If he has lost the entire debt, he is entitled to recover the whole amount of it as damages, together with the costs he has necessarily expended in the action for its recovery. If he is still entitled to recover his debt, the damages will be decreased accordingly. *Scott v. Henley*, 1 M. & Rob. 227. *Morris v. Robinson*, 3 B. & C. 206.

[3] In an indictment against a constable for the escape of a prisoner in his custody, it is not necessary to prove negligence in the defendant, for the law implies it (*see* 1 Hale, 600); but if the escape were not in fact negligent, if the debtor by force rescued himself or were rescued by others, and the defendant made fresh pursuit after him, but without effect, this must be shown on the part of the defendant. Arch. C. L. 572.

The constable is liable to fine and imprisonment. 14 & 15 Vic. c. 100, s. 29.

concerned therein, or aiding, abetting, or assisting the same, a certificate[1] given by the clerk of assize, or other clerk of the court in which such offender shall have been convicted, shall, together with due proof of the identity of the person, be sufficient evidence to the court or jury of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced."

(C) *Breach of Prison.*

By the 1 Edw. 2, st. 2, c. 1, concerning prisoners which break prison, our "lord the king willeth and commandeth that none from henceforth that breaketh prisons shall have judgment for life or member for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise."[2]

(D) *Aiding Prisoners to Escape.*

4 Geo. 4, c. 64, s. 43, enacts, "that if any person shall convey, or cause to be conveyed, into any prison to which this act shall extend, any mask, vizor, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver or cause to be delivered to any prisoner in such prison, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper of such prison, every such person shall be deemed to have delivered such vizor or disguise, instrument or arms, with intent to aid and assist such prisoner to escape, or attempt to escape; and if any person shall, by any means whatever, aid and assist any prisoner to escape,

[1] The certificate must set forth the effect and substance of the conviction. *R. v. Watson*, R. & R. 468.

[2] 7 & 8 Geo. 4, c. 28, s. 8, *as to offences not punishable by particular statutes*, enacts, "that every person convicted of any felony not punishable with death, shall be punished in the same manner prescribed by the statute or statutes especially relating to such felony; and that every person convicted of any felony for which no punishment hath been or hereafter may be specially provided, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly whipped, or privately whipped (if the court shall so think fit), in addition to such imprisonment." As to such punishment, *see* 25 Vic. c. 18, s. 11.

And by sect. 9, with regard to the place and mode of imprisonment for all offences punishable under this act, enacts, "that where any person shall be convicted of any offence punishable under this act for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet." *See* 20 & 21 Vic. c. 3.

On an indictment for breaking prison, the escape must be proved, and the breaking be charged as a felony (2 Hawk. c. 18, s. 12); but otherwise, it should seem, if it be a misdemeanor only. And the breaking proved must be an actual breaking; merely getting over the walls, or passing out through a door, or the like, is an escape only, and not a breach of prison (1 Hale, 611; and see *R. v. Burridge*, 3 P. Wms. 439); and on this account it should seem that the manner of the breaking should be stated in the indictment, in order that the court may see that it was such as is necessary in law to constitute a breach of prison. But the breaking need not be intentional; and, therefore, where a prisoner, in effecting his escape, by accident threw down some loose bricks at the top of the prison wall, placed there to impede escape and give alarm, it was holden to be a prison breach. *R. v. Haswell*, R. & R. 458.

Every place where a man's person is lawfully imprisoned, whether upon accusation or after conviction, such as the common gaol, the constable's house, the stocks, &c., is a prison within the meaning of the statute (2 Hawk. c. 18, s. 4); and as described in the indictment, so it must be proved.

Although it is not material whether the defendant were guilty of the offence for which he was imprisoned or not (id. s. 16), yet if he can prove that no such offence was ever actually committed, or that he was arrested and detained without any reasonable cause of suspicion against him (1 Hale, 610, 611), or if he has been subsequently indicted for the offence and acquitted, this will be a sufficient defence to the indictment for breach of prison.

or in attempting to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony, and being convicted thereof shall be transported beyond the seas for any term not exceeding fourteen years."[1]

ESCHEAT.[2]

[1] The 16 Geo. 2, c. 31, s. 1, for the further punishment of persons who shall aid or assist prisoners to attempt to escape out of lawful custody, enacts, "that if any person shall, from and after the 24th day of June, 1743, by any means whatsoever, be aiding or assisting to any prisoner to attempt to make his or her escape from any gaol, although no escape be actually made, in case such prisoner then was attainted or convicted of treason, or any felony except petty larceny, or lawfully committed to or detained in any gaol for treason, or any felony except petty larceny, expressed in the warrant of commitment or detainer, every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America for the term of seven years; and in case such prisoner was then convicted of, committed to, or detained in any gaol for petty larceny, or any other crime, not being treason or felony, expressed in the warrant of his or her commitment or detainer as aforesaid, or then was in gaol upon any process whatsoever for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds, every person so offending as aforesaid, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of a misdemeanor, for which he or she shall be liable to a fine and imprisonment."

By sect. 2, "if any person shall, from and after the 24th day of June, 1743, convey or cause to be conveyed into any gaol or prison any vizor or other disguise, or any instruments or arms proper to facilitate the escape of prisoners, and the same shall deliver, or cause to be delivered, to any prisoner in any such gaol, or to any other person there for the use of any such prisoner, without the consent or privity of the keeper or under-keeper of any such gaol or prison, every such person, although no escape or attempt to escape be actually made, shall be deemed to have delivered such vizor or other disguise, instrument or arms, with an intent to aid and assist such prisoner to escape or attempt to escape; and in case such prisoner then was attainted or convicted of treason, or any felony except petty larceny, or lawfully committed to or detained in any such gaol for treason, or any felony except petty larceny, expressed in the warrant of commitment or detainer, every person so offending, and being thereof lawfully convicted, shall in like manner be deemed and adjudged guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America for the term of seven years; but in case the prisoner to whom or for whose use such vizor or disguise, instrument or arms, shall be so delivered, then was convicted, committed, or detained for petty larceny or any other crime, not being treason or felony, expressed in the warrant of commitment or detainer, or upon any process whatsoever for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds, every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of a misdemeanor, for which he or she shall be, in like manner, liable to a fine and imprisonment."

Sect. 3 enacts, "that if any person shall, from and after the 24th day of June, 1743, aid or assist any prisoner to attempt to make his or her escape from the custody of any constable, headborough, tithingman, or other officer or person, who shall then have the lawful charge of such prisoner, in order to carry him or her to gaol, by virtue of a warrant of commitment for treason, or any felony except petty larceny, expressed in such warrant, or if any person shall be aiding or assisting to any felon to attempt to make his escape from on board any boat, ship, or vessel, carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns or agents, or any other person to whom such felon shall have been lawfully delivered in order for transportation; then, every person so offending and being lawfully convicted thereof shall be deemed and adjudged to be guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America for the term of seven years."

Sect. 4 provides and enacts, "that there shall be no prosecution for any of the said offences unless such prosecution be commenced within one year after such offence committed." *See* 9 & 10 Vic. c. 24, s. 1; 20 & 21 Vic. c. 3. As to rescuing prisoners, *see* 1 & 2 Geo. 4, c. 88, s. 1; and *post*, Rescue.

Where the commitment was *on suspicion* of felony, it was held not to be within the act, which extends only to cases where the offence is clearly and plainly expressed in the warrant, or where the prisoner stands convicted of it. *R. v. Walker*, 1 Leach, 97; and *see* id. 98, n. 363. If a prisoner be convicted, it is an offence within the statute to deliver instruments to him to facilitate his escape, though he be pardoned of the offence of which he was convicted on condition of transportation, and even though the party delivering the instruments did not know of what specific offence the prisoner was convicted. *R. v. Shaw*, R. & R. 526. The statute does not extend to cases where an *actual escape* is made. *R. v. Tilley*, 2 Leach, 662.

[2] An escheat is an obstruction of the

ESCROW.[1] *See* also, Bond; Covenant; Deed.

ESSOIGN.[2]

ESSOIGN-DAY. The first general return-day of every term, usually called the first day of term. It derived its name from the court sitting to take essoigns (excuses). *See* 3 Bl. Com. 277. *Belk v. Broadbent*, 3 T. R. 185. But these general return-days were abolished by 11 Geo. 4 and 1 Wm. 4, c. 70, s. 6.

ESTATE and House Agent. *See* Principal and Agent; Sale.

ESTATES. *See*

Copyhold	Manor	Pleading
Ecclesiastical Persons	Market	Poor
Evidence	Marriage Settlement	Power
Grant	Master and Servant	Trusts
Husband and Wife	Mesne Profits	Vendor and Purchaser
Infant	Mortgage	Warranty

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course of descent, and a consequent determination of the tenure by some unforeseen contingency, in which case the land naturally results back by a kind of reversion to the original grantor or lord of the fee (*see* Bl. Com. c. 15); or to the king; *see* 2 Inst. 64; Salk. 85.

1st. *Of Escheats to the lord.*—When inheritable blood is wanting, in all these cases the land escheats to the lord. 1st. When the tenant dies without any relations on the part of his ancestors. 2d. When he dies without any relations on the part of those ancestors from whom his estate descended. 3d. When he dies without any relations of the whole blood. And, lastly. When there is an attainder of treason or felony.

2d. *Of Escheats to the king.*—Inheritances of things not lying in tenure, as rents, tenures, commons, &c. do not escheat to the lord, because there is no tenure, nor descent, because the blood is corrupted. But they are forfeited to the king by an attainder of treason, and the profits of them shall go to the king on attainder of felony during the life of the offender; and, after his death, it is said the inheritance shall be extinguished. *See* 2 Hawk. P. C. c. 49. It has been held, that where a *cestui que trust* dies without heirs the land does not escheat to the Crown (*see* Black. 123); there is no escheat of lands *felo de se*. *See* 1 Saund. 362 (n. a.) *Chambers v. Norris*, 7 Jur. N. S. 59; on appeal, id. 689; 9 W. R. 794. But in escheat by baron and feme, the writ must conclude to the *feme* only. *See* Hob. 1.

Where land descends to the son of an illegitimate father, who is proved to have been the purchaser thereof, and the son dies seised, intestate and without issue, such land does not devolve upon the heirs *ex-parte maternâ*, but escheats to the Crown, notwithstanding the stat. 3 & 4 Wm. 4, c. 106, s. 2. *Doe d. Blackburn v. Blackburn*, 1 M. & Rob. 547.

By 3 & 4 Wm. 4, c. 106, s. 2, it is enacted, "that in every case descent shall be traced from the purchaser, and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same; in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same." *See* Attainder, vol. ii. p. 1.

[1] Is delivering a deed to a *third person* to be kept until the happening of a particular event, and when the condition is performed, it is to be delivered to the party for whose benefit it was deposited (*see* Co. Litt. 31; Roll. Abr. 25. *Bowker v. Burdekin*, 11 Mee. & W. 147. *Johnson v. Baker*, 4 B. & A. 440. *See* 2 B. & C. 82); but if the delivery be to the *party himself*, it is no escrow (*see* Hob. 246; Cro. Eliz. 520), for it makes the deed absolute. *See* 1 Dyer, 34, pl. 25. Where a deed is delivered as an escrow, a second delivery is requisite (*see* Holt, 213); and if the obligor or obligee die, it does not nullify the instrument as an escrow if the condition be performed. *See* 5 Co. 84, a. Whether a document has been delivered as an escrow, or absolutely, is a question for the jury (*Furniss v. Meek*, 27 L. J. Ex. 34), unless the terms of delivery be shewn by a letter or writing. (Id.) The doctrine applies to contracts not under seal. 25 L. J. Ex. 246; 28 id. 122.

[2] Is an excuse for a party summoned to appear and answer an action, or to perform suit to a court-baron, &c. by reason of sickness and infirmity, or some other just cause of absence; in fact, it is a kind of imparlance or craving for a longer time, and may be entered by the plaintiff as well as the defendant (*see* Co. Litt. 131), in all personal (*see* 2 T. R. 16) and mixed actions. Co. Litt. 131. *Barcley v. Earle*, 2 Stra. 1194. *Argent v. Dean and Chapter of St. Paul's*, 2 T. R. 16. *Rooke v. Earl of Leicester*, id. *Anson v. Jefferson*, 2 Wils. 164. *Baynell v. Archbishop of York*, 1 Ld. Raym. 79.

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(2) *Estates Tail.* *See* Tail, Tenant in.

(*b*) *Not of Inheritance.*

(1) *Estates for Life.* *See* Life, Tenant for.

(2) *Estates by the Curtesy.* *See* Copyhold, Estate in; Curtesy.

(3) *Estates in Dower.* *See* Dower.

(2) *Estates less than Freehold.*

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(3) *Estates upon Condition.* *See* Condition; Mortgage; Equity of Redemption.

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Deed	Gift	Powers
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Dower	Landlord and Tenant	Uses and Trusts
Exchange	Lease and Release	Will

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Dower	Life, Tenant for	Will

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V. „ Entry.[2]

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[1] An estate in lands, tenements, and hereditaments, signifies such *interest* as the tenant hath therein; so that, if a man grant all his *estate* in Dale to A. and his heirs, every estate he can possibly grant shall pass thereby. Co. Litt. 345. It is called in Latin *status*, signifying the condition or circumstance in which the owner stands with regard to his property.

[2] Where a freehold estate is conveyed to a person by feoffment with livery of seisin, or by any of those conveyances which derive their support from the Statute of Uses, he acquires a seisin in deed, and a livery in deed. But where a freehold estate comes to a person by act of law, or by descent, he only acquires a seisin in law, that is, a right to the possession, and his estate is called a freehold in law, for he must make an actual entry on the land to acquire a seisin and a freehold in deed. 1 Inst. 266, b.

An estate by statute merchant or *elegit*, must be executed by entry (*Hannam v. Woodford*, 4 Mod. 48), for till entry he has but a bare right which is not assignable; so that, although he should release all his right to the land, yet he may extend it after. All he acquires is a lien on the land, but it is not certain whether he ever will make use of it, for he may recover the debt out of the goods of the cognizer by a *scire facias*, and take his body, and then, during the debtor's life, he can have no execution. 2 Cruise Dig. 65.

There is no need of an entry to avoid an estate in case of a limitation. *Anon.* 2 Mod. 8.

The effect of an entry or claim is to put the person who enters or claims into the actual possession and seisin in deed of the

lands. Thus Littleton says: "By such entry he shall have as good a possession and seisin of all the lands and tenements whereof he hath title of entry, as if he had entered in deed into every parcel." And, speaking of the continual claim, he says: "Presently by such claim he hath a possession and seisin in the lands, as well as if he had entered in deed, although he never had possession or seisin of the same lands, or tenements, before the said claim."

The entry of the heir upon any part of the estate will give him a seisin in deed of all the lands lying in the same county; for, since the freehold in law is cast upon him by the death of his ancestor, and no person is in possession, so that no particular estate is to be defeated, a general entry into part will be sufficient to reduce the whole into actual possession: but where lands lie in different counties, there must be an entry in each county. 1 Inst. 15, a. 252, f; 1 Leon. 265.

Where necessary, the mere act of going on the land will not amount to a legal entry, so as to clothe the person who has the right of entry with the actual seisin, but it must be made *animo intrandi*, with the intention of making such legal entry, and the person entering must express that intention, or evince it otherwise by some obvious act. Co. Litt. 245, b; 368, a. And Mr. Robinson (*Law of Inherit.* 33, n. 1), conceives that in all cases where the heir exercises any act of dominion over the inheritance, such as repairing houses, fences, ditches, &c., or as receiving rents, &c., any single act of the heir will amount to an entry. It is for the purpose of notoriety of the possession, by way of evidence of the right or claim of the person so entering, that the law requires this entry to be made; and this purpose would be very badly answered by permitting any secret, unintentional, or accidental entry, in the place of that open avowal which declares to the world the object and claim of the person to whom the title or right attaches. 2 Bl. Com. 209.

The entry into the lands must be made in a peaceable manner, and not with force or strong hand (3 id. 178); for if one turns or puts another out of possession forcibly, this is an injury both of a civil and criminal nature. *See* 8 Hen. 6, c. 9; 31 Eliz. c. 11; 8 T. R. 357; 3 Burr. 1698; 1 Hawk. c. 64, s. 1.

If the heir be deterred from entering by means of bodily fear (2 Inst. 483), he may make claim as near to the estate as he safely can, with the same forms and solemnities as if he made an actual entry. This claim continues in force for only one year and a day. Litt. s. 423. If, however, such claim be repeated once in the space of every year and day (which is called *continual claim*), it has the same effect with, and in all respects amounts to, a legal entry. Id. s. 419, 423. Such a legal entry gives a man a seisin (Co. Litt. 15); or puts into immediate possession him that hath right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase. 3 Bl. Com. 175; and *see* Chitty on Descents, p. 48.

No entry is necessary to complete an estate by the curtesy; for, on the death of the wife, the law adjudges the freehold to be in the husband immediately, as tenant by the curtesy. Bro. Abr. Præcipe, 38.

No estate for years can be created by a lease, or other common-law conveyance, without an actual entry made by the person to whom the land is granted; for, although the grantor has done everything necessary on his part to complete the contract, so that he can never afterwards avoid it, yet till there is a transmutation of the possession by the actual entry of the grantee, it wants the chief mark and indication of his consent, without which it might be unwarrantable to adjudge him in actual possession, to all intents and purposes; and for this reason the law does not cast the immediate and actual possession on him till he enters; neither has the grantor a reversion to grant such entry. 1 Inst. 46, b; 51, b; 270, a; Bac. Abr. Leases, M. *See* 1 Platt on Leases, 3, 22; id. 2, p. 1. Upon the execution of a lease, the lessee acquires an interest, called an *interesse termini*, which he may at any time reduce into possession by an actual entry. This might be done not only by the lessee himself, but, in case of his death, by his executors or administrators. 1 Inst. 46, b. It should, however, be observed, that in consequence of the operation of the Statute of Uses, an estate for years may now be created without an entry. 1 Cru. Dig. 240.

In the case of a devise of lands, the freehold is transferred to the devisee before entry. 1 Inst. 111, a; and *see* Devise, *ante*, p. 71.

Upon the breach of a condition, the feoffor, or grantor, or his heir, becomes entitled to the estate to which such condition was annexed; and, in the case of freehold estates, the only mode by which advantage can be taken of the breach of a condition is by entry; or, if that should be impossible, then by claim; because the solemnity of a feoffment, with livery of seisin, can only be defeated by an act of equal notoriety. But an entry by a stranger on behalf of the person entitled to enter is good, without any authority, provided it be assented to afterwards by the person entitled. 1 Inst. 218, a; 2 Stra. 1128.

When an estate for years determines by a condition, no entry is necessary. Plowd. 142; Bro. Abr. Cond. 83.

The entry must in all cases be made by the person having right, or some one authorised by him; for, it has been said, the mere act of going on the land will not amount to a legal entry, sufficient to vest the actual seisin in the person who has the right: but in order to constitute a legal entry, the person must enter with that intent, and do some act to show such intention. 1 Inst. 245, b; Plowd. 92.

(A) *In what Cases, How, and by Whom Made.*

Goodtitle d. Newman v. Newman, 3 Wils. 521. Doe d. Barnett v. Keen, 7 T. R. 386. Doe d. Gregory v. Whichelo, 8 id. 211.

The entry of an heir upon an estate is only necessary where the lands were in the actual occupation of the ancestor at the time of his death.

In this case, the court held, that the entry of an heir is only necessary where the lands are in the actual occupation of the ancestor at the time of his death; for, if the lands are held under lease, and the lessee has entered under this lease, the heir will be considered as having seisin in deed before entry, on receipt of rent. Likewise the possession of the lessee for years is his possession.

See 1 Inst. 15, b; 3 Rep. 411, b; and *ante*, Descent, p. 47.

(B) *In what Cases the Entry of one of several will suffice.*[1]

(C) *At what Time made.*[2]

(D) *Effect of Entry.*[3]

(E) *Reservation of.*[4]

(F) *When an Entry is averred in Pleading.* *See* Landlord and Tenant; Lease.

(G) *How a Right of Entry may be taken away.*[5]

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[1] Every act done by one joint-tenant for the benefit of himself and his companion shall be deemed an act of both. 1 Inst. 496. Thus, the entry or re-entry of one joint-tenant is as effectual as that of both. Id. 192, a. And the death of a joint-tenant before entry does not destroy the right of survivorship. Id. 466; *see* 2 Cru. Dig. 476. But if one coparcener enters claiming the whole, and makes a feoffment in fee, and takes back an estate to her and her heirs, and hath issue and dies seised, this descent shall take away the entry of the other sister. *Davenport v. Tyrrell*, 1 Bligh, 675. *Doe d. Gill v. Pearson*, 6 East, 172; 2 Smith, R. 295.

[2] An estate for years may be created to commence *in futuro*, though an estate of freehold cannot; for, where an estate for years is created to commence *in futuro*, the freehold in not thereby put in abeyance, but still continues in the lessor, so that he is capable of answering the *præcipes* of strangers, which may be brought against him. And before the abolition of military tenures, he was liable to perform the services that were due for the feud. Where an estate for years is granted to commence *in futuro* it cannot, of course, be executed by an immediate entry, as that would be a disseisin; it is therefore only an *interesse termini*: but still the lessee may assign it over; and even if a stranger enters by wrong, yet such grant will transfer the lessee's power of entry and right of reducing the estate into possession: for, till the entry of the lessee, the estate is not executed, but remains in the same plight as it was when the lease was made, so that no intermediate act, either of the lessor or of a stranger, can divest or disturb it; because whoever comes to the possession, whether by right or by wrong, takes it subject to such future charge, which the lessee may execute whenever he thinks fit, as by a title prior and paramount to all such intermediate violations of the possession. 1 Cru. Dig. 240; 1 Platt, 3, 22.

If a lessee enters before the lease made, it operates as a disseisin. *Hennings v. Brabason*, 1 Leon. 45.

[3] In *Page v. Hayward* (2 Salk.; 3 id. 134), *Holt, C. J.*, laid it down, that a bare entry on another without an expulsion made only a *seisin*, so that the law would adjudge him in possession who had the right; but that in the absence of an *expulsion* it would not work a disseisin, or gain the possession. *See* Hob. 80, 120; Plow. 412; Orl. Bridgm. 14; Holt, 256.

[4] A right of entry cannot be reserved to a stranger. In *Doe d. Barber v. Lawrence*, 4 Taunt. 23, ejectment to recover certain premises, upon a forfeiture committed by an under-tenant, by the breach of covenants contained in a building lease. The entry on the breach of covenant was reserved to the several *cestui que trusts* and trustee together. It was objected that a right of entry could not be reserved to a stranger to the estate; but it was urged and agreed to by the court, that the covenant of the lessee, that the *cestui que trust* might re-enter, estopped him from taking this objection.

[5] In the case of a disseisin, abatement, or intrusion, the descent of the lands to the heir of the disseisor, or abator, or intruder, tolls the entry of such disseisor, abator, or intruder; for the law presumes that the possession which is transmitted from the ancestor to the heir is rightful until the contrary be shown, so that in general no person can recover possession by mere entry on lands which another hath by descent. *Makepiece v. Fletcher*, 2 Com. 461.

It is, however, enacted by the stat. 32 Hen. 8, c. 33, that the dying seised of any disseisin of or in any manors, &c. having no right or title to them, shall not be taken or deemed to be such descent in law, or to toll or take away the entry of any such persons,

VI. Relative to the Conveyance, Disposition of, and Incident to Estates. *Vide* Analysis, *ante*, p. 270.

VII. „ to the Confirmation of Estate.[1]

VIII. „ to Remitter.[2]

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except such disseisor hath had the peaceable possession of such manors, &c. whereof he shall so die seised by the space of five years next after the disseisin, without entry or continual claim. 3 Cru. Dig. 357.

When a person who has a right of entry is under any legal disability, such as infancy, coverture, imprisonment, insanity, or absence from the realm, a descent will not take away the right of entry. Litt. s. 403.

It is enacted by the 3 & 4 Wm. 4, c. 27, s. 2, that "no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued, to some person through whom he claims, within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." *See* Adverse Possession, vol. i. p. 209.

[1] A confirmation is a conveyance of an estate or right *in esse* that one hath in or to lands, &c. to another that hath the possession thereof, or some estate therein whereby a voidable estate is made sure and unavoidable, or a particular estate is increased, or a possession made sure. 1 Inst. 295; Shep. Touch. 311. It is a strengthening of an estate formerly made, which is voidable though not presently void; as, for example, a bishop granteth his chancellorship by patent for term of the patentee's life. This is no void grant, but voidable by the bishop's death, except it be strengthened by the confirmation of the dean and chapter. Toml. *L. Dict.* Confirmation. Where there was a limitation of an estate by deed to A. for life, remainder to B. for life, remainder to the heirs of the body of B., an act on A.'s bankruptcy vested his estates in trustees for payment of his debts, and gave the lands in question after payment, &c. to B. for life, with such remainders over as were limited by the deed. The court held the act enured not to give B. a new estate, but to confirm the one she took under the deed. *Goodright d. Burton v. Rigby*, 2 H. Black. 46.

[2] Remitter is defined to be an act of law which puts an end to the seisin under a wrongful and new-acquired title, and restores the rightful owner to the ancient seisin and better title (3 Prest. Conv. 11); and it takes place in two cases:—First, where there is a naked possession distinct from the right of possession and propriety; and secondly, where there is a right of possession and propriety, as between the disseisor and the disseisee, where the entry is lawful. 1st. Where there is a naked possession distinct from the right of possession, as between disseisor and disseisee. In this case, if the disseisee take back the possession from the disseisor, without doing any act by which he is estopped to insist on his ancient title, there he shall be remitted: for it cannot be otherwise but that, when he has taken back the possession, he should be seised in his own right: for he who has really the title cannot claim from a disseisor who has no title at all; and it would be very absurd and unreasonable that the disseisee, by accepting his own possession, should transfer back any right to the disseisor. 2d. Where the right of possession is distinct from the right of propriety: here, if the proprietary re-obtain the right of possession by agreement, he must hold it under the agreement; for, the other having the right of possession, and transferring it to the proprietary, he must take the right in the same manner as it has been conveyed: he must keep to the terms of the bargain; and he therefore leaves in the feoffer all the right which he has not contracted for: for it is his own folly and laches that he would contract about such right of possession, and not assert his propriety in an action. Hence, if tenant in tail enfeoffs his heir of full age, and dies, the heir must hold under the feoffment; because it is his own folly that he would take the right of possession in this manner, when he was entitled to the right of propriety after the death of his ancestor. But, where the proprietary comes to the right of possession without any fault or folly of his own, as where the right of possession is cast upon him by the law, or he or she comes to the right of possession by feoffment under age, or during coverture, where no folly can be imputed, there such proprietary is remitted, and seated in his ancient and former right. For, the eldest title being the more ancient, is the least subject to dispute; and, therefore, when the proprietary has in such manner acquired the right of possession, it is esteemed, for the repose of men's inheritances, to be only a restitution of the old title, and not the acquiring a new one; and the rather, because, as the party cannot sue himself, there is none against whom the action may be brought to regain the propriety. Thus, if the heir of the disseisor be disseised by the disseisee, he, by such wrong and injustice, cannot regain the right of possession; for an act of wrong can never gain any right: but, if such disseisee die seised, his heir acquires the right of possession by the descent from his ancestor; and, having then both the right of possession and of propriety, he is, for the reasons above-mentioned, seised in his an-

cient right. Hence it appears that the remitter, when it operates, supplies the place of an entry, when an entry is lawful; and of an action, when an action might be maintained; and it redresses the injury done to the person in whom the right resides, by putting him into possession, or obtaining for him seisin of the freehold under his rightful title, in the same manner and to the same extent as he could restore himself to his estate by means of an entry or an action. This restitution of right by mere operation of law is given upon the principles of justice, on the ground that the right of entry being in the person in actual possession, or the right of action being in the person who has seisin of the freehold, there is no one upon whom he can enter, or against whom he can bring an action: therefore, the law places the party precisely in that situation to which his entry or action, grounded on his former trial, would have restored him; and to the intent, that if any person will controvert the title in an action, the mere right, as it subsists between these parties, may be decided. And although this determination of the law might seem superfluous to an hasty observer, who perhaps would imagine that, since the tenant has now both the right and also the possession, it little signifies by what means such possession shall be said to be gained; yet the wisdom of our ancient law determined nothing in vain. As the tenant's possession was gained by a defective title, it was liable to be overturned by showing that defect in a writ of entry; and then he must have been driven to his writ of right to recover his just inheritance, which would have been doubly hard, because, during the time he was himself tenant, he could not establish his prior title by any possessory action. The law, therefore, remits him to his prior title, or puts him in the same condition as if he had recovered the land by writ of entry. Without the remitter, he would have had *jus et seisinam separate*, a good right, but a bad possession. Now, by the remitter, he has the most perfect of all titles: *juris et seisinæ conjunctionem*. 3 Bl. Com. 190; Gib. Ten. 129, 132; 3 Prest. Convic. 13. It thus appears that remitter is favoured by law; and, therefore, it takes effect, though the estate which made the remitter was voidable; and it defeats entirely the wrongful estate, and that immediately without entry; and a remitter to the principal remits to the appendant. So a remitter to the particular estate remits to him the reversion or the remainder. Hob. 255; Pollexf. 397. But there shall be no remitter to a bare title, as for a condition broken; nor to a right for which the party has no remedy by action, as, if the issue in tail be barred by the act of his ancestor, and the freehold is afterwards cast upon him, he shall not be remitted to his estate tail; for the operation of the remitter is exactly the same after the union of the two rights, as that of a real action would have been before it. As, therefore, the issue in tail could not by any action have recovered his ancient estate, he shall not recover it by remitter. 3 Bl. Com. 21; Moor, 115. So there shall be no remitter where the party has no right, but only to have an action; nor if the freehold does not accrue to the right (Dyer, 24, a.; Hob. 71); nor where there was default in him who takes the defeasible estate; nor if he takes by statute 27 Hen. 8, c. 10, which executes the use in the same plight as it was limited. Hob. 298; Dyer, 106. But this statute operates only with respect to the first taker, and, therefore, the issue of the issue, who takes by force of it, shall be remitted. Hob. 255; 1 Roll. Abr. 260; 2 id. 419; G. 45. So if the husband makes a feoffment of the land of his wife to the use of himself and his wife, she shall be remitted; for she has her election to take by the Statute of Uses, or to enter by the stat. 32 Hen. 8, c. 28, upon which she shall be remitted. See *Duncombe v. Wingfield*, Hob. 254; Dyer, 191, b.; 2 Leon. 222; 1 Sid. 63. So there shall be no remitter to a term for years. Hence, if lessee for years to commence at a future day enter before that day, which is a disseisin, and continues in possession till the term commences, he shall not be remitted; for the law will not divest the fee for a term, which is of no account. 2 Roll. Abr. 420; l. 35; 6 Com. Dig. 205; Remitter (c. 7); Co. Litt. by Thomas, 154, n.

[1] Merger is described to be whenever a greater estate and less coincide, and meet in one and the same person, without any intermediate estate; whereby the less is immediately annihilated, or is said to be merged, that is, sunk or drowned in the greater. Thus, if there be a tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. Shep. Touch. 341, ed. Hillyard; 2 Bl. Com. 177. The object of merger is to accelerate the possession, or at least the estate, in which the merger takes place. 3 Prest. Conv. 6. It is an act of law, and seems entitled to the denomination of the extinguishment by act of law of one estate in another by the union of these two estates. To consolidate two estates and confound them into one estate are its effects. The estate thus blended will give the precise time of enjoyment originally limited by the more remote of the two estates, and no more; for the estate in which the merger takes place is not enlarged by the occasion of the preceding estate. (Id.) And see *Smith v. Lord Camelford*, 2 Ves. jun. 714. *Webb v. Russell*, 3 T. R. 394; Brooke, Exting. pl. 50; 1 Saund. 387; Salk. 326; 2 Co. Litt. p. 557.

(A) *Circumstances necessary to Merger.*[1]

[1] Two or more estates must vest in the same person in the same lands (*Paulin v. Hardy*, Skin. 2, 62), and the several estates must be held in the same legal right.

Merger applies between trustees and their *cestui que trust*. *Willoughby v. Willoughby*, 1 T. R. 763. *Goodright d. Larmer v. Searle*, 2 Wils. 29.

If the owner of a term make the freeholder his executor, the term will not merge, for the executor is recognised by the law as usually holding for the benefit of creditors and legatees (*see* Co. Litt. 33, b); but if the executor himself should be the legatee of the term, it seems that after all the creditors have been paid the term will merge. *Law v. Urlwin*, 16 Sim. 377; Sug. V. & P. 507, 13th ed. And if an executor, whether legatee or not, should purchase the immediate freehold, the better opinion is, that this being his own act will occasion the merger of the term, except so far as respects the rights of the creditors of the testator. Sug. V. & P. 505, 13th ed.; Wms. R. P. 376.

Tithes exist as distinct subjects of property separate from the land, and the ownership of both by the same person has not the effect of merging the one in the other. The Tithe Commutation Acts make provision for the merger of the tithes or rent-charge in the land, by which the tithes or rent-charge may at once be made to cease, whenever both land and tithes or rent-charge belong to the same person. *See* 6 & 7 Wm. 4, c. 71, s. 71; 1 & 2 Vic. c. 64; 2 & 3 id. c. 62, s. 1; 9 & 10 id. c. 73, s. 19.

For instances in which the question may arise, whether the party has one estate or several estates, *see* 5 Co. 13 Cro. Eliz. 401; Goldsb. 187; Moor, 398; 15 Vin. 366; Cro. Jac. 282; 3 Prest. Conv. 58, 85. That the determination or acquisition of a third or intermediate estate may be the cause of merger, as between estates kept distinct by means of the intermediate estate, *see* 1 Salk. 254; Ld. Raym. 326; 2 Lev. 437; 3 Prest. Conv. 85, 87, 143; and that, by the descent of a portion of the ultimate remainder in fee, a particular estate in that portion may be merged, *see* 7 Taunt. 362.

The next rule on the subject is, that the more remote estate must be the next vested estate in remainder or reversion, without any intervening vested estate, and also without any intervening interest by way of contingent remainder, created in the same instant of time, or by the same act which gives origin to the other estates. *See* Bro. Lease, 63. *Duncomb v. Duncomb*, 3 Lev. 437. *Bates's case*, 1 Salk. 254; 4 Leon. 9; 33 Eliz.; Brooke, Exting. 54. *Whitchurch v. Whitchurch*, 2 P. Wms. 286. *Scott v. Fenhoulet*, 1 Bro. C. C. 59. But although a contingent remainder, depending on the former of two estates vested in the same person, will suspend the absolute union of these estates, if created by the same conveyance; yet this protection from merger will continue only till the owner of these estates has done some act, by which he confounds the first of his estates in the more remote estate, and by that means destroys the contingent remainder: *per Hale*, *Purefoy v. Rogers*, 2 Saund. 380. And even while the intervening remainder is in contingency, the several estates belonging to the same person will unite for all the purposes of tenure; and there will be a temporary merger, subject to the right of those entitled under the contingent remainder, to have the benefit of that remainder when it can vest. In this instance, the estate opens and closes as the circumstances of the contingent remainder require. *Lewis Bowler's case*, 11 Co. 79; 3 Prest. Conv. 112, 113. And, notwithstanding an intervening estate for years, the freehold may unite with the inheritance, when the freehold and the inheritance meet in the same person, so as to confer a title by curtesy, dower, *possessio fratris*, &c., without prejudice to the term, which affords an instance of a qualified merger, or, more accurately speaking, of union and consolidation, without producing all the effects of a merger. *Bates's case*, 1 Salk. 254; 3 Prest. Conv. 114, 115. And an intervening estate for years will prevent the merger of another estate for years in the freehold or inheritance, limited to take place after the several estates for years. Id. 127. *Bicknal v. Tucker*, 15 Vin. 362, pl. 2; Brownl. 181. An *interesse termini*, however, is not such an intervening interest as will prevent the application of the law on merger. On the contrary, notwithstanding an *interesse termini*, two estates, which in all other respects are immediate to each other, will unite, and the right of possession under the *interesse termini* may, unless circumstances impede, be accelerated. 3 Prest. Conv. 120, 121. *Northam's case*, Hetl. 55. That the merger of one of three or more estates may be interrupted by reason of a mesne estate, which cannot merge because it is larger than the more remote estate, *see* 3 Prest. Conv. 141, 142.

Again, the estate in reversion or remainder must be as large as, or larger than, the preceding estate. Bro. Ab. Exting.; 11 Hen. 4, c. 34; 3 Leon. 157, 151; Jenk. Cent. 243, pl. 37. *Mordant v. Watt*, Brownl. 19. Thus an estate at will will be merged by the acquisition of an estate for years. 3 Prest. Conv. 176. So estates by extent on statutes, &c., may merge in each other (*Dighton v. Grenville*, 2 Vent. 321; Collis's Par. Cas. 64; Vin. Abr. Merger), and in estates for years, &c. 3 Prest. Conv. 177. So, estates for years may merge in each other. Owen, 97; Cro. Eliz. 173; 4 Bac. Abr. 211), or in estates of freehold or inheritance. 11 Co. 93; 3 Preston, 219. So, estates, after possibility of issue extinct are, for all the purposes of merger, estates for life, and may merge in estates of that or a superior degree. Roll. Rep. 173; 11 Co. 81; 12

East, 212; 2 Prest. Conv. 222. So, estates for life may merge in each other, or in larger estates; and though an estate-tail, while in the tenancy of the tenant in tail, and descendible to the issue inheritable under the entail, is privileged from merger; yet, when the right of the issue under the entail ceases, or is defeated or suspended, this estate may merge in the fee-simple. 11 Co. 50, a; Plowd. 259; 3 Prest. Conv. 240. So, determinable fees, qualified fees, and conditional fees, will merge in the fee-simple, or in any fee of the same or larger extent; that is, in any fee not being a fee-tail. 3 Prest. Conv. 258. And it seems probable that, when the base or determinable fee depends in point of title on an estate-tail, it will merge in the immediate reversion or remainder, whether the same is held for an estate in fee, or in fee-tail. Id. 259. And although a person cannot have a power and a fee in the same lands, when he is seised of that fee under a gift or conveyance to him by the rules of the common law; but the power will merge in the estate (*Goodill v. Brigham*, 1 B. & P. 192); yet it is clearly settled that in a conveyance to uses, the same person may have a power of appointment, and also a fee. *Sir Edward Clere's case*, 6 Co. 17. *Maundrell v. Maundrell*, 10 Ves. 244. As if a conveyance is made by A. to B. in fee, to such uses as A. shall appoint, and in default of appointment to the use of A. in fee, A. is seised by means of the Statute of Uses, and the power and the fee are consistent. So, if A. convey to B. in fee, to such uses as A. shall appoint, and in default of appointment to the use of A. for life, remainder to B. in fee; the power being in a conveyance to uses is good; but it is otherwise in the case of a conveyance to A. in fee to such uses as A. shall appoint, and, in default of appointment, to the use of A. in fee; for the Statute of Uses is applicable only when there is an use divided from the legal ownership; and therefore the statute does not execute uses of this description, when the use or beneficial ownership is in effect embraced in and conferred by the legal estate. 3 Prest. Conv. 270, 273.

The doctrine will not have effect to alter the quality of one of two estates in the same person, or to destroy a contingent remainder, when the several estates are limited by the same deed or instrument, or take their effect in the same instant of time, and in some degree by the same act, and some other person is concerned in the consequence of the merger. With respect to this branch, see *Rogers v. Downes*, 2 Mod. 293. *Purefoy v. Rogers*, 2 Saund. 386; 3 Prest. Conv. 376, 403.

The doctrine does not apply to an estate for several lives, arising under the same limitation, as giving one undivided and entire time of continuance. In *Ross's case*, 5 Co. 13, it was determined that a lease for several lives was one entire estate, and not several and distinct estates; and, consequently, that there could not be any merger, since they were not two estates, so that one might merge in another; and *see* Utty, *Dale's case*, Cro. Eliz. 182. But when a lease is made for several lives, as distinct periods of time, giving one estate in possession, and others in remainder, then, *cæteris paribus*, the doctrine of merger will apply, because there are several estates: that doctrine, however, cannot operate, unless the estate in remainder is larger than, or as large as, the estate in possession. 3 Prest. Conv. 406.

And, lastly, the union of two estates in the same person, by means of the joint act of the respective owners of these estates, with an intention that the estate of their assignee should continue for the collective time of their several estates, will not be a cause of merger. Id. 50, 51. On this head, Mr. Preston observes, that all the cases in which the doctrine of merger has prevailed, are authorities only that one estate will be annihilated, when there are two distinct estates, and the time of one becomes, either in point of fact, or in intendment of law, inconsistent with the other; or there is an evident intention to change the tenancy under one estate to a tenancy under another estate. But where one person accepts a conveyance from two persons who have distinct estates, becoming the purchaser of the estate of each them, and their estates give particular interests only, and not the complete ownership and absolute dominion over the property, either generally, or subject to certain particular estates, it is a natural and reasonable inference that he intended to have the right of enjoyment for the several periods of time comprised in these estates. To many purposes there is a union and consolidation of the two estates. They become one entire interest, so as to perfect a right of dower, tenancy by curtesy, &c., and give the remedies proper to the estate, considered as an estate of an inheritance in possession; still, however, there is not any merger. For, to merger, it is essential that the time of one estate should, in point of title, be absorbed and lost in the time of the other estate; while, in the case under consideration, the right of enjoyment will continue for the several times of the several estates. Another circumstance peculiar to these cases, and distinguishing them from those to which the doctrine of merger is applicable, is, that the right of enjoyment continues under each estate for the time of that estate; so that, under these circumstances, the charges on the reversionary or more remote estate, which were created by the former owner of that estate, will not be accelerated by the union and consolidation of the two estates. Id. 409, 410; and see *Bredon's case*, 1 Co. 77. *Treport's case*, 6 id. 14. *The Earl of Clanricarde's case*, Hob. 273. *Beckwith's case*, 2 Co. 56. But when one and the same person has several estates, which are kept distinct in him by reason that one of the estates is privileged from merger under the Statute of Entails, or for the sake of some other person

concerned in benefit under a joint tenancy, or a contingent remainder, there will be a merger when this person conveys these several estates, even by one conveyance and one entire grant; for, as these estates were kept distinct and exempted from merger for a particular cause, a merger will take place on the union of these estates in another person, or even in the same person, as taking under a conveyance to uses, since the cause for the exemption from merger no longer exists, *et cessante causâ cessat effectus.* 3 Prest. Conv. 441. *Symonds v. Cudmore*, 4 Mod. 1. *Eustace's case*, Jones, 55; 2 Salk. 204; 2 Co. Litt. by Thomas, p. 560.

An executory interest by devise, or by bequest, or any executory interest under a springing or shifting use, will not cease by the union of the executory interest in the person who has the estate, which is subject to the interest. *Goodright v. Searle*, 2 Wils. 29. *Goodtitle v. White*, 15 East, 174; 3 Prest. Conv. 493. But although these interests are distinct while they are in the original owner, yet after he has aliened the fee the two interests will be united; for the conveyance will operate, first as a transfer, and secondly as a release, by way of extinguishment of the interest under the executory devise, &c. Id. 407.

With respect to persons who are releasers to uses, no estate will be merged by reason that the owner thereof accepts another estate merely as a releasee or grantee to uses. On the other hand, an estate which such feoffee, releasee, or grantee, may take under an use declared of his estate may be the cause of merger, in the same manner as if the person taking an estate under the use had not been the feoffee, releasee, or grantee to uses. It is also to be remembered that this protection is extended to a person who is an instrument towards the raising of uses, although he be not the feoffee, releasee, or grantee, on whose immediate seisin the uses arise. Thus, where formerly a conveyance was made to a man and his heirs, to the intent that he might be tenant of the freehold, to the end that a common recovery might be suffered to uses, although the uses arise from the seisin of the demandant, and not from the seisin of the tenant, yet the estate which was in the tenant prior to the acceptance of the conveyance was protected. *Ferrers & Curson v. Feemor*, Cro. Jac. 643; 3 Prest. Conv. 512.

Merger is not favoured in equity, except to promote the intention (*Phillips v. Phillips*, 1 P. Wms. 41); and, therefore, though there may, as to equitable estates, be an union in equity as well as at law, yet equity would not permit an acceleration of charges, incumbrances, &c., as a consequence of the union against the justice of the case, or contrary to the intention. But even in equity, if a man grant a lease of the possession, while he has merely a reversion or remainder expectant on a prior estate, yet, on his purchase of the particular estate, equity proceeding upon those rules which govern that court in enforcing specific performance of contracts, would decree a lease to operate on the ownership thus acquired, subsequent to the lease, so as to charge the possession with the lease. 3 Prest. Conv. 558. As to money paid, the union of the title to the money to the person who is owner of it, whether it be real or personal property, will extinguish the demand. The fund must be taken as it is found. *Pulteny v. Darlington*, 1 Bro. C. C. 223; 2 Ves. jun. 175.

With respect to creditors it is observable, that after the merger of a term belonging to an executor or an administrator in that character, in the reversion or remainder which the executor or administrator, or the husband of an executrix or an administratrix, has in his own right, the term, it should seem, no longer remains assets against which an execution can be sued as part of the goods of the testator. In consequence of annihilating the term by his own act, the value of the term is assets in the hands of the husband or executor, &c., making the husband in his lifetime, and his wife after his decease, liable to that extent as for value received, or for a *devastavit*. But at law the term does not, it is apprehended, continue specifically liable to the demands of the creditors, merely as creditors. *Charlton and others v. Low and others*, 2 P. Wms. 328. But it is probable that a court of equity would not suffer creditors to be defrauded by the merger of the term, but would follow the inheritance while it remained with the executor, &c., or with the wife or the husband, so as to give to the creditors out of the inheritance a compensation to the value of the term, as assets belonging to them in equity, though withdrawn from them by the rules of law. 3 Prest. Conv. 559.

With respect to persons who have legal and equitable estates united, as a legal estate cannot merge in an equitable one, it frequently becomes material, with reference to the application of the doctrine now under consideration, to consider whether the term be not legal and the inheritance equitable, or *è converso*. It has been seen that an equitable fee may be extinguished by the legal fee, and that the purchase of the legal fee will govern the order of succession. In general, too, all equitable interests will be absorbed in and extinguished by the legal interest, as far as they are united, since the legal estate will govern the title as far as the same person has the legal estate, and the benefit of that estate as the equitable owner. *Wade v. Paget*, 1 Bro. C. C. 363. But the legal estate will not extinguish more of the equitable interest than is corresponding to and co-extensive with the legal estate. 3 Prest. Conv. 567. And where a charge upon land comes to the same person that is entitled to the land (*Clerk v. Rutland*, Lane, 111. *Chester v. Willes*, Ambl. 246), if he has not the same interest in both, there shall be no extinguishment upon this account (*Price v. Seys*, Barn. C. C. 120); in which respect there is a distinction between

legal and equitable estates on the one hand, and freehold and copyhold interests on the other hand; because the fee of a copyhold may be extinguished in a particular estate of the freehold tenure. *St. Paul v. Lord Dudley and Ward*, 15 Ves. 167. So, if a person has a charge on the inheritance, and purchase an estate, being a portion of that inheritance, the charge will not be extinguished or suspended, except so far as it affects the ownership which the party acquires in such portion of the inheritance. 3 Prest. Conv. 567. The general rule also is, that if a person has a portion charged on the inheritance, and then acquires the inheritance in fee by purchase, the charge cannot be enforced by the personal representatives to the prejudice of the heirs or real representatives. *Chester v. Willes*, *supra*. But if there be evidence of the intention of the owner of the fee that the charge should not merge, or where no intention is expressed, or the party is incapable of expressing any, if it appear to the court to be most advantageous for him that it should continue personal property, in such case the charge will not sink (*Thomas v. Kernish*, 2 Vern. 348; and see *Forbes v. Moffatt*, 18 Ves. 384), in which case a mortgage was held not to be merged by union with the fee, the actual intention, not established by the acts of the party, being presumed from the greater advantage against merger in favour of the personal representative. So it is when the inheritance descends on an infant entitled to a portion, or when an estate-tail or for life only is acquired (*Chandos v. Talbot*, 2 P. Wms. 610; Ambl. 246), or creditors would be prejudiced. *Danisthorpe v. Porter*, Ambl. 600; 1 Saund. 242. There are also some other exceptions to the general rule that the succession shall be governed by the legal, and not by the equitable estate; for if a person has a term of years at law, and purchases the equitable inheritance, the term will become attendant on the inheritance for the benefit of the heirs, in exclusion of the executors, or, more correctly speaking, the executors, as to the legal estate, will become trustees for the heirs. *Charlton v. Low*, 3 P. Wms. 328. Also, when a copyholder of the legal estate purchases the equitable fee of the freehold tenure, the heirs of the freehold tenure, though merely equitable, will be entitled to the benefit of the legal estate of the copyhold tenure. 3 Prest. Conv. 569. The general rule, however, is, that if a man has the same interest and absolute dominion and property in the whole inheritance as he has in the term, or power for raising money out of the inheritance, there it must merge; for a man cannot have power to raise money merely for my benefit out of that which is mine. But if there be any difference in the two interests, or any other person intermediate, then there can be no merger; for if there be any merger in the first case, it will change the intent of the conveyance, and in the other case, there being an intermediate estate, there is no merger at law; no more is there in a court of equity in the case of a trust. 2 Fonbl. Tr. Eq. 167; and see *Willoughby v. Willoughby*, 1 T. R. 766. But though a term will not become attendant on the inheritance by the construction of the Court of Equity, except under the circumstances stated in the general rule, yet it may, under other circumstances, become attendant by the express declaration of the owner of the term and of the inheritance. *Scott v. Fenhoulet*, 1 Bro. C. C. 69; 3 Prest. Conv. 570; 2 Co. Litt. by Thomas, 561, 562, 563.

When the estates are held in different legal rights, one of them must not be an accession to the other merely by act of law. The exemption from merger in favour of estates held in *autre droit* appears to apply, first, as between husband and wife. If a husband, who is tenant for years, intermarried with a woman who at that time had the reversion, or to whom the reversion descends after their intermarriage, the term will not merge, because in one case the right of the husband in the reversion of his wife, and in the other case the descent, is an act of law. And, accordingly, it has been held, that if a term be held by a person to whose wife the immediate freehold afterwards comes by descent or devise, such freehold coming to the husband in right of his wife will not cause a merger of the term. *Doe d. Blight v. Pett*, 11 Ad. & E. 842. *Jones v. Davies*, 5 H. & N. 766. But if a husband, tenant for years in the right of his wife, purchase the intermediate reversion, the term will be annihilated, for the purchase was the express act of the husband, and amounts to a disposition of the term. And if a *feme* who has a term for years as executrix, intermarry with a person who, after the intermarriage, becomes entitled by purchase to the immediate reversion, or if a person who has a term as executor do himself purchase the immediate reversion, the term will, in either case, be merged. 3 Prest. Conv. 314.

When the husband has an estate of freehold in his own right, and the fee in the right of his wife, the freehold will not merge; and, therefore, where a woman seised of land in fee leased the same to a stranger for life, and took a husband, and the lessee granted his estate to the husband, this was no surrender, and yet the husband was seised of the reversion in fee, which was immediate unto the estate of the lessee, viz. in the right of his wife, and not in his own right. And it seems to be a general rule that the freehold of the wife will not, in any case, merge in the freehold of the husband, for the wife cannot part with her freehold without some act of record. 3 Prest. Conv. 305. *Stephens v. Britridge*, 1 Lev. 36; Perk. sec. 612, 622. 2 Co. Litt. 556, n. Second, as between executors and administrators having an estate in their own right, and another in right of their testator or intestate. Third, as between persons who form a part of a corporation aggregate of many, and who have their estates in their individual capacity at the same time that the

By 3 & 4 Wm. 4, c. 74, s. 39, "that if a base fee in any lands, and the remainder or reversion in fee in the same lands shall, at the time of the passing of this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as a tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act, if such remainder or reversion had been vested in any other person." Base fee, when united with the immediate reversion, is enlarged instead of being merged.[1]

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corporation, of which they are a constituent part, has an estate in its corporate capacity. Fourth, between persons entitled under an entail, and who have the fee expectant upon that estate. And fifth, between persons who have an instantaneous or temporary seisin to serve uses, to be raised out of the estate conveyed to them, and also an estate in their own right. 2 Co. Litt. 558. For it is a general rule in equity that a person cannot be a trustee for himself, and that as between real and personal representatives, or between different classes of heirs, or heirs in different lines, there is not any equity, but the legal right must prevail (3 Ves. jun. 126; id. 339); therefore, excepting the cases of infants, &c., an equitable charge will merge in the legal ownership when they are united; an equitable term will, as between the heirs and executors, merge in the legal estate of inheritance; and an equitable fee by descent *ex-parte paternâ* will merge in the legal fee taken by descent *ex-parte maternâ*, so as, in the two former cases, to exclude the person entitled to the charge; and, in the latter case, to exclude the paternal heirs in favour of the maternal heirs. *Doe d. Balch v. Pott*, cited Dougl. 772; 3 Ves. jun. 339; 3 Prest. Conv. 328. But when a person has a fee subject to an executory devise to his mother, and the interest under the executory devise descends to him, and the event happens on which the executory devise is to operate, the descent from the mother will govern the title, and, consequently, the interest by executory devise is not extinguished in the fee. *Goodright v. Searle*, 2 Wils. 29. Also an exemption from merger is not allowed, as between joint tenants, when the reversion comes to one of them by descent (*Wiscot's case*, 2 Co. 60); nor when the reversion is limited by any other deed, &c., than that which creates the joint tenancy. And it is doubtful whether it applies as between parsons who have a term in their own right, and also the parsonage in right of their church, and in their capacity of parsons, or between the prebendaries who have an estate in the revenues and lands of the prebend, under a grant from the prebendary, and also the advowson of the prebend, as their inheritance, or the incumbency of the prebend in the character of prebendary. Vin. Abr. Merger; 3 Prest. Conv. 298, 300; 2 Co. Litt. 559, n.

The estate must not be privileged under the Statute of Entails. An estate-tail and reversion in fee may exist together; for in such a case, by the operation of the statute *De donis*, the estate-tail is kept alive, not merged by the reversion in fee. *Roe d. Crow v. Baldwere*, 5 T. R. 104.

With respect to the privilege from merger under the Statute of Uses, Mr. Preston observes that all the cases which have arisen on this statute, as well as the words of the statute itself, prove that there is an exemption from merger under this statute, in those instances only in which the owner of the term or particular estate is the instrument mediately or immediately for raising the uses, so that the uses are to arise out of the estate conveyed to him; for, even at this day, an estate arising to a feoffee to uses under a declaration of uses, will merge an estate previously vested in such feoffee to uses. And also when a man has a term or other particular estate in his own right, and the reversion or remainder is conveyed to him upon trusts which do not execute into estate by force of the Statute of Uses, the legal right under the term or other particular estate will be extinguished. So, when a termor joins with those who have the reversion in making a conveyance to a third person, either to uses or upon trust, and although there be an express declaration that the conveyance shall not affect the right of the termor, yet his estate will be annihilated. And the only mode of keeping his estate on foot is to insert an express declaration of use, by way of confirmation in his favour. And then there is rather a new term under a new title than the old term under the ancient title. 3 Prest. Conv. 369, 370. *Ferrers v. Fermor*, Cro. Jac. 643. *Fountain v. Coke*, 1 Mod. 107; 2 Co. Litt. by Thomas, 559, n.

[1] The application of the doctrine of merger has been further restricted by the enactment of the 8th sect. of 8 & 9 Vic. c. 106, that a contingent remainder shall be, and if created before the passing of the act, shall be deemed to have been capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

By the 8 & 9 Vic. c. 106, s. 9 (repealing 7 & 8 Vic. c. 76, s. 12), it is enacted, "that when the reversion expectant on a lease made either before or after the passing of the act of any tenements or hereditaments of any tenure, shall, after the 1st of

(B) *Effect of Merger.*[1]

X. Relative to the Conversion of Estates into Personal Property. *See* vol. iii. p. 216.

XI. „ to the Forfeiture of Estates. *See* Analysis, p. 270.

ESTOPPEL.

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(A) *In order to be Conclusive Evidence, an Estoppel must be Pleaded if an Opportunity to Plead it be afforded*, p. 287.

I. Nature and Qualities of an Estoppel.[2]

October, 1845, be surrendered, or merge the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements or hereditaments shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease." *See* 2 Platt, 394.

[1] As to the effect of merger, it is observable, first, that the doctrine of merger may be injurious to the person in whose estate in reversion or remainder a prior estate becomes merged. When he is a trustee, he will be protected by a court of equity from the consequences of the merger; but unless he can derive a protection from this or some other source, he may, by reason of the merger, be subjected to a lease operating by *interesse termini*, to a charge, or to a judgment, as a present and immediate incumbrance affecting the possession; while, without the merger, such lease, judgment, &c., would not have attached on the possession until the prior estate had determined by effluxion of time. Secondly, notwithstanding the merger of the particular estate, persons who have interests affecting the estate which is merged will be left in the same condition, in point of benefit, as if no merger had taken place. Therefore, if tenant for life has made a lease, or granted a rentcharge, or confessed a judgment, such lease, rent, or judgment will remain in force, and affect the land during the period of the estate which is merged, in like manner as if that estate had continuance. For the purpose of these estates, the particular estate, though merged, has continuance in point of title, although it is merged in point of law. 3 Prest. Conv. 446, 448. Under the same principle, the right of exercising powers of leasing and of cutting timber cannot be accelerated to the prejudice of persons who have opposing interests. Id. 452. Thirdly, the effect of the merger on the estate in which the merger takes place is to subject the reversion or remainder thus accelerated to all those burdens and consequences which would have attached on that estate in case the prior estate had not existed, and in the same order or series of time as if that estate were determined. *Symonds v. Cudmore*. 4 Mod. 1; Perk. sec. 62, 63. *Shelbourne v. Biddulph*, 4 Bro. P. C. 594. Thus, the possession will be chargeable during the period appointed for the continuation of the particular estate, with all the incumbrances which affected that estate; and also, by way of acceleration, with the incumbrances which attached on the reversion or remainder as thus accelerated. *Errington v. Errington*, 2 Bulst. 42; 2 Co. Litt. by Thomas, 561, n.

[2] An estoppel is an *admission*, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high, and so conclusive, that the party whom it affects is not permitted to aver against it, or offer evidence to controvert it; though he may show that the person relying upon it is estopped from setting it up, since that is not to deny its conclusive effect as to himself, but to in-

II. Different Kinds of.

(A) *By Matter of Record.*

(*a*) *A Fact cannot be alleged for Error which contradicts the Record.*

Rex v. Carlile, 2 B. & Adol. 362.

A fact cannot be alleged for error which contradicts the record.[1]

The defendant had been convicted of a seditious libel, and brought a writ of error in the Queen's Bench, assigning for error in fact that there was but one of the justices named in the commission present when the jury gave their verdict. On the record returned to the King's Bench (and which was made up in the ordinary way), it appeared that a sufficient number of the justices were present; and the court held, that it was not competent to the defendant to question the fact so stated. "The authorities," said *Lord Tenterden*, in delivering the judgment of the court, "are clear that a party cannot be received to aver as error in fact a matter contrary to the record. In 1 Inst. 260, *Lord Coke* says: 'The rolls being the records or memorials of the judges of the courts of record, import in them such incontrollable credit and verity, as they admit of no averment, plea, or proof to the contrary. And if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself: and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient.' The cases from Yelverton and Sir Thomas Raymond (*King v. Gosper*, Yelv. 58. *Okeover v. Overbury*, T. Raym. 231), are direct authorities upon this point, as well as that for which they were cited; and one of the instances put by *Lord Hale*, namely, that the court was not sitting, is very like the present case. Other cases were quoted at the bar upon this point (*Whistler v. Lee*, Cro. Jac. 559. *Plomer v. Webb*, 2 Ld. Raym. 1415; and the authorities in Bac. Abr. Error; and it is unnecessary to repeat them); but it

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capacitate the other from taking advantage of it. Such being the general nature of an estoppel, it matters not what is the fact thereby admitted, nor what would be the ordinary and primary evidence of that fact, whether matter of record or specialty, or writing unsealed or mere parol: the fact may in each case be proved, the ordinary evidence rendered unnecessary, by an estoppel. And this is no infringement on the rule of law requiring the best evidence, and forbidding secondary evidence to be produced till the sources of primary evidence have been exhausted, for the estoppel professes not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence, by showing that the fact is already admitted; and so, too, has it been held, that an *admission*, which is of the same nature as an estoppel, though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose: for instance, in *Bringloe v. Goodson*, 5 Bing. N. C. 739, a deed was recited to be executed in pursuance of a power contained in the will of P. S. A will, purporting to be that of P. S., was produced, and there was some slight evidence that it was a will of P. S. This was held sufficient evidence to go to the jury, that the will produced was executed by P. S., without calling the attesting witnesses. "I do not put the admission," said *Tindal, C. J.*, "so high as an estoppel, but it has its effect on the principle laid down in *Shelley v. Wright*, Willes, 9, where a party executing a deed was held estopped by the recital of a particular fact in that deed to deny that fact." *See* also *Slatterie v. Pooley*, 6 Mee. & W. 664. *See*, however, *Gillett v. Abbott*, 7 Ad. & E. 783, where a deed reciting another deed was admitted on the record; but it was held that it involved the admission of so much only of the second deed as was recited, and that in order to introduce the rest strict proof was requisite. 2 Sm. L. C. 436, notes to *Duchess of Kingston's case*. See *Carter v. Carter*, 27 L. J. Ch. 75. *Fraser v. Pendlebury*, 31 L. J. C. P. 1. *South-Eastern Railway Co. v. Warton*, 6 H. & N. 520.

[1] "Touching estoppels," says *Lord Coke*, "which are a curious and excellent sort of learning, it is to be observed, that there lie three kinds of estoppels: viz. *by matter of record*, *by matter in writing*, and *by matter in pais*." Although his lordship uses the word "writing," it is clear that the writing which is to operate as an estoppel must be a deed. See *Straton v. Rustall*, 2 T. R. 366. *Lampon v. Corke*, 5 B. & Al. 611. *Greaves v. Key*, 3 B. & Ad. 313. Estoppels, therefore, are,—1. By matter of Record; 2. by Deed; 3. in Pais.

may be proper to observe, that one of them, namely, *Molins v. Werby*, 1 Lev. 76; 1 Sid. 94; 1 Keb. 355, is quite analogous to the present. That was a writ of error on a judgment in the Palace Court, said to be holden before James, duke of Ormond: the error assigned was, that the court was not holden before the duke, but before his deputy; and this was held not assignable, being contrary to the record. In the case of *Bowes v. Carnington*, Cro. Jac. 244, the error assigned was, that one W. B. of Bradfield was returned upon the jury process, and one W. B. of Metfield, who was another person, and not returned, was sworn. And this was held not assignable for error, because contrary to the record, and the party estopped; for otherwise every record might be brought in question upon such surmise. I will mention one more case only, viz. *Cole v. Green*, 1 Lev. 309. An action of waste was brought in the Court of Hustings of the city of London: there were two trials; upon the first, the verdict was for the plaintiff; and upon the second, for the defendant. The judgment was given for the defendant. The plaintiff brought a writ of error, which was heard before several of the judges assigned for that purpose in St. Martin's-le-Grand: the errors there assigned are not applicable to the present case. The judgment given for the defendant in the Hustings was reversed, and judgment given to the plaintiff on the first verdict. Upon this reversal of the judgment the original defendant brought a writ of error in the House of Lords, and there assigned for error that the jury did not come out of the four nearest wards, as by the custom of London they ought to do. The defendant in error pleaded *in nullo est erratum*, and upon argument the lords, with the advice of the judges, resolved: first, that this was not assignable for error, being contrary to the cause, because the award of *venire facias* is out of the four nearest wards, and the writ returned served accordingly; and, secondly, that *in nullo est erratum* is a demurrer: and although there be error in fact, that is not confessed by demurrer, it not being assignable, but the demurrer upon it is in the point of law, because not assignable, and the judgment given at St. Martin's was affirmed. This a judgment pronounced by the highest tribunal of the country: the matter is settled, as I have before observed, by a series of decisions, and the rules in this respect have been perfectly established, and long known and received as law in Westminster Hall. For these reasons the judgment of the court below must be affirmed." [1]

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[1] In *Reed v. Jackson*, 1 East, 355, the court would not permit evidence to be given that the verdict had been entered by a mistake of the associate. See *R. v. Shaw*, R. & R. C. C. 526. *Leighton v. Leighton*, 1 Stra. 210.

This conclusive effect of a record is limited by certain rules and considerations; several cases are mentioned in Com. Dig. Estoppel, E. 1, to E. 10, namely,—

1. *Where the record is coram non judice.* As if the record were of an indictment purporting to have been determined in the Common Pleas—a court having no criminal jurisdiction.

2. *Where the truth appears in the same record* (Co. Litt. 352, b). As, for instance, where the record shows that a judgment, which is relied upon as an estoppel, has been reversed in error.

3. *Where the thing averred is consistent with the record;* which is, indeed, no exception at all.

4. *Where the allegation in the record is uncertain.* For an estoppel not being favoured by the law ought to be certain to every intent. Co. Litt. 352, b; 303, a. And therefore, "if a thing be not directly and precisely alleged it shall be no estoppel." Co. Litt. 352, b.

5. *Or if it is alleged merely by way of supposal.* The words used by *Lord Coke* are:—"Matters alleged by way of supposal in counts shall not conclude after nonsuit. Otherwise it is after judgment given. And after nonsuit, albeit the supposal in the count shall not conclude, yet the barre, title, replication, or other pleading, of either party, which is precisely alleged, shall conclude after nonsuit, and hereby are the books reconciled." Co. Litt. 352, b.

6. *Or, is not traversable or material.* See *Attorney-General v. King*, 5 Price, 195; and *see* Co. Litt. 352. b. As, for instance, the day in an indictment. On this principle, too, seems to have proceeded *Skipwith v. Green*, 1 Stra. 610; 8 Mod. 311, where the tenant was held not to be estopped by the description of the nature of the land in the lease.

7. *Or, where there is an estoppel against an estoppel.* For, to use the expression of *Lord Coke*, "Estoppel against estoppel setteth the matter at large."

8. To these may be added the rule that estoppels ought to be mutual, laid down by many of our text writers. *See* Co. Litt. 352; Cro. Eliz. 37. Thus, if a man take a lease of his own lands from a married woman by indenture, this works no estoppel on either party, because the married woman not being estopped by reason of her disability, the lessee is not so.

Yet this rule, that an estoppel must be mutual otherwise neither party is bound, must be taken with some limitation, and probably, on accurate investigation, would be found to apply to those cases only where both parties are intended to be bound, since otherwise there could be no estoppel by deed-poll. Indeed, in Bac. Abr. Leases, it is remarked, that where a lease is by deed-poll the lessee is not estopped to say that the lessor had not the land; "but," it is added, "it should seem that such lease by deed-poll binds the lessor himself as much if it were by indenture, because it is executed on his part with the very same solemnity, and, therefore, it should seem that he is bound by such lease by way of estoppel."

9. It is also a rule, that there is no estoppel where an interest passes. The meaning of which is, that the person who accepts a grant is not estopped from saying that it does not pass so great an estate as it purports to convey, though he is estopped from saying that it passes no estate at all.

On the ground, that a judgment recovered will be evidence whenever the cause of action is the same, a recovery of damages in trover will vest the property in the chattels sued for in the defendant, and will be a bar to an action of trespass for the same thing. *Smith v. Gibson*, Ca. Temp. Hard. 319. *Moor v. Watts*, 1 Ld. Raym. 614. *Cooper v. Shepherd*, 3 C. B. 266. If any doubt arises as to the identity of the causes of action, a proper test is to consider whether the same evidence would support both actions, and what was the particular point or matter determined in the former action. See *Hadley v. Green*, 2 Tyr. 390. *Wiat v. Essington*, 2 Ld. Raym. 1410.

The circumstance that the former judgment was erroneous, either absolutely or in awarding an inadequate amount to the successful party, cannot, so long as that judgment stands unreversed by a competent court, be set up in answer to its effect, or prevent its concluding. *Overton v. Harvey*, by C. B. 324. *Todd v. Stuart*, 9 Q. B. 759.

The validity of a decree of a court of competent jurisdiction upon parties legally before it, may, however, be questioned on the ground that it was pronounced through fraud, contrivance, or covin, of any description, or not in a real suit, or if pronounced in a real and substantial suit, between parties who were really not in contest with each other: *per Lord Eldon, C., Earl of Bandon v. Becker*, 3 Clark & Fin. 510. See *Gore v. Stackpoole*, 1 Dow. 18.

Decrees of the Court of Chancery have the same operation in respect of the doctrine of estoppel as judgments of the superior courts of common law. Bull. N. P. 243. *Case of Manchester Mills*, Dougl. 222. *Trotter v. Blake*, 2 Mod. 231. *Allasan v. Stark*, 9 Ad. & E. 255. See *Collins v. Cave*, 27 L. J. Ex. 146.

But with respect to ejectments, although a judgment in ejectment is evidence in another ejectment between the same parties (*Doe d. Strode v. Seaton*, 2 C., M. & R. 728), yet it is not conclusive evidence, because a party may have a title to possession and to grant a lease at one time, and not at another. Neither can a judgment in ejectment be pleaded as an estoppel. *Doe d. Strode v. Seaton, supra.* See *Wright d. Doe v. Tatham*, 1 Ad. & E. 19; 5 Clark & Fin. 670; Bull. N. P. 232.

In an action of debt on a simple contract for 400*l.*, the defendants pleaded as to 43*l.* 6*s.* 9*d.* payment, and as to the residue, that the plaintiffs impleaded defendant for the same in an action on promises, and recovered 314*l.* 8*s.*, as well for their damages in the said action as for their costs. The replication alleged that the residue of the said causes of action in the declaration mentioned, were not the causes of action in respect of which the judgment was recovered; and on the issue thus raised the jury found for the defendants. It was held that the above plea was good after verdict, and that it amounted to an ordinary plea of judgment recovered. *Stewart v. Todd*, 16 L. J. Q. B. 327.

The record of a verdict followed by a judgment in a suit *inter partes* will estop parties and privies.

Parties.—A recovery in a suit upon issue joined on matter of title is conclusive upon the subject-matter of such title; and a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. *Outram v. Morewood*, 3 East, 346. See *Simpson v. Pickering*, 1 C., M. & R. 529. *Ward v. Wilkinson*, 4 B. & Al. 412. *Eastmure v. Lawes*, 5 Bing. N. C. 450. *See* 27 L. J. Ex. 146; id. 262.

A verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and, in fact, as a different person in law. *Robinson's case*, 5 Rep. 32, b; Com. Dig. Estoppel (C).

A judgment *inter partes* is conclusive between the same parties, for *res inter alios acti nocere non debet.* "The verdict ought to be between the same parties, because otherwise a man might be bound by a decision who had not the liberty to cross-examine; and nothing can be more contrary to natural justice than that a man should be injured by a determination that he, or those under whom he claims, was not at liberty to controvert." Bull. N. P. 233. And "every estoppel ought to be reciprocal; and that is the reason that regularly a stranger shall neither take advantage of, nor be bound by, an estoppel. Co. Litt.

352, a. See *Gaunt v. Wainman*, 3 Bing. N. C. 62. *Lady Wenman v. Mackenzie*, 5 E. & B. 447. *Doe d. Marchant v. Errington*, 6 Bing. N. C. 79.

A judgment is evidence between those who, although not nominally, are really and substantially the same parties. *Kinnersley v. Cope*, 2 Dougl. 517.

Privies.—A judgment recovered will be admissible as evidence, not only between the same parties, if suing in the same right (*Outram v. Morewood*, 3 East, 346; Com. Dig. Estoppel, C.), but likewise between their privies, whether in blood, law, or estate. *Trevilan v. Lawrence*, 1 Salk. 276. *Earl of Carnarvon v. Villebois*, 13 Mee. & W. 313. *Dawson v. Gregory*, 7 Q. B. 756.

And it has been held that a judgment without satisfaction recovered against one of two joint debtors, may be pleaded in bar of an action against the other contracting party. *King v. Hoare*, 13 Mee. & W. 494. See *Holmes v. Newlands*, 5 Q. B. 634. This rule, however, does not apply to the case of a joint and several contract, for there the instrument sued on comprises the joint contract of all, and the several contracts of each of the contracting parties, and gives different remedies to the person with whom the contract has been entered into. *See post*, Judgment; 13 Mee. & W. 504. *Henry v. Goldney*, 15 id. 494.

A party claiming through another is estopped by that which estopped that other respecting the same subject-matter. Thus, an heir (who is *privy in blood*) is estopped by a verdict against his ancestor, through whom he claims. *Lock v. Norborne*, 3 Mod .141. An executor or administrator, suing as such, is bound by a verdict against his testator or intestate, to whom he is *privy in law*. *R. v. Hebden*, And. 389. "The lord by escheat, the tenant by the curtesy, the tenant in dower, and the incumbent of a benefice, shall be bound by, and shall take advantage of, estoppels." Co. Litt. 352, b. And as regards *privies in estate*, a verdict against the feoffor would estop the feoffee; and against the lessor, the lessee, &c. See *Blakemore v. Glamorganshire Canal Co.* 2 C., M. & R. 133. *Helps v. Hereford*, 2 B. & Al. 242. *Doe v. Earl of Derby*, 1 Ad. & E. 783.

A verdict of guilty, and judgment thereon, on an indictment for obstructing a public highway, cannot be pleaded as an estoppel in an action brought by the party convicted against a third person for using the way. *Petrie v. Nuttall*, 11 Ex. 569.

Whether as regards judgments *in rem* or judgments *in personam*, the production of the record is conclusive upon all the world for the mere purpose of proving the existence of the judgment. *Green v. New River Co.* 4 T. R. 590. *R. v. Hebden*, Bull. N. P. 231. *Pritchard v. Hitchcock*, 6 Man. & G. 151; 6 Scott, N. R. 851. As to the distinction between judgments *in rem* and *in personam*, *see post*, Judgment.

A judgment *in rem* being an adjudication pronounced upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose, concludes all persons from saying that the *status* of the thing adjudicated upon was not such as declared by the adjudication. See *Cammell v. Sewell*, 3 H. & N. 617; 5 id. 728, in error. *Castrique v. Imrie*, 8 C. B. (N. S.) 1, 405. *See* vol. i. Admiralty.

A grant of probate or administration is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him. It is conclusive against all the world. *Noel v. Wells*, 1 Lev. 235. *Allen v. Dundas*, 3 T. R. 125. A sentence in a matrimonial suit is conclusive, for it is an adjudication upon the *status* of the parties. See *Kenn's case*, 7 Co. 42. *Meadowcroft v. Huguenin*, 4 Moore P. C. 386. *Perry v. Meadowcroft*, 10 Beav. 122. *Da Costa v. Villa Real*, 2 Stra. 961. *Bunting's case*, 4 Co. 29. But it is otherwise when the suit is for jactitation of marriage; for there the decree does not affect the *status* of the parties, but merely prevents one party from asserting that a marriage took place under certain specified circumstances. See *Duchess of Kingston's case*, 2 Sm. L. C. 642. As between the parties, a finding that alleged acts of adultery were not proved in a suit for judicial separation, is conclusive in a suit for restitution of conjugal rights. *Sopwith v. Sopwith*, 30 L. J. P. & M. 131.

The sentence of a college visitor, depriving or expelling, is conclusive. *Phillips v. Bury*, 2 T. R. 346. *R. v. Grundon*, Cowp. 315. So is the sentence of a court martial. *R. v. Suddis*, 1 East, 306. *Grant v. Gould*, 2 H. Black. 100: *per Lord Loughborough. In re J. W. Poe*, 5 B. & Adol. 681. *Hannaford v. Hunn*, 2 C. & P. 148.

As to the case of foreign judgments it seems, after a considerable conflict of authority, to be settled, that where an action is brought here upon the judgment of a foreign or colonial court of competent jurisdiction over the subject-matter and the parties, such judgment cannot be impeached on the ground that it is erroneous on the merits. *De Cosse Bussac v. Rathbone*, 6 H. & N. 301. *Ricardo v. Garcias*, 12 Clark & Fin. 368. *Bank of Australasia v. Harding*, 9 C. B. 661. *Bank of Australasia v. Nias*, 16 Q. B. 717. *Cammell v. Sewell*, 3 H. & N. 617; 5 id. 728. *Castrique v. Imrie*, 8 C. B. (N. S) 1. *Castrique v. Behrens*, 30 L. J. Q. B. 163. *Kelsall v. Marshall*, 1 C. B. (N. S.) 241. *Barber v. Lamb*, 8 id. 95. "The inquiry is still open, not indeed into the merits of the action, or the propriety of the decision, but whether the judgment passed under such circumstances as to show that the tribunal had properly jurisdiction over the party.' *Ferguson v. Mahon*, 11 Ad. & E. 179. It may be impeached on the ground that the defendant was *non resiant* or present in the country when the suit began, so as to be bound by the decision by reason of allegiance, or domicile, or temporary presence. *General Steam Navigation Co. v. Guillou*, 11 Mee. & W. 894. And a foreign judgment is not conclusive here,

(*b*) *But to constitute an Estoppel, the Matter must have been in Issue in the former Action.*

CARTER v. JAMES, 13 Mee. & W. 137.

But to constitute an estoppel, the matter must have been in issue in the former action.[1]

Debt on an indenture, whereby the defendant covenanted to pay the plaintiff 600*l.* with interest on a certain day. *Plea*, by way of estoppel, that the plaintiff had impleaded him in a former action of debt on bond, conditioned in the penal sum of 1200*l.* for payment of 600*l.* and interest, being the same principal sum and interest as were secured to the plaintiff by an indenture of even date with the bond; in which action the defendant pleaded an usurious agreement between the plaintiff and himself, and averred that the bond was given in pursuance of such agreement. The plea then averred that the issue raised by a traverse of this last-mentioned allegation was found for the defendant, and alleged the identity of the indenture in the present and in the former action, as well as of the 600*l.* and interest so sought to be recovered. Demurrer.

The Court held the plea to be no estoppel, on the ground that the point in issue before them was not raised at all in the former action, wherein the fact of usury had been incidentally taken for granted, and that otherwise the plaintiff

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where the proceedings are so defectively set out that the point sought to be established by it does not clearly appear to be decided. *Obicini v. Bligh*, 8 Bing. 335. *Sadler v. Robins*, 1 Camp. 253. *Callander v. Dittrich*, 4 Man. & G. 82; 4 Scott, N. R. 682. *Behrens v. Sieveking*, 2 Mylne & C. 682. As to the judgments of foreign admiralty courts, *see* vol. i. p. 193.

[1] See *Wade v. Simeon*, 1 C. B. 610. *Haigh v. Paris*, 16 Mee. & W. 144. Generally, the judgment neither of a concurrent nor of an exclusive jurisdiction is (whether receivable or not receivable) conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, or of any matter incidentally cognisable, or of any matter to be inferred by argument from the judgment; and that a judgment is final only for its proper purpose and object. *Per Knight Bruce*, *V. C.* *Bavis v. Jackson*, 1 You. & C. 585.

"From the variety of cases relative to judgment being given in evidence in civil suits, these two deductions seem to follow as generally true. First, that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter to be inferred by argument from the judgment." *Duchess of Kingston's case*, 20 Hard. Sta. Tr. 538: *per De Grey, C. J.*

In an action for the stipulated price of a chattel, the defendant pleaded payment into court of a sum which the plaintiff took out in satisfaction of the cause of action; it was held that the defendant was not thereby estopped from suing the plaintiff for negligence in the construction of the chattel. *Rigge v. Burbidge*, 15 Mee. & W. 598. See *Mondel v. Steele*, 8 id. 858.

It follows from the restriction of estoppels to matters in issue in the previous action, that though the defendant might, if he had chosen, have pleaded as a defence to the first action matter which he did not then plead, but which he pleads to the subsequent action, he will not be estopped from so doing, for such matter was not then in issue. *Howlett v. Tarte*, 9 C. B. (N. S.) 14; 9 W. R. 869. A sheriff, having a writ commanding him to arrest A. took B., who represented herself to be the person named in the writ: — *Held*, that though B. might be estopped by her misrepresentation from suing the sheriff for the original taking, he could not justify detaining her after he had notice that she was not the real party. *Dunstan v. Paterson*, 2 C. B. (N. S.) 495; 3 Jur. N. S. 982.

The rule was thus expressed by *Vice-Chancellor Knight Bruce* in *Bavis v. Jackson*, 1 You. & C. 597: — "It is, I think, to be collected, that the rule against re-agitating matters adjudicated is subject generally to this restriction, that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed in them as established, and however binding and conclusive the decision as to its immediate and direct object may be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from the operation, so as to defeat its direct object. This operation of the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority."

would be deemed to be estopped by the finding of a matter which he never disputed, and on which the jury gave no verdict and the court no judgment.

(B) *By Deed.*[1]

(C) „ *Acts in Pais.*[2]

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[1] To be binding as an estoppel the allegation must be certain. Accordingly, where a party had covenanted with a mortgagee that he was "legally or equitably" entitled, a subsequent mortgagee was held not estopped from setting up the legal estate which the mortgagor had acquired after the first mortgage, on the ground that there was a want of that certainty of allegation which was necessary to make it an estoppel. *Doe d. Jeffries v. Bucknell*, 2 B. & Adol. 278.

A recital in a deed does not estop the parties where the action is founded on a matter wholly collateral to the deed. See *Carpenter v. Buller*, 8 Mee. & W. 212. *South-Eastern Railway Co.* 6 H. & N. 520.

"It seems clear," said *Cockburn, J.*, "that where it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts as the basis on which they can trace the statement of those facts, though but by way of recital, shall estop the parties to aver the contrary." *Young v. Raincocke*, 7 C. B. 338. When a recital is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument. *Stronghill v. Buck*, 14 Q. B. 787.

The sureties in a bond have been considered not to be bound by a recital that the principal had been duly appointed (*Kepp v. Wiggett*, 10 C. B. 35), for a general recital is not an estoppel, though recital of a particular fact is. *Salter v. Kidley*, 1 Show, 59: *per Holt, C. J.*

[2] "The acts in pais," said *Parke, B.*, "which bind parties by way of estoppel, are but few, and are pointed out by Lord Coke." Co. Litt. 352, a. They are really acts which anciently really were, and, in contemplation of law, have always continued to be, acts of notoriety not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. *Lyon v. Reed*, 13 Mee. & W. 309. See *Sanderson v. Collman*, 4 Man. & G. 209.

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it as true, the party making the representation will be precluded from contesting its truth. *Freeman v. Cook*, 2 Ex. 663. *Howard v. Hudson*, 2 E. & B. 1. *Cornish v. Abington*, 4 H. & N. 549. For it is a universal principle of law that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct. *Cairncross v. Lorimer*, 3 Macq. H. of L. C. 829; 7 Jur. N. S. 149. *Smith v. Kay*, 7 H. L. C. 750.

Where, by the deed of a company, it was provided that the capital of the company should be 100,000*l.* in 1000 shares of 100*l.* each, and that it should be competent to any general meeting of the company to create additional shares of 100*l.* each. The company, at a general meeting, created 1500 new half-shares of 50*l.* each, some of which the defendant purchased, executed the deed of settlements, and received dividends declared on the shares. It was afterwards resolved, at a special general meeting, that the company should be wound-up. The defendant, being sued for calls made by the directors and the liquidators of the company, was held estopped from denying that the 50*l.* shares were valid shares. *Hull Flax and Cotton-mill Factory Co. v. Wellesley*, 6 H. & N. 38. *See* 13 Moore, P. C. C. 185.

It has been held that a person whose name appeared at the head of an invoice as the seller of goods, was not estopped from showing that the invoice was only made in this form for the convenience of the real parties to the contract. *Holding v. Elliott*, 5 H. & N. 117.

There can be no estoppel where an interest passes: thus, though a lessee is estopped from showing that his lessor had no title to the demised premises, yet he may show that he was entitled to a particular estate which has expired. See *Weld v. Baxter*, 11 Ex. 816, in error; 1 H. & N. 568. *Langford v. Pelines*, 3 Kay & J. 220. *Doe v. Seaton*, 2 C., M. & R. 728. *Neave v. Moss*, 1 Bing. N. C. 380. But where a mortgagor in possession granted a lease, and afterwards assigned all his interest and title to a third person, who sued the tenant for a breach of covenant to repair, it was held that the tenant could not show that the plaintiff merely had an equity of redemption, "because the lessee is estopped from denying that the plaintiff had such a legal estate as would warrant the lease, and as no other estate or interest is shown to have been in the lessor, it must have been taken as against the lessee by estoppel that the lessor had an estate in fee. *Cuthbertson v. Irving*, 4 H. & N. 742; 6 id. 135.

Neither the tenant, nor any one claiming by him, can dispute the landlord's title.

III. Of Pleading an Estoppel.

(A) *In order to be Conclusive Evidence, an Estoppel must be Pleaded if an Opportunity to Plead it be afforded.*

Lord Feversham v. Emerson, 11 Ex. 385.

In order to be conclusive evidence, an estoppel must be pleaded if an opportunity to plead it be afforded.[1]

Trespass to the plaintiff's close. *Plea, Liberum tenementum.* At the trial the plaintiff, in order to show his boundaries, produced an award, upon a submission by ancestors of the both parties, setting out the boundaries, and relied upon this as conclusive evidence. The defendant gave evidence of his title to the *locus in quo*, and the jury found a verdict for the defendant. The plaintiff then applied to the court for a new trial, on the ground that the learned judge at the trial misdirected the jury, in not telling them that the award was conclusive evidence between the parties.

Parke, B. (delivering the considered judgment of the court). "There can be no doubt that an estoppel may be replied to a plea of *liberum tenementum;* indeed the case in 2 Edw. 4 is precisely in point. Then the rule is established by a series of cases, that if a party means to insist upon an estoppel, he must plead it. If a party intends to rely on a subject-matter of defence, which the law does not favour, he must, at his own peril, take the earliest opportunity of setting it up. In this case the plaintiff might have replied the award of the arbitrator in 1812, stating that the defendant claimed under the parties to the arbitration. It is perfectly well-settled law, and does not now admit of the least question, because there are no less than seven or eight cases upon the subject, that if a party does not take the first opportunity which the pleadings afford him of relying on an estoppel, he leaves the matter at large, and it is competent for the jury to determine upon the evidence, without regard to strict law. (*Trevilan v. Lawrence*, 2 Ld. Raym. 1048; 1 Salk. 276. *Magrath v. Hardy*, 4 Bing. N. C. 782. *Armstrong v. Norton*, 4 Irish Cases, 100. *Speake v. Richards*, Hob. 206. *Reg. v. Blackemore*, 2 Den. C. C. 410. *Reg. v. Hon-*

Doe d. Knight v. Lady Smyth, 4 M. & S. 347. Accordingly, if a tenant consents to give up possession to a party claiming by a party adverse to his own landlord, that party is estopped, as the landlord would have been, from disputing the landlord's title. *Doe d. Bullen v. Mills*, 2 B. & E. 17. *Doe v. Mizem*, 2 M. & Rob. 56. The rule as to claiming title which applies to the case of a servant, extends also to that of a person coming in by permission as a mere lodger, or as a servant. *Doe d. Johnson v. Baythop*, 3 Ad. & E. 118. See *Francis v. Doe*, 4 Mee. & W. 331. *Doe v. Wiggins*, 4 Q. B. 367. *Doe v. Foster*, 3 C. B. 215. *Dolby v. Iles*, 11 Ad. & E. 335. *Veale v. Warner*, 1 Wms. S. 325, notes; and *see post*, Landlord and Tenant.

But though the tenant cannot dispute the landlord's title, he is permitted to show that it has expired (see *Walton v. Waterhouse*, 1 Wm. Saund. 418), for in that case he does not dispute the title, but confesses and avoids it by matter *ex post facto*. See *Hopcroft v. Keys*, 9 Bing. 613. *Doe v. Seaton*, 2 C., M. & R. 728. *Doe d. Higginbotham v. Barton*, 11 Ad. & E. 307. *Mayor of Poole v. Whitt*, 15 Mee. & W. 571. *Delaney v. Fox*, 2 C. B. (N. S.) 768. *Downes v. Cooper*, 2 C. B. 256; *see post*, Landlord and Tenant.

[1] Although a judgment recovered, if for the same cause of action and between parties substantially the same, will be admissible in evidence, yet, in order to render it conclusive as an estoppel, it must be so pleaded. *Doe v. Huddart*, 2 C., M. & R. 316. *Doe d. Strode v. Seaton*, id. 731. *Doe v. Wright*, 10 Ad. & E. 763.

Thus a judgment in ejectment is conclusive in the action for mesne profits, when pleaded by way of estoppel (*Doe v. Wright, supra.* See *Doe v. Welsman*, 2 Ex. 368. *Williamson v. Kirby*, 15 C. B. 430), but not otherwise. *Doe v. Huddart*, 2 C., M. & R. 316; 5 Tyr. 846.

It follows from this rule, that there is this distinction between estoppels by record or by deed, and estoppels in pais; namely, that the former must, in order to make them binding, be pleaded, if there be an opportunity; otherwise the party omitting to plead it waves the estoppel, and leaves the issue at large, on which the jury may find according to the truth; while with respect to estoppels in pais they need not, in most cases at least, be pleaded in order to make them obligatory. *Freeman v. Cooke*, 2 Ex. 662. Thus, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he made it himself, and is his contract in point of law; and no form of pleading would leave such a matter at large, and enable the jury to treat it as no contract. *Freeman v. Cooke, supra.*

diton, 1 E. & B. 501.) Then I apprehend that the plaintiff had this opportunity, for he was in full possession of the award, and the freehold boundaries of the manor are stated to have been referred to the arbitrator. It is quite clear, looking at the subject-matter in dispute, that the true point left to the decision of the arbitrator was the right in the waste of the manor. That matter remained at large for the jury to decide; and my brothers who heard the argument entirely concur upon the facts of the case, that the jury were perfectly right in coming to the conclusion that the boundary of the waste was that which was alleged by the defendant, and not by the plaintiff. There cannot be the least doubt that the matter should be decided in favour of the defendant; and consequently the rule will be discharged."

ESTOVERS. An allowance of wood made to a tenant for life or years. The liberty or privilege of cutting down and carrying away trees, or the loppings of trees, shrubs and underwood, in another man's woods, coppices or forests, for burning, building, or inclosing. It is in general appendant to an ancient dwelling-house, and is claimable by grant or by prescription, except in the case of copyholders, who may, it seems, claim by custom. Bract. fol. 31. *Selby v. Robinson*, 2 T. R. 758. It must be restricted to some use on the land or premises to which it is appurtenant. *Bailey v. Stephens*, 6 L. T. (N. S.) 356 [1]

ESTRAY and Waif. *Estray*, such valuable animals as are found wandering in any manor or lordship, the owner being unknown.[2] *Waifs*, stolen goods, which are waived or thrown away by a thief in his flight, for fear of being apprehended.[3] 1 Bl. Com. 296.

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[1] A right to estovers for the repair of a house and farm-buildings will not justify the tenant in using the timber to enlarge his house, or to board the sides of a barn which had middle walls, or the like, before (*Earl of Pembroke's case*, Clayt. 47); nor in building new chimneys where formerly there were none. *Luttrell's case*, 4 Co. 87, a. But he may have his estovers for the making of a new chimney in substitution of an old one. *Costard v. Wingfield*, 2 Leon. 44.

[2] Estrays in general belong to the king, unless a special grant has been made, which is usual, to the lord of the manor. Dalt, Sheriff. 79; 1 Bl. Com. 297; 2 Step. Com. 661. Animals of a wild nature are not reckoned estrays, as swans unmarked and wild. *See* Chit. jun. Prer. 151.

It is unlawful to work an estray. *Oxley v. Watts*, 1 T. R. 12.

In *Henley v. Walsh*, 2 Salk. 686, trespass for a horse. *Plea*, that defendant, by the command of one A. B., who was owner of the horse which had estrayed out of his possession, seised the same within a year and a day, the plaintiff refusing, after tender of amends, to give him up. On a demurrer to a frivolous replication,—

The Court resolved, 1st. that, without telling any marks as proof of property (except at the trial, if contested), the owner may seise his horse where he finds him; and 2d. that it was sufficient to tender amends generally, without expressing any certain sum; for there is a difference between this case and that of a tender of amends in trespass: in that of a trespass the defendant must tender a certain sum. And the law puts this difficulty upon him, because he is a wrongdoer: but the owner of the estray is no wrongdoer; and it is impossible he should know how long his beast hath been in the lord's custody, nor how much will make him a proper satisfaction.

[3] In order to constitute a waif, the goods must have been *thrown away* by the thief in his flight; and if he previously hide or leave them anywhere with intent to resume the possession, so that they were not in his possession when he fled, the king's prerogative does not apply, and the owner is at all events entitled to the property. 5 Rep. 109; Cro. Eliz. 694; 1 Bl. Com. 296. But the goods waived need not be the identical property stolen; for if a felon in his flight waive his own goods, and the king seize them, they are a species of waifs, for they are relinquished, and the property is in nobody. Bro. Estray, 9. But these are properly fugitive's goods, and not forfeited till it be found before the coroner, or otherwise of record, that he fled for the felony. Hawk. P. C. 481. But waifs vest in the crown without office found. 5 Co. 109. The king acquires no property in the goods waived until they are seized by some one to his own use; and if the owner of the stolen property can seize them first, though at any distance of time, the king shall not have them. 21 Edw. 4, 16; Kitch. 82. The prerogative was given to the king, that the owner might be induced to bring the felon to justice to regain them. Hence it will be remarked, that the royal prerogative can obtain only where the party robbed is guilty of that negligence which the law re-

ESTREAT. *See* Recognisance.

ESTREPEMENT. *See* Waste.

EVICTION. *See* Ejectment; Landlord and Tenant; Quiet Enjoyment.

EVIDENCE in General.[1]

I. Of the Facts which ought or need not be Proved, p. 293.

(A) *Facts judicially noticed by the Courts*, p. 293.

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prehends in every instance, but especially in those cases where it may occasion the escape of a criminal from justice. All waifs are *primâ facie* the property of the Crown, and are not necessarily incident to a leet (Year Book, 8 Hen. 7; 1 Bro. Estray, 15), though they are frequently franchises in the hands of lords of manors and others.

[1] The doctrine of evidence comprehends that part of our system of laws which is applicable to the discovery of unknown circumstances. Every case presented to a court of justice consists of facts; and the judgment results from an application of the rules of law. In our system of administration the office of the presiding judge is, for the most part, confined to a knowledge and application of the law. A question of fact is decided by the opinion of a jury. Although the appropriate subjects of the two jurisdictions are sufficiently obvious on a proper analysis, yet, in practice, considerable niceties will often occur in extracting the peculiarities of the case, and reducing the matter under consideration to a simple and conclusive problem. For this purpose a previous view of the question is submitted to the court in writing, and certain abstract forms of statement, called pleadings, are in use, framed on a classification of cases, and discriminating the points on which the judgment must necessarily turn. This is a subject entirely of a technical nature, and confined to the province of the law agents. But when the issue or material point in dispute, as manifested by the pleadings between the parties, results in a question of fact, it is for the most part referred for trial to the *nisi prius forum*, consisting of a judge and jury of twelve men; the judge superintends the jurors in the exercise of their deliberative function, with regard to facts, and applies the rules of evidence in the exhibition of the proofs which are presented for their consideration.

If facts judicially in dispute were susceptible of intuitive or demonstrative evidence, the only process required in the examination would be a simple exposition of the subject, or statement of the proofs. But probabilities alone are in general the objects of legal discussion. They comprehend the infinite variety of questions of fact which occur between mere possibility and the confines of demonstration. In the higher branch of the series some cases will be found excluded from doubt or controversy, on the ground of legal presumption, or that species of certainty or approximation to it of which the courts are possessed, or with which they are satisfied, from considerations of policy or convenience. But the rules of evidence are calculated to restrain our belief in the more doubtful cases, and to limit the admission of the inferior order of proofs.

In the absence of the higher species of intuitive or demonstrative evidence, we must form our opinion, with respect to facts, from the observations of a witness, or of some sentient or intelligent being. In general, a preliminary distinction is made between written and parol evidence; but this is rather a secondary division of the subject. Before we examine the nature and effect of the evidence, it is previously requisite to consider the mode by which we must obtain our knowledge of it. Writing is a species of proof which is in no case evidence *per se*: for the verification of it must always be ascribed to the attestation of some witness, or to that legal presumption which may be deemed judicial demonstration. The division of the subject, therefore, as a primary one, into written and parol testimony, is certainly confused and premature. An instrument in writing, as conveying the intention of the parties to a contract, is a subject of subordinate consideration, totally distinct from that by which its authenticity is established, and which, as with facts of every description, must constitute the previous object of inquiry. There are only two original sources from whence the knowledge of facts is derived, and both these may be resolved into the observation of witnesses; with this difference, that in the one instance it is communicated by the testimony of an observer, and in the other it originates with the judge.

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(*e*) *Matters relating to Common-law Rights and Duties, and General Customs*, p. 294.

(*f*) *Matters relating to the Terms, Calendar, Days of the Week, &c.*, p. 294.

(*g*) *Matters relating to the Division of England into Counties, Towns, &c.*, p. 295.

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(C) *Or where the Presumption of Law is in favour of the Affirmative. See* id.

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V. Of the Mode of Objecting to Evidence. *See* Demurrer to Evidence; Exceptions, Bill of; New Trial; Nonsuit.

VI. Evidence in Particular Cases. *See* Account Stated; Action; Admissions; Appropriation; Arson; Bills of Exchange; Burglary; Carriers; Copyright; Ejectment; Insurance, &c.

I. Of the Facts which ought or need not be Proved.

(A) *Facts judicially noticed by the Courts.*[1]

(*a*) *Matters that must happen according to the course of Nature.*

The King v. Luffe, 8 East, 202.

Per Lord Ellenborough, C. J. "Here, in nature, the fact may certainly be known, that the husband, who had no access till within a fortnight of his wife's delivery, could not be the actual father of the child. Where the thing cannot certainly be known, we must call in aid such probable evidence as can be resorted to, and the intervention of a jury must, in all cases in which it is practicable, be had to decide thereupon; but where the question arises as it does here, and where it may certainly be known from the invariable course of nature, as in this case it may, that no birth could be occasioned and produced within those limits of time, we may venture to lay down the rule plainly and broadly, without any danger arising from the precedent."

The courts will take judicial notice of the existence of facts which must have happened according to the constant and invariable course of nature.

(*b*) *Matters relating to the King; Proclamations, Orders in Council, &c.*[2]

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[1] Courts of justice, as the organs of government, particularly those sitting in Westminster Hall (where the king himself originally presided), are cognisant of a variety of facts, for which no evidence is required in individual cases. The judges are described by Blackstone (1 Com. 69) as the living oracles, the depositaries of the law. "Their knowledge of that law," he says, "is derived from experience and study, from the *viginti annorum lucubrationes*, which Fortescue mentions, and from being long personally accustomed to the judicial decisions of their predecessors. And, indeed, these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of records, in public repositories set apart for that particular purpose; and to them frequent recourse is had when any critical question arises, in the determination of which former precedents may give light or assistance. And, therefore, even so early as the Conquest, we find the *præteritorum memoria eventorum* reckoned up as one of the chief qualifications of those who were held to be *legibus patriæ optime instituti*." The law, generally speaking, comprehends, not only the customs and decisions alluded to, but all acts of the legislature, with which the judges are presumed always to be conversant.

[2] The courts will take *ex officio* notice when the king came to the throne (*Holman v. Burrow*, 2 Ld. Raym. 791); and of all the privileges of the Crown. *Elderton's case*, id. 980. And it has been said that the court will take judicial notice of the royal proclamations. 1 Ld. Raym. 283; Lutw. 35; 1 Salk. 46. But *Lord Ellenborough* ruled that the proclamation ought to be proved by the *Gazette*. *See* 2 Camp. 44; 5 T. R. 436. And now copies of royal proclamations, if

(*c*) *Matters relating to the Parliament and Statutes.*[1]

(*d*) „ „ *Ecclesiastical, Marine, and Foreign Laws.*[2]

(*e*) „ „ *Common-law Rights and Duties, and General Customs.*[3]

(*f*) *Matters relating to the Terms, Calendar, Days of the Week, &c.*[4]

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they purport to be printed by the queen's printers, are admissible in evidence. 8 & 9 Vic. c. 113, s. 3.

Private orders of council are not considered as matters of law, or of such a public nature as to render it incumbent on the judges to take *ex-officio* notice of them. 2 Lit. Prac. Reg. 303. And a pardon under the great seal will not be noticed unless produced. 4 Bl. Com. 402.

When the existence of a war has been recognised in acts of parliament, the courts take judicial cognisance of it (*Rex v. De Beranger*, 3 M. & S. 69. But not of a war between foreign states, or a recently declared war in which this country is engaged; but the commencement of hostilities must be proved. 2 Carp. 44; 3 Camp. 61.

[1] The courts take judicial notice of the commencement of parliament, and of the prorogations and sessions (*Rex v. Wilde*, 1 Lev. 296; 2 Keb. 686. *Birt v. Rothwell*, 1 Ld. Raym. 343; *see* also Hetl. 119; Dyer, 203; Plowd. 296; 2 Mod. 241; 9 East, 5); and also where any parliament sat (*Birt v. Rothwell*, 1 Ld. Raym. 210); and of the course of proceeding in either House of Parliament. *Lake v. King*, 1 Saund. 133. See *Astley v. Younge*, 2 Burr. 811. But the journals of the House are not records of parliament, and therefore the court cannot take judicial notice of them. *Rex v. Knollys*, 1 Ld. Raym. 15; *see* Cowp. 17; Dougl. 569; 1 Saund. 133.

A recital in a public statute is evidence of the facts recited. *Rex v. Sutton*, 4 M. & S. 549; *see* Co. Litt. 19, b. And public statements, or facts ascertained by public statutes, must be noticed by the courts in all cases, without their being proved by extrinsic evidence. 1 Bl. Com. 85; Dougl. 97, n; 2 Wils. 376; Willes, 210. But the court will not take *ex-officio* notice of private acts of parliament; and, consequently, such parts of them as may be material to the action or defence must be stated in pleading, and proved in evidence (1 Bl. Com. 86; 1 Ld. Raym. 381; 1 Dougl. 97; 1 Lev. 296): for, in general, a private statute, though it contains a clause requiring it to be judicially noticed, is not, as against strangers, any evidence of the facts recited (*Brett v. Beales*, M. & M. 421. *Taylor v. Parry*, 1 Man. & G. 604); neither does it affect the public with a knowledge of its contents. *Ballard v. Way*, 1 Mee. & W. 529.

A recital, however, of a relationship in a private act of parliament, has been received by the House of Lords as cogent evidence of pedigree in a peerage case, because such recital is never inserted in a private act unless its worth has first been ascertained by the judges to whom the bill has been referred. *Wharton Peerage case*, 12 Clark & Fin. 302.

The recitals even in a public act are not conclusive evidence; and, therefore, where the schedule of the Municipal Corporation Act described a place as an existing borough, evidence was admitted to show that this description was false. *R. v. Greene*, 6 Ad. & E. 548.

[2] The judges will recognise, without proof, the ecclesiastical (Bro. Abr. *Quare impedit*, pl. 12; 1 Roll. Abr. 526; Cro. Eliz. 602; 5 Co. 29; Ld. Raym. 338, 1334; Carth. 446; 5 Mod. 395; Comb. 475; 12 Mod. 194), civil, and marine laws (2 H. Black. 606, n. a; 14 Q. B. 504; 17 id. 281; 8 Ex. Rep. 705; 22 L. J. Ex. 269); but not foreign laws (*see post*, p. 335; and 29 L. J. M. P. 5), or the laws of our colonies (2 East, 273; Cowp. 174; 6 Mod. 194; Salk. 651; Burr. 1077; Rep. T. Hard. 85; 4 T. R. 192; 3 Esp. 164; 4 Taunt. 40); or the laws of Scotland (4 Taunt. 46; 2 D. & R. 280); or the forest laws. 2 Leon. 209.

[3] The courts are bound to take judicial cognisance of all common-law rights and duties, and of general customs (Co. Litt. 89, a, n. 7; 1 Ld. Raym. 175; 2 id. 1542; Carth. 83); such as the customs of gavelkind and borough English (Co. Litt. 175, b, n. 4; Ld. Raym. 1025), lien of bankers (6 Man. & G. 630), but not of any particular local usages (1 Roll. Rep. 106; 9 East, 185), as the customs of London, except where they have been certified by the recorder to either of the courts of record (Stra. 187, 1187; And. 304; 1 Bl. Com. 76), without which there must be distinct evidence of the custom. *See* 1 Roll. Rep. 106; Co. Entr. 139, b; 1 Saund. 66, n. 1; Dougl. 378; 1 Salk. 269.

The custom or law of the road—namely, that horses and carriages should respectively keep on the left side—has been repeatedly recognised by judges at *nisi prius*. See *Leame v. Bray*, 3 East, 593. *Turley v. Thomas*, 8 Car. & P. 104.

[4] The courts take notice of the days of the week, &c., on which particular days fall. 2 Ld. Raym. 994; 6 Mod. 41, 81; Salk. 181, 626. Where a writ of inquiry was stated in pleading to have been executed on the 15th of June, which was a Sunday, the proceeding was held defective. Fortes. 373; Stra. 387; 4 Dowl. P. C. 48. And where the defendant justified an arrest under process from an inferior court, which he stated to be held every Friday, and the process appeared by the pleading to have been dated the 7th of

(*g*) *Matters relating to the Division of England into Counties, Towns, &c.*[1]

(*h*) „ „ *Meaning of Peculiar English Words.*[2]

(*i*) „ „ *course of Proceeding in the different Courts of Justice.*[3]

August, which was Saturday, upon demurrer it was held bad. Rep. Temp. Hardw. 162; 1 T. R. 116. So the court will take notice what number of days there are in each month (1 Roll. Abr. 524, c, pl. 4; 3 B. & B. 186; 6 T. R. 224; 1 M. & S. 111; 1 Stra. 652, 446), and in leap-year, and of the moveable feasts (6 Mod. 11; Salk. 626; 1 Ld. Raym. 994); and of the terms, as to their commencement and conclusion, whether moveable or not. 1 T. R. 116; 1 Ld. Raym. 329; Cro. Jac. 568; 2 Lev. 176; Bull. N. P. 137; 12 Mod. 647; and *see* Latch. 11, 118; 1 Sid. 307; 1 Roll. Abr. 524; Dyer, 181. And if process be stated not under a *videlicet* (5 Moore, 538; 2 B. & B. 659, S. C.), to have been issued on a day in vacation, and that the court was then sitting, the pleading will be bad. 5 Burr. 2586; 3 T. R. 184; 1 Saund. 300, b, n. 7.

The court will look at the almanack if doubtful as to any particular date. "We take notice," said *Holt, C. J.*, in *Brough v. Perkins*, 6 Mod. 81, "of all feasts, and the almanack is part of the common law, the calendar being established by act of parliament. 2 & 3 Edw. 6, c. 1; 5 & 6 id. c. 1; 1 Eliz. c. 2. *See* vol. i. p. 308.

[1] The division of England into counties will also be noticed by the court *ex officio* (2 Inst. 537; March. 124; Comb. 460); and the reason of this is, that the sheriff of the county is the person to whom the court directs its writs. But the court will not take judicial notice of the division of England into parishes, vills, or particular liberties, which must be stated in pleading (id.); nor will it take notice of the local situation and distances of the different places in counties in England from each other (4 B. & A. 243; 1 Chit. 32); and though the courts will notice provinces and dioceses, they will not any particular place within each province or diocese, except that where the court sits. Ld. Raym. 854, 1379; Stra. 609; 3 T. R. 387. The division of Ireland, or any other country than England, into counties, or the known towns or cities of such county, will not be judicially noticed by the courts; and the situation of such counties, towns, or cities, should be specially stated. 1 Chit. Rep. 28, 32; 2 B. & A. 361; 2 D. & R. 15. Where, however, a public act of parliament describes a place generally, without mentioning its situation, the courts, in construing such act, will sometimes take judicial notice of such situation. 1 B. & C. 10, S. C. So the courts will take judicial notice of what towns are incorporated, and of the extent of ports, and the river Thames, &c. Stra. 469; 1 H. Black. 356, 357. So of the object of universities. 8 E. & B. 184.

The courts do not take judicial notice of the relative positions of local divisions, nor their precise boundaries, further than they may be described in public statutes. *Deybel's case*, 4 B. & A. 243. *Thorne v. Jackson*, 3 C. B. 661. Thus the court refused to say judicially that a part of the coast called Suffolk was not in Kent, or that "Orfordness, in the county of Suffolk," was not situated between the North Foreland and Beachey Head. *Deybel's case, supra.* See *Kirby v. Jackson*, 1 L. M. & P. 364; and 16 Q. B. 908. Neither will they notice that a particular place is within a certain city (*Brune v. Thompson*, 2 Q. B. 789); nor that a particular town is within a certain diocese (*R. v. Sympson*, 2 Ld. Raym. 1379); nor that a particular street is not in a certain county, though it be notorious that a street bearing the same name is in another county. *Humphreys v. Budd*, 9 Dowl. 1000.

They have taken notice that the Queen's Prison is situated in England. *Wickens v. Goatley*, 11 C. B. 666.

The courts will not take judicial notice that a city mentioned in a document is in a particular foreign country, even though it appear that one with a similar name is the capital of such country. *Kearney v. King*, 2 B. & A. 301. *Brune v. Thompson*, 2 Q. B. 789.

[2] The courts will take judicial notice of the meaning of English words and terms of art, according to their ordinary acceptation, however vulgar and peculiar to a particular county or place. They also judicially recognise the names and quantity of legal weights and measures (1 Roll. Abr. 525), and of time according to ordinary computation. *See* Ld. Raym. 794.

[3] Courts are bound judicially to notice their own rules and course of proceeding (*Dobson v. Bell*, 2 Lev. 176. *Pugh v. Robinson*, 1 T. R. 118), and of those of the other superior courts at Westminster (*Caldwell v. Hunter*, 10 Q. B. 85; *see* 17 id. 281; Cro. Jac. 67; 1 Roll. R. 106; Sir W. Jones, 417; Cro. Car. 527); the limits of their jurisdiction (*Doe v. Caperton*, 9 Car. & P. 116), and the privileges of their officers (*Ogle v. Norcliffe*, 2 Ld. Raym. 869); and attornies (*Challand v. Thornley*, 12 East, 544. *Stokes v. Mason*, 9 id. 423. *Walford v. Fleetwood*, 14 Mee. & W. 449); the existence of courts of general jurisdiction (*Tregany v. Fletcher*, 1 Ld. Raym. 154), and the powers of ecclesiastical courts, and the limits of their jurisdiction. *Whyte v. Rose*, 3 Q. B. 493. *Adams v. Terre-tenants*, 2 Ld. Raym. 856.

The judges of the superior courts are not, it has been held, bound to notice who are the judges in the other superior courts. 2 Stra. 1080; And. 74); but it would probably be now ruled otherwise (*see* 8 & 9 Vic. c. 113, s. 2, *post*, p. 296; 1 Tayl. Evid. 21): they do not, however, take judicial notice of who are

(*k*) *Signature of Judges.*

Signatures of judges to be judicially noticed.

8 & 9 Vic. c. 113, sect. 2, enacts, "that all courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common-law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document."

(B) *Facts admitted on the Record.*[1]

(C) „ *Collateral to the Question at Issue.*[2]

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the judges of inferior tribunals, as the Court of Review. *Van Sandau v. Turner*, 6 Q. B. 773.

The courts are also bound judicially to notice the power of courts of equity, and the authority of the Master of the Rolls, 12 & 13 Vic. c. 109, ss. 47, 48. The fact that the assizes, though constituting for some purposes one legal day, may be continued from day to day, with or without adjournment, and often occupy several natural days. *Whitaker v. Wisbey*, 12 C. B. 56. They will further notice the power of the Court for Divorce and Matrimonial Causes, and of the Court of Probate, &c. *Whyte v. Rose*, 3 Q. B. 493.

But the common-law courts at Westminster, though bound to recognise the doctrines and rules of equity without proof (*Reeves v. Burrage*, 14 Q. B. 504. *Sims v. Marryatt*, 17 id. 228), will not take judicial notice of the practice of the Court of Chancery. *Dicas v. Lord Brougham*, 1 M. & Rob. 309. See *R. v. Koops*, 6 Ad. & E. 202. *Tucker v. Inman*, 4 Man. & G. 1049), or of the officers of that court (*Doe v. Lloyd*, 1 id. 685. *Worsley v. Filisker*, 2 Roll. Rep. 119), or of the ecclesiastical courts. *Beaurain v. Sir W. Scott*, 3 Camp. 388. And the superior courts will not take cognisance of the customs and proceedings in inferior courts (*R. v. University of Cambridge*, 2 Ld. Raym. 1334. *See* also *Peacock v. Bell*, 1 Saund. 75. *Dance v. Robson*, M. & M. 295. *Lane's case*, 2 Rep. n. d), unless when called upon to review their judgment upon a writ of error. *Chitty v. Dendy*, 3 Ad. & E. 324; 4 Nev. & M. 842.

[1] No evidence need be given of what is admitted by the pleadings; for the jury are only sworn to try the matters in issue between the parties, so that nothing else is properly before them. Thus, in replevin, when the defendant avowed taking cattle damage feasant *in loco in quo*, as parcel of his manor of H., the plaintiff replied, that it was a parcel of the manor of H., and made title to it, and traversed that the manor of H. was the freehold of the defendant. He was not admitted to prove that H. was no manor, for that is admitted by the traverse. *Anon.* Dy. 182. *See* 5 T. R. 2.

And the jury cannot find a verdict against the admissions of the parties on the record, though they be contrary to the truth. *Goddard's case*, 2 Co. 46; Bull. N. P. 298; 2 Y. & J. 79.

But where there are several issues joined, an admission involved in one does not operate as an admission relative to any other. *Harpington v. Macmorris*, 5 Taunt. 228. *See* 1 Mee. & W. 816; 12 Ad. & E. 438. Nor can an averment in one count of a declaration be insisted on as an admission of any fact in another count. 2 Saund. 103.

A judgment by default is an admission of the cause of action, and of all the material allegations respecting the contract in the declaration; and, in the same manner, a judgment on *demurrer* admits everything but the amount of the sum in demand. *See post*, Judgment by Default. So, payment of money into court is an admission, by the defendant, that the plaintiff has a legal demand to the amount of the sum paid into court, and all the formal requisites to sustain the action. *See post*, Payment of Money into Court.

But it is only with respect to material allegations that the rule operates; and, therefore, a demurrer admits no more than is well pleaded. *Van Sandau v. Turner*, 6 Q. B. 785: *per Lord Denman, C. J.* And if a plea denies a particular fact alleged in the declaration, it does not thereby admit all the *immaterial* statements which the pleader has chosen to introduce as part of the plaintiff's case. *Dunford v. Trattles*, 12 Mee. & W. 534. *Bennion v. Davison*, 3 id. 179. *See* C. B. 703; 14 Q. B. 869.

[2] As the sole object and end of evidence is to ascertain the truth of the several disputed facts or points in issue on the one side or the other, no evidence ought to be admitted to any other point.

The rule is, that all facts and circumstances are admissible in evidence which are in their nature capable of affording a reasonable presumption or inference as to the disputed fact; and that, on the other hand, remote and collateral facts, from which no fair and reasonable inference can be drawn, are inadmissible, for they are at least useless, and may be mischievous, because they tend to distract the attention of the jury, and frequently to prejudice and mislead them: *per Blackstone, J.*, Bl. 1169: *per De Grey, J.*, Bl. 1165. It seems to be the province of the judge, in the exercise of a sound discretion, to discriminate between such facts as are connected with the issue and such as are merely collateral. It is frequently difficult to ascertain *à priori*, whether proof of a

(D) *Evidence must be confined to Points in Issue.*

(*a*) *As regards Collateral Facts.*[1]

particular fact offered in evidence will or will not become material; and in such cases it is usual in practice for the court to give credit to the assertion of the counsel who tenders such evidence, that the fact will turn out to be material.

Evidence of a custom in a particular parish (*Furneux v. Hutchins*, Cowp. 807), archdeaconry (*Ruding v. Newell*, 2 Stra. 957), or manor, is no evidence of the same custom in another, unless the custom be general, or, in the case of a manor, both manors lie within a certain district, and are holden by the same tenure. *Duke of Somerset v. France*, 1 Stra. 654. *Champion v. Atkinson*, 3 Keb. 90. *See* Fortes. 44; 2 Atk. 189; Cowp. 807; Dougl. 495; 5 T. R. 31; 1 M. & S. 662.

But proof of a general right over one entire district is admissible to explain and affect the rights of different persons in different parts. 14 East, 333. So, where half a river belongs, by the constant custom of the country, to the lords of the manors on each side of the water, proof of the custom in one manor is evidence of the same customary right in another (1 M. & S. 662); but where the issue is as to a particular right upon a common, evidence is inadmissible of the existence of such right upon an adjoining piece of common, unless a connexion between them be proved, and the right be claimed on both. *Morewood v. Wood*, 4 T. R. 157. But it must first be shown that the particular place did or does form part of the larger district over which the custom prevailed. *Tyrwhett v. Wynne*, 2 B. & A. 554.

The mere fact that the two manors lie within the same parish or leet will not be sufficient, nor even that the one was a subinfeudation of the other; at least, unless it be clearly shown that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs. *Marquis of Anglesea v. Lord Hatherton*, 10 Mee. & W. 218. If, however, it can be satisfactorily shown that the customs in the two manors are identical, or that the one was derived from the other after the time of Richard I., then the customs of each will respectively become evidence. (Id.)

So, upon a question whether the Crown in right of the Duchy of Lancaster had the exclusive privilege under the original charter, granted to Henry Duke of Lancaster in 1349, of appointing a coroner within the honour of Pontefract, evidence of appointments of coroners and of their acting in other parts of the duchy out of the honour of Pontefract was held admissible. *Jewison v. Dyson*, 9 Mee. & W. 540.

[1] When the question is one of skill and judgment, evidence may be given of other facts, which, although in other respects collateral, are, by means of the skill and judgment of the witness, connected with, and tend to elucidate the issue. *Wells Harbour case*, 2 Stark. Ev. 382.

In an action for a malicious prosecution, a publication by the defendant on the subject of the prosecution is evidence to prove the malice. So, although acts done subsequent to a contract cannot alter the nature of the contract, they may be adduced to show what the contract was, if it be doubtful (*Saville v. Robertson*, 1 T. R. 720); therefore, an admission of a debt by the acceptance of bills of exchange by partners, in payment of goods sold, is evidence to show the fact of a sale to the partners. 1 T. R. 720. So, where the meaning of the terms of an agreement is doubtful, and depends on custom or usage, collateral evidence is admissible to explain them. *See* 1 Stark. C. 210. So, collateral evidence is admissible to show the probability of a surrender by a tenant for life, where the possession has long accompanied the recovery. *See* 2 Saund. 42 (7).

The rule, with regard to the exclusion of evidence tending only to establish collateral facts, applies, if possible, more strongly to criminal prosecutions than to civil cases, in which every species of evidence ought to be rejected that is foreign to the point in issue. This rule is founded on common justice; for no person can be expected to answer, unprepared and at once, for every action of his life. In treason, therefore, no evidence is admitted of any overt act that is not expressly laid in the indictment. This was the rule at common law; and it is again prescribed and enforced by the stat. 7 Wm. 3, c. 3, s. 8, which contains an express provision to that effect, in consequence of some encroachments that had been made in several state prosecutions. Foster, 245, 246. The meaning of the rule is, not that the whole detail of facts should be set forth, but that no overt act, amounting to a distinct independent charge, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; but still, if it conduce to the proof of any of the overt acts which are laid, it may be brought as evidence of such overt acts. Id. 9, 246; *Vaughan's case*, 5 St. Tr. 2; *Deacon's case*, 9 id. 8. And acts of treason tending to prove the overt acts charged, though committed in a foreign country, may be given in evidence. Fost. 10; *Deacon's case*, 9 Str. Tr. 8. So, former threats and ill-will are admissible to prove malice on indictments for murder. On an indictment for arson, evidence was received to show that property taken out of the house at the time of firing was afterwards found secreted in the possession of the prisoner. 2 East, Pl. 1035. On an indictment for treason, the declarations and seditious language of the prisoner are admissible in evi-

(*b*) *As regards the Character of either Party.*[1]

dence. 2 Stark. 134. On an indictment for sending a threatening letter, a subsequent letter from the prisoner explanatory of that stated on the record was considered as admissible. In prosecutions for uttering forged documents, with a knowledge of the fact, it may be proved that the prisoner had uttered other forged documents of the same kind, or perhaps of a different description, or that he had such others in his possession. In prosecutions for uttering counterfeit money, proof may be given of the conduct of the prisoner at the time, or that he had previously uttered other counterfeits, or that he had others in his possession. On an indictment against several for a conspiracy to carry on the business of common cheats, evidence was received to show that the prisoners had made similar representations to other tradesmen besides those named on the record. On an indictment against a county for not repairing a bridge, the defendants may show by whom it has heretofore been repaired, for the purpose of ascertaining whether or not it is a public bridge. 2 M. & S. 262.

The relevancy of the evidence must depend upon the nature and circumstances of the particular case; therefore, where the acceptor of a bill of exchange refuses to pay on the ground of forgery, he cannot show that the drawer has been guilty of other forgeries. *Viney v. Barss*, 1 Esp. 293. *Griffits v. Payne*, 11 Ad. & E. 131. *Thompson v. Mosely*, 5 C. & P. 502. *Balcetti v. Serani*, Peake, N. P. C. 142. So, to show at what time one tenant pays his rent, is no evidence as to the time at which it is paid by another. *Carles v. Pryke*, Peake, 95. But in order to prove that the acceptor of a bill of exchange knew the payee to be a fictitious person, evidence is admissible to show that the indorsee had a general authority from the acceptor to fill up bills with the name of a fictitious payee. *Hunter v. Gibson*, 2 H. Black. 187.

In an action against a publican on a brewer's agreement, the brewer cannot prove that he furnished good beer by showing the quality of the beer he furnished to other customers during the same period (*Holcombe v. Hewson*, 2 Camp. 391), or the terms on which he sold to others. 27 L. J. C. P. 241.

Where the point in issue was whether the plaintiff's scholars were ill fed, a witness was not allowed to be asked as to the comparative quality of the provisions supplied by the plaintiff with those consumed in a particular school where the witness was educated, though evidence would be admissible to show the general treatment of boys at schools. *Boldron v. Widdows*, 1 C. & P. 65.

[1] As evidence is to be confined to the points in issue, the character of either party cannot be inquired into, unless it be put in issue by the nature of the proceeding itself. Accordingly where, on the trial of an information against the defendant, for keeping false weights, it was proposed to call witnesses on behalf of his character, *Eyre, C. B.*, ruled, that such evidence was not admissible in a civil suit. "The offence imputed is not," he said, "in the shape of a crime. To admit such evidence would be contrary to the true line of distinction, which is this: that, in a direct prosecution for a crime it is admissible; but where the prosecution is not directly for the crime but for the penalty, it is not. If evidence to character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the Excise and Custom-house laws." *Attorney-General v. Bowman*, 2 B. & P. 532, a.

So, in an action of ejectment by an heir at law, to set aside a will for fraud and imposition, committed by the defendant, witnesses cannot be examined to the defendant's good character (*Goodright d. Forr v. Hicks*, Bull. N. P. 296); but in an action for slander, as the plaintiff's character is in some degree put in issue, it is said that evidence of antecedent good conduct is admissible. *King v. Waring*, 5 Esp. 13. The principle of this decision, however, appears to be very dubious. Evidence of the character of a party when admissible must be so, either upon the ground that it furnishes a presumption that the party has not been guilty of a criminal act imputed to him, or, as will be seen, with a view to damages. But where the defendant does not justify the slander, presumptions of innocence are out of the question; the defendant by his plea admits that the imputation was false, and therefore in strictness the character of the plaintiff is not involved in the issue: in other words, the presumption to be derived from character tends only to prove what is already conceded. Where, indeed, the defendant justifies the slander, which conveys an imputation of dishonesty, the case may admit of a very different consideration; for there the party is charged with a crime, and in such a case character affords just the same presumption of innocence as if the party had been tried for the offence. And next, although, as will be seen, a defendant may in some instances impeach the plaintiff's character, or even that of a third person, in order to mitigate the damages; and where he does so, it is clear that the plaintiff may, on the other hand, prove the goodness of his character; yet, in general, a plaintiff is not allowed to adduce such evidence in the first instance (*Dodd v. Norris*, 3 Camp. 519. *Bamfield v. Massey*, 1 id. 460); such evidence is unnecessary till the character has been impeached, for the law presumes a person's character to be good till the contrary be proved.

A distinction has been taken, however, between those cases where particular acts of misconduct are imputed to a party and those where his general conduct is put in issue; and though evidence of character is

(E) *Evidence to be Confined to the Substance of the Issue.*[1]

II. Of the Party Bound to Prove the Necessary Facts. *See* Affirmative, vol. i. p. 266.

(A) Onus Probandi *lies on the Party alleging the Affirmative.*[2] *See* vol. i. p. 266.

III. Of the Mode of Proving the Necessary Facts, and the Different Kinds of Proof.

(A) *The best Evidence must be Produced.*[3]

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rejected in the former, it has several times been admitted in the latter class. Thus, in an action for a libel contained in an answer to inquiries respecting the character of a governess, where the language complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and her not being ladylike or good-tempered," general evidence was given of her competency, good temper and manners, by witnesses who were her personal friends. *Fountain v. Boodle*, 3 Q. B. 5. See *King v. Waring*, 5 Esp. 14. *See post*, Libel; Slander;

The character of third persons is also in some instances admissible, as affording a presumption with respect to the disputed fact. Upon the question of illegitimacy it has been held that, after probable evidence of non-access has been adduced, evidence may be given that the mother was a woman of bad character. *Pendrell v. Pendrell*, 2 Stra. 925. So, upon an indictment for a rape, or for an attempt to commit a rape, general evidence is admissible to impeach the character of the woman for chastity and decency. *Hodgson's case*, by a majority of the judges on a case reserved, 1812. *See* 2 Stark. 241. And in such a case evidence is admissible that the woman has formerly been connected with the prisoner, although it cannot be shown that she has been criminally connected with other persons. (Id.) General evidence to impeach the character of a prosecutrix is admissible upon an indictment for a rape, or for an attempt to commit a rape, although she has been examined as a witness, and has not been asked questions on cross-examination tending to impeach her character for chastity. *Rex v. Clarke*, 2 Stark. 241; 3 Camp. 515. *See* vol. iii. Character, p. 74.

In some instances evidence in disparagement of character is admissible, not in order to prove or disprove the commission of a particular fact, but with a view to damages. Thus, in actions for libel and slander, where the defendant has not justified, evidence of the plaintiff's bad character has been admitted. *Lord Leicester v. Walter*, 2 Camp. 251; 1 M. & S. 284. *Rodriguez v. Tadmire*, 2 Esp. 720. The ground of admitting such evidence is, that a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished. ——— *v. Moor*, 1 M. & S. 284. See *Snowdon v. Davis*, id. 286. *King v. Francis*, 3 Esp. 116. *Watson v. Christie*, 2 B. & P. 224.

In criminal prosecutions which have for their object the punishment of the offence, the defendant's character is put in issue by the prosecution; and the prisoner is always allowed to call witnesses to speak to his general good character, but not to particular acts. *I'Anson v. Stuart*, 1 T. R. 754: *per Buller, J.*; 2 Russ. C. & M. 784. The presumption of innocence thus raised may, however, be rebutted by cross-examination of the witnesses, either as to particular facts (*R. v. Hodgkiss*, 7 C. & P. 298), or as to the grounds of their belief. 2 St. Ev. 304. It seems, also, that on principle evidence of general bad character would in such case be admissible, thought it is seldom, if ever, resorted to in practice. (Id.) And by the 14 & 15 Vic. c. 19, s. 9, "if upon the trial of any person for a subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto to give evidence of the conviction of such person for a previous offence or offences."

A witness in any cause may be asked if he has been convicted of a felony or misdemeanor, and upon his denial may prove such conviction. 17 & 18 Vic. c. 125, s. 25. *See* vol. i. p. 74.

[1] Both in civil and criminal cases it suffices to prove the substance of the issue; that is, it is sufficient if part of what is alleged be proved, provided it be adequate to sustain the substance of the issue, although other matter be alleged which is not proved: consequently the degree of proof will vary with the manner in which the alleged facts are introduced, for matters of inducement do not require such strict proof as those facts which are directly put in issue between the parties. *See post*, Variance.

[2] The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute; according to the maxim, "*Eo incumbit probatio qui dicit non qui negat.*" "A rule," says Mr. Best (Evidence, 358), "to which the common sense of mankind at once assents, and which, however occasionally violated in practice, has ever been recognised in jurisprudence. Some of the civilians speak of it as '*Regula leppis et tonsoribus nota.*'"

See Affirmative, vol. i. p. 266.

[3] It is a settled principle that the best evidence must in all cases be given of which the nature of the fact to be established or

negatived is capable. This is a rule of policy grounded upon a reasonable suspicion that the substitution of inferior for better evidence arises from some sinister motive, and an apprehension that the best evidence, if produced, would alter the case to the prejudice of the party. This rule, however, does not exclude any evidence in the abstract, but only by comparisons with better evidence which may be had; and where no better evidence can be obtained, such secondary evidence in general becomes admissible.

Although the best evidence is to be given which the nature of the case admits, yet the strongest possible assurance of the fact is not required. If a deed, for example, is attested by several subscribing witnesses, the execution may be proved by one of them; or if none of the witnesses can be produced, proof of the signature of one witness will be sufficient: for the proof is, as far as it goes, complete, and not inferior in its kind to any that can be produced. Nor can it be inferred, merely from the absence of other proof of the same kind, that such additional testimony would be inconsistent with that already produced. And now by statute, although attested, execution may be proved by any other witness, unless attestation is necessary to the validity of the instrument. 17 & 18 Vic. c. 125, s. 26. So, to prove the plaintiff's demand satisfied, the defendant may give evidence of an admission by the plaintiff to that effect, though it should appear that the plaintiff also signed a receipt, and it may be said the receipt would be more satisfactory proof. *Jacob v. Lindsay*, 1 East, 460. *Smith v. Young*, 1 Camp. 439. And where an agent for the plaintiff made a verbal agreement, and then made a note of its terms, it may be used by the agent for the purpose of refreshing his memory (*Dalison v. Stark*, 4 Esp. 163; 1 East, 460. *Ramsbottom v. Tunbridge*, 2 M. & Sel. 434); so, if parol evidence should be offered to prove a tenancy, it is no objection that there is some written agreement relative to the holding, unless it should appear that the agreement was between the landlord and tenant, and that it continued in force to the very time to which the parol evidence applies. *Doe d. Wood v. Morris*, 12 East, 237. *Doe v. Pearson*, id. 239, n. And in a great variety of cases (see *Porthouse v. Parker*, 1 Campb. 82. *Taylor v. Jones*, 2 id. 105. *Gibbon v. Coggon*, id. 188. *Helmsley v. Loader*, id. 450. *Jones v. Morgan*, id. 474. *Panton v. Jones*, 3 id. 372. *Greenway v. Hindley*, 4 id. 52), *primâ facie* or presumptive proof is admissible, although perhaps stronger evidence might have been produced.

Thus where, by the cross-examination of the plaintiff's witness, who had proved a *primâ facie* case of the sale of goods, it appeared that the plaintiff had said that the goods were sold under a written contract, which he produced to the witness:—*Held*, that the written contract spoken of was evidence for the plaintiff without calling the broker by whom it purported to be made and signed. *Smith v. Blandy*, 1 R. & M. 257.

But to prove an insurance from fire at a public office, the policy must be produced. *Rex v. Devon*, 1 Esp. 127.

So, the written instrument must be produced where the question at issue is as to the amount of rent reserved upon a demise, and there has been a lease in writing (*Turner v. Power*, 7 B. & C. 625; M. & M. 131); or where the question is as to who was the party to whom a demise had been made (*R. v. Rawden*, 8 B. & C. 708; 3 M. & R. 426); or under whom the tenant came into possession. *Doe v. Harvey*, 8 Bing. 239; 1 M. & Scott, 374.

In an action for the price of labour performed, where it appeared that the work was commenced under an agreement in writing, but the plaintiff's claim was for extra work, it has been several times held that, in the absence of positive proof that the work in question was entirely separate from that included in the agreement, and was, in fact, done under a distinct order, the plaintiff was bound to produce the original agreement, since it might furnish evidence not only that the items sought to be recovered were not included therein, but also of the rate of remuneration which the parties had agreed upon. *Vincent v. Cole*, M. & M. 257. *Buxton v. Cornish*, 1 D. & L. 585; 12 Mee. & W. 426. *Jones v. Howell*, 4 Dowl. 176. *Edie v. Kingsford*, 14 C. B. 759. *Holbard v. Stephens*, 5 Jur. 71.

The plaintiff had been employed as secretary to the committee of a charitable society, pursuant to a resolution entered in the book of the committee, of which, during his service, he had the care. The society being afterwards dissolved, the plaintiff sued some of the members of the committee for his salary. The court held that he was bound to produce the book under which he was engaged; for though he was no party to the original resolution, which was entered into before his appointment as secretary, yet by accepting the situation, and the benefit attached to it, he must be taken to have adopted the terms contained in the resolution, and, consequently, was bound to produce the book to show what those terms really were. *Whitford v. Tuthie*, 10 Bing. 395; 4 M. & Scott, 166.

Where the written communication or agreement is collateral to the question in issue, it need not be produced.

If the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent parol evidence, such as payment of rent, or the testimony of a witness who has seen the tenant occupy, notwithstanding that the occupancy was under an agreement in writing. *R. v. Holy Trinity, Hull*, 7 B. & C. 611; 1 M. & R. 444. *Doe v. Harvey*, 8 Bing. 239. See *Twyman v. Knowles*, 13 C. B. 222. *Hey v. Moorhouse*, 6 Bing. N. C. 52; 8 Scott, 156.

The fact that a party has agreed to sell goods on commission may be established by oral testimony, though the terms re-

specting the payment of the commission have been reduced into writing. *Whitfield v. Brand*, 16 Mee. & W. 282.

And if the writings between the parties amounted only to mere unaccepted proposals, or mere minutes capable of conveying no definite information to the court or jury, and cannot by any sensible rule of interpretation be construed as memoranda which the parties themselves intended to operate as fit evidence of their several agreements, parol evidence will be admissible without the production of the writings being otherwise excused. See *R. v. Wrangle*, 2 Ad. & E. 514. *Ingram v. Lea*, 2 Camp. 521. *Wilson v. Bowie*, 1 C. & P. 8. Thus, where at the time of letting some premises to the defendant, the plaintiff had read the terms from pencil minutes, and the defendant had acquiesced in those terms, but had not read the minutes. *Trewhitt v. Lambert*, 10 Ad. & E. 470. *See* also *Doe v. Cartwright*, 3 B. & A. 326. *R. v. St. Martin's, Leicester*, 2 Ad. & E. 210; 4 Nev. & M. 202. *Hawkins v. Warre*, 3 B. & C. 690; 5 D. & R 512.

The primary proof of the publication of an opera is the production of the printed music; and the fact of publication cannot be proved in the first instance by a witness who has merely seen the opera in print, or heard parts of it played in society. *Boosey v. Davidson*, 13 Q. B. 257; but see 10 C. B. 696. So, the fact of rating cannot be legally proved without production of the rate-books. *R. v. Coppull*, 2 East, 25. A plaintiff cannot be asked in cross-examination whether his name is written in a certain book described by the questioner, unless a satisfactory reason be first given for the non-production of the book itself. *Darby v. Ouseley*, 1 H. & N. 1.

A preliminary agreement, which has been followed up by the execution of a deed of conveyance, cannot be admitted as evidence to shew what parcels were subsequently conveyed. *Williams v. Morgan*, 15 Q. B. 782.

A memorandum of an arrest filed in the sheriff's office at the request of a deceased officer is not evidence. *Chambers v. Bernasconi*, 1 C. & J. 451; 1 Tyrw. 535.

Where, in trover against the sheriff by assignees, it appeared that the warrant to the officer was lost, the court held that parol evidence of its contents to connect the officer with the sheriff was admissible, without calling for the entry in the book at the sheriff's office. *Moon v. Raphael*, 7 C. & P. 115.

The giving in evidence by the one side, without objection raised by the other, a copy letter from a letter-book, does not waive the right of the party so giving it from objecting to the other side putting in a letter between the same parties from the same book. *Sheddon v. Patrick*, 2 Sw. & Tr. 170; 30 L. J. P. & M. 217.

A party's own admissions are, however, admissible against himself, and those claiming under him, although they relate to the contents of a deed or other instrument which are directly in issue in the cause. "The reason why such statements or acts are admissible without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced, for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case where better evidence is withheld; whereas, what a party himself admits to be true may reasonably be presumed to be so." *Per Parke, B.: Slatterie v. Pooley*, 6 Mee. & W. 669. See *Newhall v. Holt*, id. 662. *Earle v. Picken*, 5 C. & P. 542. *Bethell v. Blencowe*, 3 Man. & G. 119. *Howard v. Smith*, id. 254. *King v. Cole*, 2 Ex. 632. *R. v. Basingstoke*, 14 Q. B. 611. *Boulter v. Peplow*, 9 C. B. 501. *Ante*, Admissions, vol. i. p. 195.

Where, on a preliminary hearing of a charge, the magistrate's clerk takes down what the witness says, but neither the witness nor the magistrate signs the writing, nor does it constitute part of the depositions returned, oral evidence of what passed on that occasion is equally admissible with the clerk's note. *Jeens v. Wheedon*, 2 M. & Rob. 486. *R. v. Christopher*, 2 C. & Kir. 994; 1 Den. 536; 4 Cox, C. C. 76. The same rule prevails for the hearing of an information for a trespass in pursuit of game. The clerk takes a note of the charge, because this is not one of those cases where the magistrate is bound to take down what the witness says. *Robinson v. Vaughton*, 8 C. & P. 252. Where the proceedings of directors, commissioners, public trustees, and the like, are entered in books, the circumstance that such books are rendered by statute admissible in evidence does not exclude parol proof of what has taken place at the respective meetings. *Miles v. Bough*, 3 Q. B. 845. *Inglis v. Great Northern Railway Co.* 1 Macq. H. of L. 112.

In support of an indictment for perjury committed in a county court, it is unnecessary to subpœna the judge to produce his notes, for he is not required by law to keep any, and the perjury may be proved by any witness who was present at the trial. *R. v. Morgan*, 6 Cox, C. C. 107. *Harmer v. Bean*, 3 C. & Kir. 307.

So, the fact of birth, baptism, marriage, death or burial, may be proved by parol testimony, though a narrative or memorandum of these events may have been entered on registers which the law requires to be kept; for the existence or contents of these registers forms no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care. *Harrison v. Corporation of Southampton*, 22 L. J. Ch. 722. *R. v. Mainwaring*, 26 L. J.

(*a*) *General Rule.*

(*b*) *When the General Rule is not Applicable, as where the Superior Evidence fails.*[1]

M. C. 10. *Evans v. Morgan*, 2 C. & J. 453. *R. v. Allison*, R. & R. 109.

Upon an application of the rule requiring the best evidence, if there were two witnesses to a fact, and one is dead, the survivor must be called. *Williams v. the East India Co.* 3 East, 193.

[1] As the rule requiring the highest species of evidence is founded upon the presumption that there is superior or greater evidence behind, it does not, of course, exclude evidence which is the best that can be then produced by the party; therefore, if a deed or other written document be lost, or be in the hands of the adversary, who refuses to produce it, a copy of it is admissible. For the contents of writings may be proved by secondary evidence where their production is either physically impossible or highly inconvenient. Thus, inscriptions on walls and fixed tablets, mural monuments, gravestones, surveyors' marks on boundary trees, notices warning trespassers affixed on boards, and the like, may be proved by secondary evidence, since they cannot conveniently, if at all, be produced in court. See *Mortimer v. M'Callan*, 6 Mee. & W. 68. *Per Lord Abinger: Bruce v. Nicolopulo*, 11 Ex. 129. But where a notice was merely suspended to the wall by a nail, it was held that it was necessary it should be produced. *Jones v. Tarleton*, 9 Mee. & W. 675; 1 Dowl. N. S. 625.

If a document be deposited in a foreign country, and the laws or established usage of that country prohibit its removal, its contents may, on the same ground of the impracticability of producing the document itself, be proved by secondary evidence. *Boyle v. Wiseman*, 10 Ex. 647. *Alivon v. Furnival*, 1 C., M. & R. 277.

Secondary evidence is admissible when a document is in the hands of a stranger who is not compellable at law to produce it, and who refuses to do so either when summoned as a witness with a *subpœna duces tecum*. *Marston v. Downes*, 1 Ad. & E. 31; 4 Nev. & M. 861. *Doe v. Ross*, 7 Mee. and W. 102. *Mills v. Ody*, 6 C. & P. 728. Accordingly, when a document cannot be produced by reason of privilege in defendant, secondary evidence of it is admissible. *Reg. v. Leatham*, 30 L. J. Q. B. 205; 7 Jur. N. S. 674. Or when sworn as a witness without a subpœna, if he admits that he has the document in court. *Doe v. Clifford*, 2 C. & Kir. 448. *Newton v. Chaplin*, 10 C. B. 356. The mere disobedience, however, of a person served with a *subpœna duces tecum*, will not render admissible secondary evidence of the document which he is called upon to produce (*Jesus College v. Gibbs*, 1 You. & C. 156); but the witness must also be justified in refusing the production, for otherwise the party will have no remedy except as against him. *R. v. Llanfaethly*, 2 E. & B. 940.

If an attorney, who is not acting under special instructions from his clients, declines to produce an instrument on the ground of privilege, it is questionable whether the client must not be subpœnaed in order to ascertain whether he also relies on his right to withhold the deed; for the party offering secondary evidence might wish to show that he has done all in his power to obtain the original document. *Doe v. Ross*, 7 Mee. & W. 122. *Newton v. Chaplin*, 10 C. B. 356.

As to the grounds upon which documents may be lawfully withheld, *see post*, Witness.

What degree of diligence is necessary in the search for a lost instrument, in order to let in secondary evidence of its contents, cannot be easily defined, but the party is generally expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. *R. v. Saffron Hill*, 1 E. & B. 93; 22 L. J. M. C. 22. See *M'Gahey v. Alston*, 2 Mee. & W. 214. *Gathercole v. Miall*, 15 id. 319. *Brewster v. Sewell*, 3 B. & A. 299.

When the document belongs to the personal custody of a particular individual, or is proved or may be presumed to be in his possession, he must in general be served with a *subpœna duces tecum*, and be sworn to account for it (see *R. v. Saffron Hill*, 1 E. & B. 93); since, so long as he is capable of being called as a witness, his declarations respecting it will, in strictness, be inadmissible (*R. v. Denio*, 7 B. & C. 620); and even after his death, this species of evidence, although admissible as tending to prove the diligence and extent of the search, must be received with great caution. *R. v. Rawden*, 2 Ad. & E. 158; but see *R. v. Morton*, 4 M. & S. 48. The necessity of this strictness of proof has, however, been very much relaxed by a distinction taken between evidence addressed to the material facts in the case, and that which is admitted to satisfy the conscience of the judge and preliminary inquiry; and the Court of Queen's Bench has almost gone the length of holding that, in order to show that search has been made for a document, so as to let in secondary proof of its contents, hearsay evidence of the answers given by persons who were likely to have it in their custody, might be received. *R. v. Kenilworth*, 7 Q. B. 642.

If the instrument ought to have been deposited in a public office, or other particular place, it will generally be deemed sufficient to have searched that place, without calling the party whose duty it was to have put it there, or any other person who may have had access to it. *R. v. Stourbridge*, 8 B. & C. 96. *Minshall v. Lloyd*, Mee. & W. 450,

(*c*) *Or where no Presumption of Fraud arises.*[1]

(*d*) ,, *there is a direct Admission by the Party.*[2]

(B) *Secondary Evidence when Admissible, and its Effect.*

(*a*) *Difference between Secondary and Defective Evidence.*[3]

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and *M'Gahey v. Alston*, 2 id. 206. *Fernley v. Worthington*, 1 Man. & G. 491.

Where a doubt exists as to the proper custody, inquiry should be made in those quarters in which the instrument might reasonably be expected to remain. In the case of an expired indenture of apprenticeship, stricter inquiry should be made of the apprentice than the master; but search should be made among the papers of both. See *Hall v. Ball*, 3 Man. & G. 247.

Search among the muniments of the lessor, it has been said, is sufficient to let in secondary evidence of the lease. *Brewster v. Sewell*, 3 B. & A. 301. *Hall v. Ball*, *supra*. But prudence dictates an application to both parties whenever it may be necessary to prove the loss of such an instrument. 1 Tayl. Ev. 388, 3d ed.

[1] The rule excluding all but best evidence does not apply in the absence of all presumption of fraud; therefore, with regard to evidence to prove the fact of persons holding official appointments, or to prove documents of a public nature, a copy of it is evidence. This is undoubtedly an exception to the rule which we have now been illustrating, but it has been adopted because, if it were necessary to give the record itself in evidence, it might be required in several parts of the kingdom at the same time; and by thus removing it from the place in which it is deposited there would necessarily be great danger of its being lost. Gilb. Ev. 7, 8.

For the same reasons, the journals of the House of Commons; a bill, answer, depositions, and decree in equity; libel, answer, depositions, &c. in the Ecclesiastical and Admiralty Courts; the rolls of a court-baron and of other inferior courts; parish registers; entry in corporation books, or the books of public companies, relating to things public and general; may all be proved by certified or examined copies.

In the cases of public officers, it suffices to prove that they acted in the particular capacity without producing their appointments. *Berryman v. Wise*, 4 T. R. 366. *Gordon's case*, 1 Leach, 589. Hence, on an indictment for perjury committed by the defendant before a surrogate in an ecclesiastical court, proof that the person who administered the oath acted as surrogate has been held to be sufficient *primâ facie* evidence of his appointment and authority. *Rex v. Verelst*, 2 Camp. 432. And on an information against a military officer for false returns, it is sufficient to prove that he acted in the character alleged in the charge, without adducing direct evidence of his appointment. *Rex v. Gardner*, 2 Camp. 512; *see* 10 East, 104; 2 Camp. 11; 3 id. 190; 2 Marsh. 38; 1 N. R. 208; 4 T. R. 366.

[2] "There are some instances," said *Chambre, J.*, in *Smith v. Taylor* (1 N. R. 210), "in which strict proof is made unnecessary because the party against whom it would otherwise be essential to produce proof of some particular fact, has precluded himself in the way of estoppel by his conduct from disputing the fact. There are few cases, indeed, in which a man's own acts operate against him in the way of estoppel; though they may often be used as good *primâ facie* evidence against him. Such is the rule in actions against clergymen for non-residence, in which it is reasonable that the acts of the defendant as parson, and his receipt of the emoluments of the church, should be evidence against him that he is parson, without calling upon the plaintiff to prove the defendant's character formally. So, in actions for subtraction of tithes, proof of the defendant's former acknowledgments of the plaintiff's right to the tithes, as against the defendant, who is a wrongdoer, is deemed sufficient."

Where the parties have expressed their agreement in writing, the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the case of negotiable securities; and in all cases of written contracts the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is of the very essence of their agreement. *R. v. Castlemorton*, 3 B. & Ad. 590: see *per Abbott, C. J.*

The memorial of a registered conveyance is inadmissible as primary evidence against third persons to prove the contents of the deed. *Molton v. Harris*, 2 Esp. 549. But against the party by whom the deed was registered, and those who claim under him, it can be received as secondary, if not primary evidence, being considered in the light of an admission. *Doe v. Clifford*, 2 C. & Kir. 448. *Boulter v. Peplow*, 9 C. B. 502. *Wollaston v. Hakewill*, 3 Man. & G. 297; 3 Scott, N. R. 593. See *Sadlier v. Biggs*, 4 H. of L. C. 435.

[3] There is a difference between the rejection of evidence by the operation of the rule excluding secondary evidence, and a mere failure or defect in evidence that is in itself admissible. The effect of the rule is to exclude particular evidence altogether, until proof be given that better evidence is unattainable; and when such proof has been given, to admit the evidence of inferior degree. But evidence tending to the proof

(*b*) *Preliminary Proceedings to authorise the Admission of Secondary Evidence.*

(1) *Proof that the highest Evidence cannot be obtained.*[1]

of a fact may be admissible, yet insufficient, and may still be so although it be proved that better evidence cannot be had. In the case of *Williams v. the East India Co.* 3 East, 192, the question was, Whether the agent of the defendants, who were the freighters of the plaintiff's ship, had apprised the plaintiff or his officers of the inflammable and dangerous nature of a quantity of rhogan which had been stowed on board the ship, and which ultimately occasioned its destruction. It was the duty of the conductor of military stores to convey goods on board the ship, and of the chief mate to receive them; the chief mate was dead, and no evidence was given of what passed between him and the conductor of the stores: but the captain and second mate proved that no communication had been made to them of the nature of the rhogan. It was objected, that the conductor of the stores ought to have been examined, and it was so ruled by *Lord Ellenborough* at *nisi prius*, and afterwards decided by the whole court, on the ground, first, that the delivery without notice thus insisted upon by the plaintiff was a criminal act, and that therefore it was incumbent on the plaintiff to prove the neglect to give notice; and, secondly, that the plaintiff had not given sufficient *primâ facie* evidence of the want of notice. The defect in this instance seems to have consisted rather in a failure in the measure of the proof than in the substitution of secondary for original evidence.

[1] Before secondary evidence can be admitted it must be proved that better evidence cannot be obtained. *Rex v. Culpepper*, Skin. 673. *Peterborough v. Mordant*, 1 Mod. 94. *Doe d. Gilbert v. Ross*, 7 Mee. & W. 102. Thus, where a deed has been lost or destroyed, the fact must be proved. If two or more parts have been executed, the loss or destruction of all the parts must be established by evidence (Bull. N. P. 254); but whenever the instrument is out of the power of the party, secondary evidence is admissible, as when a will remains in Chancery by order of the court. Id.; 11 Co. 92. And all the proper sources from which primary evidence can be procured must be exhausted before secondary evidence can be received. *Rex v. Golding*, 1 B. & Ad. 173. *M'Gahey v. Alston*, 2 Mee. & W. 212. Hence, where a letter which had been in the possession of the defendant was filed in the Court of Chancery pursuant to an order in that court, it was ruled that secondary evidence of it was not admissible, it being in the power of either party to produce it on application to the court. *Williams v. Mannings*, 1 R. & M. 18. And it must be shown that diligent search has been made in those quarters from which the best evidence was likely to be procured. *Brewster v. Sewell*, 3 B. & A. 296. *Rex v. Johnson*, 7 East, 66. *Kensington v. Inglis*, 8 id. 276; *see* 29 L. J. Ch. 181.

If a document be abroad, secondary evidence may be given. *Hunt v. Alewyn*, 1 M. & P. 433; 3 Car. & P. 284. See *Atkins v. Owen*, 4 Ad. & E. 819; 6 Nev. & M. 229. But where a party leaves his attorney to conduct his cause and goes abroad, the court will presume all necessary papers were left with him; and it was therefore held in such a case that notice to produce papers served on the attorney on the evening next but one before the trial was sufficient to let in secondary evidence. *Bryan v. Wagstaff*, 1 R. & M. 327; 2 Car. & P. 125. *Rex v. Inhabitants of Morton*, 4 M. & S. 48. Where the loss or destruction of papers may almost be presumed, very slight evidence of their loss or destruction is sufficient to make evidence of their contents admissible. *Freeman v. Arkrell*, 2 B. & C. 496. *Brewster v. Sewell*, 3 B. & A. 300: but see *R. v. Castleton*, 6 T. R. 236; 1 Stark. 139. As where the publisher of a weekly paper, upon an indictment for a libel, swore that he believed the original had been destroyed, this was held sufficient to admit secondary evidence. *Rex v. Johnson*, 7 East, 65. And so where the secretary to the governor of a colony swore that he had put the document in question amongst waste papers in the office, as being in his opinion of no further use. *Kensington v. Inglis*, 8 East, 273. Where it was shown that an indenture of apprenticeship had been handed to a deceased party's attorney many years before, and that it could not be found among his papers, it was held sufficient to let in secondary evidence, although no application had been made to the personal representative of the deceased party. *Rex v. Piddlehinton*, 3 B. & Adol. 460.

Where, at a meeting of the plaintiff and defendant to settle an account, the clerk of the former made the entries into one book, which the defendant copied into another, but no admission was made as to the correctness of the items, but the defendant admitted the balance against him, as stated by the clerk, was correct, but added, that, as he had done many things, there would not be much, if anything, between them:—*Held*, that the plaintiff's book would not bind the defendant, so as to require its production, or its absence to be accounted for:—*Held*, also, that the defendant's admission was evidence of something due on the account stated. *Rigby v. Jeffrys*, 7 Dowl. 561. So, notice to produce deeds given to the attorney, although the deed may be in his agent's hands, and although it was only alleged to have been delivered by him to the Stamp-office:—*Held* that, being within the control of the party, the other party

(2) *Notice to produce highest kind of Evidence when necessary, and to whom to be given.*[1]

might give secondary evidence of its contents. *Sinclair v. Stevenson*, 1 Car. & P. 582. So, after the lapse of thirty-six years, and every inquiry made, secondary evidence may be received of the contents of deeds. *Rex v. Earl Farleigh*, 6 D. & R. 146. But where the witness stated that he had searched in a box where he thought he had put certain letters, but could not find them, adding that he thought they were somewhere in his possession, but that he had not searched for them except in the box: — *Held*, that it was not sufficient to admit secondary evidence of their contents. *Bligh v. Wellesley*, 2 Car. & P. 400. So, where entries were made against the interest of a party who had quitted the kingdom, there being charges of a criminal nature against him, but he was still living: — *Held*, that it was not sufficient to entitle his declarations to be read. *Stephen v. Gwennap*, 2 M. & M. 120.

It is not absolutely necessary that the search for the original document should be made for the purpose of, and shortly before the cause; when made recently after the death of the party in whose possession it had been, although three years before the action: — *Held* sufficient to let in secondary evidence. *Fitz v. Rabbits*, 2 M. & Rob. 60.

If a subscribing witness cannot be found after diligent inquiry, evidence of his handwriting is admissible the same as if he were dead; and it is not necessary to show that his absence is caused by collusion with the other party. *Willman v. Worrall*, 8 Car. & P. 380. *See ante*, vol. ii. p. 4. So, an examined copy of an entry in the Middlesex registry of deeds, received as secondary evidence of the original, which could not be obtained. *Collins v. Maule*, id. 502. *Doe v. Lloyd*, 1 Man. & G. 671.

In *assumpsit*, on a written agreement, where the attesting witness to the execution was not produced at the trial, it was held sufficient, in order to let in evidence of his handwriting, to prove, by a person who knew him, but had not seen him for eighteen months, that, at the request of the plaintiff's attorney, he had made inquiry for him at coffee-houses and other places where he thought he might hear of him, but without success; and that it was not necessary to show that inquiry had been made of both the parties who had executed the agreement. *Evans v. Curtis*, 2 Car. & P. 296. *See* 17 & 18 Vic. c. 128, s. 26.

The non-production of an original as evidence, although letting in secondary evidence, does not open the door to any loose secondary proof, as of a paper purporting to be only substantially a copy of the original. *Everingham v. Roundell*, 2 M. & Rob. 138. In debt for penalties for acting as a broker, not being licensed: — *Held*, that to make the defendant's card evidence, notice should be given to him to produce his cards, and then to prove a copy, or give parol evidence of their contents. *Clark v. Capp*, 1 Car. & P. 199. So, where a letter was traced to the defendant's daughter, who was not called: — *Held*, that it was not sufficient proof of its loss to let in secondary evidence. *Parkins v. Cobbet*, 1 id. 282. Hearsay evidence is admissible to let in secondary proof (28 L. J. M. C. 1); and answers given to inquiries may be stated. (Id.)

When sufficient evidence has been given of the loss of the deed or other instrument, it must be shown that the document existed as a genuine instrument. *Goodier v. Lake*, 1 Atk. 246. *Rex v. Sir T. Culpepper*, Skin. 677); that it was written on stamped paper or parchment; and, in case of apprentice deeds, what sum was paid with the apprentice, and that the deed bore an *ad valorem* stamp (see *Goodier v. Lake*, 1 Atk. 446); for the consciousness of a defect of this nature may have been a motive for concealing or destroying the instrument. Its execution must be proved according to the nature of the instrument.

[1] Where a written instrument sought to be given in evidence is in the hands of the opposite party, he may, since he is a compellable witness (14 & 15 Vic. c. 99), be served with a *subpœna duces tecum* to produce it; or secondary evidence of its contents is admissible, provided that a notice to produce the original has been duly served, where such notice is requisite. *R. v. Watson*, 2 T. R. 201. *Cotes v. Winter*, 3 id. 306.

The sole reason why a notice to produce is necessary, is to give a sufficient opportunity to the opposite party to produce it, and thereby secure, if he pleases, the best evidence of the contents; and it is not to enable him to procure evidence to explain or support it. Hence, if the document be in court, a request to produce immediately is quite sufficient for that purpose, *Dwyer v. Collins*, 7 Ex. 639: *contra Exall v. Partridge*, cited 1 Stark. 283. But if, from the nature of the proceedings, the party in possession of the instrument has notice that he is to be charged with the possession of the instrument — as, for example, in trover for a bond — notice to produce is unnecessary. *How v. Hall*, 14 East, 274. So, in a prosecution for stealing a written instrument (*Rex v. Ackles*, 1 Leach. 302); or on trials for treason, when the prisoner has been proved to be in possession of the original. *Rex v. Moore*, 6 East, 421, n. *Rex v. Layer*, 6 T. R. 263. But in an action against the acceptor of a bill or maker of a note, if the defendant do not, by his pleading, deny the acceptance or the making, and so the document is admitted on the record, the defendant must serve the plaintiff with a notice to produce. *Goodered v. Armour*, 3 Q. B. 956. *Lawrence v. Clark*, 14 Mee. & W. 250. And even where there is no such plea it is necessary to entitle the plaintiff to

interest from its maturity. *Hutton v. Ward*, 15 Q. B. 26. *Chaplin v. Levy*, 9 Ex. 534.

A copy of a letter taken by a copying machine is not evidence without notice to produce the original. *Nodin v. Murray*, 8 Camp. 228. *Holland v. Reeves*, 7 Car. & P. 36.

A written demand or notice of action, which is requisite to enable the plaintiff to recover (*Jory v. Orchard*, 3 B. & P. 39); or an attorney's bill delivered under 6 & 7 Vic. c. 73, s. 37 (*Colling v. Treweek*, 6 B. & C. 394), may be proved by a copy, without notice, but not by the attorney's books. *Phillipson v. Chase*, 2 Camp. 110. See *infra*.

A counterpart executed by one party only is admissible against the party who executed it, to prove the execution of the other part, which it recites, although no notice has been given to produce the original. *Colling v. Treweek*, 6 B. & C. 398. *Burleigh v. Stibbs*, 5 T. R. 465. But against a third person, unless he claim in privity (*Roe d. West v. Davis*, 7 East, 363), a counterpart cannot be read in evidence without accounting for the want of the original, or proving it to be in the possession of the adverse party, and that he had notice to produce it. *Anon.* 1 Salk. 287; 6 Mod. 225; *see* 12 Vin. Abr. 27, 404; 2 T. R. 41; 2 Atk. 71; and vol. iii. p. 330.

Notice to produce a notice is not in general requisite, and therefore the copy of a letter giving notice of the dishonour of a bill is admissible in evidence, without notice to produce the original letter. *Hine v. Beaumont*, 3 B. & P. 288; 7 Moore, 112. *Roberts v. Bradshaw*, 1 Stark, 28. *Ackland v. Pearce*, 2 Camp. 599.

It is not necessary to give notice to produce a notice to quit (*Doe v. Somerton*, 7 Q. B. 58. *Jory v. Orchard*, 2 B. & P. 41. *R. v. Mortlock*, 7 Q. B. 459. *Colling v. Treweek, supra*), or a notice of dishonour (*Swain v. Lewis*, 2 C., M. & R. 261; 5 Tyr. 998. *Kine v. Beaumont, supra*); provided the action be brought upon the bill, but not otherwise (*Lananze v. Palmer*, M. & M. 31), or to produce notice given to the adverse party's attorney, even in penal actions (*Coles v. Winter*, 3 T. R. 306. *Attorney-General v. Le Merchand*, 2 id. 201, n.), or in criminal proceedings. (Id.)

Where a party has fraudulently or forcibly obtained possession, in fraud, of a *subpœna duces tecum*, notice to that party to produce is not necessary. *Leeds v. Cook*, 4 Esp. 256. *Doe v. Rees*, 7 Bing. 724.

An exception is made in the case of seamen; they may bring forward evidence to prove the contents of any agreement, or otherwise, to support their case, without producing, or giving notice to produce, the agreement or any copy thereof. Merch. Ship. Act, 1854, s. 165.

Where a notice is painted on a board, and fixed to a poll attached to the soil—as about dogs trespassing—a copy of the notice may be given in evidence, without notice to produce the original. *Bartholomew v. Stevens*, 8 Car. & P. 728. *Jones v. Tarleton*, 9 Mee. & W. 675.

Where the defendant, at a public meeting, delivered to a person present a written paper, as a copy of the resolutions about to be read, and which corresponded with the resolutions so read, it was held good evidence, without notice to produce the paper from which the resolutions were read. *R. v. Hunt*, 3 B. & Ald. 572. And notice to produce banners bearing mottoes used at a seditious meeting is unnecessary, proof by eye-witnesses being sufficient. (Id.)

The circumstance that a notice to admit has been served, and the admission made, does not dispense with a notice to produce, and proof that the party has the document in his possession. *Sharp v. Lamb*, 11 Ad. & E. 805.

Where the adverse party, or his attorney, has the document in court, he cannot refuse to produce it, if called upon to do so, on the ground that no notice was served. *Dwyer v. Collins*, 7 Ex. 639; *see* 10 Ad. & E. 597, n.; 14 Mee. & W. 250.

To render the notice available, it must be shown in the first instance that the document is in the hands, or under the control, of the party required to produce it. *Sharp v. Lamb, supra*. *Lloyd v. Mostyn*, 10 Mee. & W. 479. Where the document exclusively belongs to the party, or in the ordinary course of business ought to be in his custody, slight evidence will raise the presumption; as where a bankruptcy certificate was proved to have been obtained for the defendant, it was presumed to have come into his possession (*Henry v. Leigh*, 3 Camp. 502); and where he is the assignee, documents relating to the estate are presumed to be in his hands. *Doe d. Richards v. Lewis*, 20 L. J. C. P. 171. *Goodtitle v. Saville*, 16 East, 91, n. If papers were last seen in a party's hands, it lies on him to trace them out of his possession (33 How. St. Tr. 757; id. 989), and defendant may interrupt plaintiff's case in order to do so. *Harvey v. Mitchell*, 2 M. & Rob. 386. *Smith v. Sleap*, 1 C. & Kir. 48.

In *Gordon's case*, tried at the Old Bailey Sept. Session, 1784, the defendant was tried for the murder of Colonel Thomas in a duel. The letter from Colonel Gordon containing the challenge was carried by his servant, and delivered to the servant of Colonel Thomas. Colonel Thomas's servant brought a letter in answer back, and delivered it to Colonel Gordon's servant; but it did not appear that the letter was in fact ever delivered to Colonel Gordon himself, yet *Mr. Baron Eyre* admitted an attested copy of it to be read against the prisoner, and left it with the jury as legal evidence, if they were of opinion that the original had ever reached the prisoner's hands. *Mr. Baron Hotham* concurred. *Mr. Justice Gould* thought that positive proof ought to have been given that the original had come into the prisoner's possession, and cited *Francis's case*, 6 State Trials.

Proof that a deed came into the hands of the defendant's brother, under whom the defendant claimed, was held to warrant the

(3) *Time of giving Notice, and the Form to be adopted.*[1]

reading of a copy. Bull. N. P. 254.

Proof of the delivery of a paper to the servant of the defendant, without calling the servant, was, in a criminal case, held to be insufficient proof of the possession of the paper by the defendant (*Rex v. Pearce*, Peake, 75); though in some cases the possession by the servant will be deemed the possession by the master. *Baldney v. Ritchie*, 1 Stark. 338. See *Gordon's case, ante*, p. 306. So, in an action against the sheriff, a notice to his attorney to produce a writ which has been returned to the undersheriff while the defendant was in office, is sufficient. *Taplin v. Atty*, 3 Bing. 164. So also notice to a defendant to produce a check drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the check remain in the banker's hands. *Partridge v. Coates*, 1 R. & M. 156. But where a paper has been delivered to a third person, under whom the defendant justified, and by whose directions he acted, a notice to produce served upon the defendant is not sufficient to authorise the admission of secondary evidence. *Evans v. Sweet*, id. 83. But see *Pritchard v. Symons*, Bull. N. P. 254, *contra;* and 2 H. & N. 867; 27 L. J. Ex. 193.

Where a document, being scheduled in an answer in a suit in equity, was deposited in that court, and an order made for delivering it to the party:—*Held*, that it was sufficiently within his control; and that, on failure to produce it on notice, secondary evidence of it might be given. *Rush v. Peacock*, 2 M. & Rob. 162.

Where the paper called for was a cheque of the defendant's, in the hands of his bankers, having been paid:—*Held*, that it might be called for under the notice to produce, and that the banker's clerk need not be called. *Burton v. Payne*, 2 C. & P. 520; *see* 2 F. & F. 193.

A copy of a notice relating to a bond is evidence, without notice to produce the original. *Bartholomew v. Stephens*, 8 id. 728. After the opposite party have been called upon, and refused to produce a paper (upon notice given), they cannot subsequently put it into a witness's hand, and put any question upon it. *Doe v. Cockell*, 6 id. 525.

Where enough is stated in the notice to produce to leave no doubt but that the party must be aware of the particular instrument intended to be called for:—*Held*, sufficient to let in secondary evidence. *Rogers v. Custance*, 2 M. & Rob. 179.

[1] The notice to produce must be in writing. Reg. Gen. (Pr.) H. T. 1853, r. 161. It should be correctly intituled (*Harvey v. Morgan*, 2 Stark. 19), though a notice has been held not to be invalidated by being intituled in the Common Pleas instead of the Exchequer. *Lawrence v. Clark*, 14 Mee. & W. 250. It is enough if the notice induce the party to believe that a particular document will be called for. *Rogers v. Custance*, 2 M. & Rob. 181.

The dates of each document need not be minutely particularised if otherwise well described: thus, "all letters written by the plaintiff to the defendant between the years 1837 and 1841, both inclusive, by or from the defendant or either of them, or any person on their behalf, and also all books, papers, &c., relating to the subject-matter of this cause," has been held good. *Morris v. Hanser*, 2 M. & Rob. 392. So, "all accounts relating to the matters in question in this cause." *Jones v. Edwards*, M'Clel. & Y. 139. But this general form of notice will not be sufficient in all cases: thus, a notice for "all letters and copies of letters, and all books relating to the cause," was held too vague for the purpose there intended. *Rogers v. Custance, supra.*

Notice to produce a letter which refers to an inclosed account is sufficient to entitle the sender to give secondary evidence of the inclosed account, if it is not produced. *Engall v. Druce*, 9 W. R. 536.

The notice to produce must be served a reasonable time before the trial, so as to enable the party served to comply with it. What is a reasonable time is for the judge, and necessarily depends on the circumstances of each case. *Bryan v. Wagstaffe*, 2 C. & P. 126. *Ehrensperger v. Anderson*, 3 Ex. 148. *Lloyd v. Mostyn*, 10 Mee. & W. 478. *Lawrence v. Clark, supra.*

If the person to be served reside in another town than that in which the trial is to take place, he must in general be served before the commission-day. *R. v. Ellicombe*, 1 M. & Rob. 260. *Trist v. Johnson*, id. 257. But service on the commission-day, where the trial did not take place till fifteen days after, was held sufficient. *Doe v. Wainright*, 5 Ad. & E. 520. If service be postponed till the opposite party has left his home to attend the court it is too late. *George v. Thompson*, 4 Dowl. 656. *Hargest v. Fothergill*, 5 C. & P. 302. *Howard v. Williams*, 9 Mee. & W. 725.

In town causes and in county causes, where the attorney to be served lives in the assize town, and the document required is such as would in the ordinary course of business be in the attorney's hands, a shorter notice is sufficient; as if it is served on the evening (before 7 P.M., Reg. Gen. (Pr.) H. T. 1853, r. 164) preceding the day of trial. *Atkins v. Meredith*, 4 Dowl. 658. *Leaf v. Butt*, Car. & M. 451. *Meyrick v. Woods*, id. 452. *Forkin v. Edwards*, 9 C. & P. 478. *Gibbons v. Powell*, id. 634.

A service for the first trial is good for any subsequent or new trial that may take place; and the costs of a fresh notice will not be allowed. *Hope v. Beadon*, 17 Q. B. 509.

If the notice is in sufficient time, it makes no difference that the cause was part heard. *Sturm v. Jeffree*, 2 C. & Kir. 442.

Where the papers are abroad, or belong to a party living abroad, and are such as would not ordinarily be put in the attorney's hands here, the notice is ineffectual; but if otherwise it is good. *Sturge v. Buchanan*,

10 Ad. & E. 598. *Bryan v. Waystaffe*, R. & M. 327. *Drabble v. Donner*, id. 47.

If, upon being served with a notice, the party state that the document is not in existence, he cannot object to the lateness of the service, and secondary evidence is admissible. *Foster v. Ponter*, 9 C. & P. 720.

If a party has not the document when served, but afterwards obtains it a reasonable time before the trial, he is bound to produce it. *Lloyd v. Mostyn*, *supra*.

The notice may be served either on the party or his attorney. *Hughes v. Budd*, 8 Dowl. 315. *Cotes v. Winter*, 3 T. R. 306. *Houseman v. Roberts*, 5 C. & P. 394. It may be material, however, on which of them it is served, if the time be unreasonably short.

When a party goes abroad, it is presumed that he leaves with his attorney all documents necessarily connected with the cause (*Affalo v. Fourdinier*, M. & M. 335. *Gibbons v. Powell*, 9 C. & P. 634), but not if only accidentally connected therewith (*Lawrence v. Clark*, 14 Mee. & W. 250. *Atkins v. Meredith*, id. *Byrne v. Harvey*, 2 M. & Rob. 89. *Holt v. Myers*, 9 C. & P. 191), it being for the judge to say whether it is so or not. *Vice v. Lady Anson*, M. & M. 97. *Boyle v. Wiseman*, 10 Ex. 647.

As to proof of the service, it is by the 15 & 16 Vic. c. 76, s. 119, enacted, that "an affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served."

If notice to admit the notice to produce has not been served, the person who served the notice must be called to prove such service.

[1] The time to produce is not until the opposite party has entered on his case (*Graham v. Dyster*, 2 Stark. 22; 1 M. & S. 1); until which time no cross-examination as to the contents is in strictness allowable; yet to avoid inconvenience this rule is often relaxed. *Sideways v. Dawson*, 2 Stark. 49. *Calvert v. Flower*, 7 Car. & P. 386.

If after due notice the party produces the document, the other party must be prepared to prove it by the attesting witness (*Gordon v. Secretan*, 8 East, 5848. *Sideways v. Dyson*, 2 Stark. 49. *Graham v. Dyster*, 2 id. 23); unless attestation is not necessary to the validity of the instrument (17 & 18 Vic. c. 125, s. 26); or unless the party producing takes some estate or interest under it. *Pearce v. Hooper*, 3 Taunt. 60.

Where the party served failed to produce the original, and proceeded to give secondary evidence, and the original was then produced to the witness, who denied its authenticity, it was held that the judge ought at once to have gone into the evidence on both sides, and have determined whether the document produced was the true original. *Boyle v. Wiseman*, 24 L. J. Ex. 284.

The production of the document does not render it evidence in the cause unless the party calling for it inspects it, and thus becomes informed of the contents, in which case it becomes part of his case (*Calvert v. Flower*, *supra*), if it is at all material to the issue. *Wilson v. Bowie*, 1 Car. & P. 10.

If the party served refuse to produce, then his opponent, upon proving service of the notice, and that the document is in the possession or under the control of the party, may give secondary evidence of the contents, and he need not first prove the execution of the deed by an attesting witness. *Edmonds v. Challis*, 7 C. B. 413. *Poole v. Warren*, 8 Ad. & E. 584. After refusal to produce, we have seen, he will not be allowed to put the document into the hands of his opponent's witnesses for cross-examination (*Doe v. Cockrell*, 6 Car. & P. 527); nor to make it part of his own case. *Doe v. Hodgson*, 12 Ad. & E. 135.

The refusal to produce raises a presumption that the document was properly stamped. *Crisp v. Anderson*, 1 Stark. R. 35. And although it gives rise to no other legal presumption against the non-producing party, it is a fair topic of comment to the jury. *Bale v. Kinsey*, 1 C., M. & R. 41. *See* 24 Beav. 679.

[2] All evidence introduced to a court of justice either leads directly to establish the fact in controversy, or affords a ground from whence we may infer the existence of it. The one is called positive, the other presumptive proof. The first arises where, admitting the preliminary proof as valid, viz. the credibility of a witness, or the authenticity of a seal or writing, the existence of some fact is an immediate and necessary conclusion from the evidence. The other species of proof does not generally afford a direct, and in no case a necessary inference of the fact; but only a probability, more or less strong, according to the circumstances from which it is deduced. For instance, if a person should swear that he saw A. at a certain hour of a particular day on the Royal Exchange. The testimony is direct and positive, and, if we give credit to the witness, affords an immediate and necessary conclusion of the existence of the fact. But if the witness could only swear that he saw a person whom he believed to be A., or that he heard B. declare he had seen him, or that it was the invariable custom of A. to be on the Exchange at that hour, the inference here furnished is merely as to the other facts, viz. the belief of the witness that he saw A., what he heard B. say, or A.'s general practice; circumstances which, although they may lead us to presume that A. was actually on the spot, afford subjects of discussion, and are liable to doubt and

contradiction.

As the premises from which conclusions of a presumptive nature may be drawn present all the variety of cases to be conceived between the nearest approximation to certainty and bare possibility, rules have been established to define the limits of reasonable and improbable presumption, and to point out the proper objects of deliberation in a court of justice.

There appear three distinguishable species of presumptions in law: first, such as are violent, and afford competent legal evidence; secondly, such as are proper subjects of deliberation for a jury; and thirdly, such as are inadmissible.

As to the first species; let us suppose it were to be proved that a certain ship, one of a fleet of two hundred West Indiamen, had entered the docks on her homeward voyage, and it appeared in evidence that the whole fleet had come safely to anchor at Blackwall, and that one hundred and ninety-nine of the number had actually passed into the basin, as soon as the tide would admit, but nothing could be certainly known of the remaining ship. The evidence in this case would not be positive as to the fact to be proved. A bare possibility would exist that one of the fleet might have gone down, by some extraordinary accident on entering, or before she could be allowed to enter the dock gates, and that might have been the identical ship in question. But, unless some circumstance could be shown to strengthen so slight a supposition, the evidence would be conclusive to the contrary, as affording that violent presumption, on which it is sometimes expedient to act as on a certainty, from the nature of things and the necessities of human affairs. Courts of justice adapt their proceedings to the general practice and understanding of mankind; to exact a greater degree of certainty would not only be inconvenient, but frequently impracticable.

Next, if we suppose that the fleet had been dispersed in a gale of wind, and several of the ships taken, that some were good, others indifferent sailers; some took a course likely to fall within the range of enemy's cruisers, others steered in a different direction; all these and similar circumstances, when applied to individual ships, the safety of which it was required to prove, might afford cases of presumption analogous to those doubts, which are daily submitted to the consideration of juries. They consist of premises, from which the minds of men will sometimes draw different conclusions, according to the extent or correctness of their knowledge and information, to their peculiarities of thinking, or faculties of reasoning, which often produce essential differences in the estimates they form of probabilities. But, thirdly, a case may be imagined within the limits of possibility, where the presumption would be in violation of probability. Thus, if more than half the fleet had gone down in a hurricane, or had been wrecked in a gale of wind on a lee-shore, such circumstances, it is obvious, would not admit of any reasonable presumption that any one unknown ship had arrived in safety at her destination. For the probability would lie on the other side, and it would become a court of justice to dismiss such a point from further consideration, without permitting the judgment of a jury, in less palpable instances of this nature, to be exposed to any fallacies or elaborate sophistry by which it might be ensnared. And such are the cases in which it will be found that presumptive evidence is rejected.

Probable or doubtful cases are those in which the jury deliberate on the strength of the presumption or weight of evidence; and, having struck a fair balance, decide according to the preponderancy. Gilbert lays down some rules in aid of the judgment on this subject, which would naturally suggest themselves to every reflecting mind; such as the following:—"That in contrary proofs, if men's swearing can be reconciled, such interpretation shall be put upon it as may make them agree, because everybody should be supposed to swear the truth, and no man shall be intended to swear a manifest perjury; one affirmative witness countervails the proof of several negative, because the affirmative may swear true, and the negative also; for the negatives may commonly be that they know nought of the matter, the affirmative swears that it is; and so the affirmative may be true, and the negative also. If a witness be produced, and another destroys, but a third supports his credit, the credit of the first witness is to be supported in proportion to the credit of the first and third witness to the second. M'Nally's *Rules of Evid.* 578. In criminal cases, the jury is directed not to weigh the evidence; but, if it is at all doubtful, to acquit the prisoner: a very humane rule, fortified by the presumption that every man is innocent till his guilt appears.

Violent presumptions may be distinguished from the last by this criterion; that in the former, where the circumstances clearly appear, the balance is not at all equivocal; but in the latter, there is room for deliberation and suspense.

The operation of the principle by which evidence is rejected, as falling without the limits of reasonable presumption or probability, is obvious in many familiar instances. Thus, the rule that general character shall not be inquired into in a civil question, and the admission of such evidence in a criminal one, is a striking example of the comparative degrees of presumption; the one case affording a proper subject for a jury, and the other excluded from their consideration as devoid of probability. The various circumstances under which plaintiffs are nonsuited generally proceed on the insufficient and inadmissible nature of the presumption furnished by the evidence. In further illustration of this subject, we may advert to the rules with respect to hearsay evidence. This species of testimony is ex-

cluded, not solely because the original witness of the fact may be sworn and cross-examined, which is sometimes impossible, but because his bare assertion, however positive, does not import a probability of sufficient strength to command our belief, or to be received as satisfactory proof of the truth. This will sufficiently appear, if we reflect on the inconsiderate habits of speaking, and the numerous instances of misapprehension and inadvertence, not to say wilful deceit, which may be discovered in the common declarations of mankind. Such is the foundation of the general rule; different exceptions may be attributed to the nature of the subject, or the peculiar circumstances of the speaker, which raise a stronger presumption than in ordinary cases of his veracity.

These different modes of proof are also distinguished by the terms "direct" or "circumstantial." "By direct evidence," says Mr. Best, "is meant, when the principal fact, or *factum probandum*, is attested directly by witnesses, things, or documents. To all other forms the term 'circumstantial evidence' is applied; which may be defined, that modification of indirect evidence, either by witnesses, things, or documents, which the law deems sufficiently proximate to a principal fact, or *factum probandum*, to be receivable as evidentiary of it. And this also is of two kinds, *conclusive* and *presumptive*. Conclusive, when the connexion between the principal and evidentiary facts, the *factum probandum* and *factum probans*, is a necessary consequence of the laws of nature; as when a party accused of a crime shows that at the moment of its commission he was at another place, &c. Presumptive, when the inference of the principal fact from the evidentiary is only probable, whatever the degree of persuasion which it may generate." Best, *Evidence*, 388, 3d ed. *See* vol. iii. p. 120.

[1] If the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, and if the evidence has that tendency, it ought to be received, and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue. *Gibson v. Hunter*, 2 H. Black. 296.

One of the most usual presumptions occurs in cases of larceny, where, upon proof of the felony having been committed, and the property shortly afterwards found in the possession of the prisoner, it is presumed that he obtained it feloniously, unless he show how he came by it. *Rex v. Smith*, 1 R. & M. 295. *R. v. Partridge*, 7 Car. & P. 551. *R. v. Adams*, 3 id. 600. But where the only evidence against the prisoner was, that goods which were stolen sixteen months before were found in the prisoner's possession, *Bailey, J.*, directed an acquittal, without calling on the prisoner for his defence. *Rex v.* ———, 1 Car. & P. 459. So, on an indictment for arson, proof that property which was taken out of the house at the time of the firing was shortly afterwards found secreted in the possession of the prisoner, raises a presumption that the prisoner was present, and concerned in the arson. *R. v. Rickman*, 2 East, P. C. 1035. A very common presumption is made by a jury in favour of a defendant from the goodness of his character. *See* vol. iii. p. 74.

It is a universal principle, that when a man is charged with doing an act of which the probable consequences may be highly injurious, the intention is an inference of law resulting from the doing the act. *Rex v. Dixon*, 3 M. & S. 15: *per Lord Ellenborough*. And whenever an act is in itself unlawful, it is presumed to be criminal until the contrary appear. Thus, on a charge of murder, malice is presumed from the fact of killing; and if there are any circumstances of accident, necessity, or infirmity, of which the prisoner could avail himself in excuse or extenuation, they ought to be proved by the prisoner in his defence, unless they arise out of the evidence produced against him.

So, in the law of treason, an intention to kill the king may be reasonably inferred from a conspiracy to seize his person and imprison him. "Experience has shown," says Mr. J. Foster (p. 196), "that the distance is very small between the prisons and the graves of princes." This is a presumption of fact. But it is fully settled by the best authorities that such a conspiracy is in law an overt act of compassing the king's death, and in itself a substantive act of high treason within the statute of Edw. 3. The same observation applies to other acts, which have a less immediate and direct tendency to endanger the king's life; such as entering into measures in concert with foreigners, in order to effect an invasion of the kingdom: this is also an overt act of compassing the king's death. 1 Fost. 196. It is a presumption of fact so obvious and undeniable, that the law has adopted it, and made it a presumption of law.

But in all cases a presumption of law arises in favour of innocence until the contrary is established. Thus where, on an appeal from the sessions, it appeared that seven years ago the pauper intermarried with R. W., who soon after went abroad, and was not afterwards heard of. In little more than twelve months after she intermarried with T. B., with whom she cohabited from that time for the remainder of that period. The court held the settlement of the second husband to be that of the woman and children; for, if the first husband was alive at the time of the second

(*b*) *Particular Rule as to Payment.*[1]

marriage, the woman was guilty of bigamy; and the presumption of law is, that he was not alive, when the consequence of his being so would be, that another person had committed a criminal act. *Rex v. Inhabitants of Twyning*, 2 B. & A. 386.

"It is," says Mr. Best, *Evid.* p. 447, a *presumptio juris*, running through the whole law of England, that no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law, whether *malum in se* or *malum prohibitum*, or done any act subjecting him to any species of punishment; such, for instance, as a contempt of court (*Scholes v. Hilton*, 10 Mee. & W. 15), or involving a penalty such as loss of dower (3 P. Wms. 276; 2 Atk. 96; id. 333), &c. And this presumption is not confined to proceedings instituted for the purpose of punishing the supposed offence or dealing with the supposed conduct; but holds in all proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally."

So it is a legal maxim, that *omnia presumuntur esse rite et solemniter acta donec probetur in contrarium;* and therefore it is a general presumption of law, that a person acting in a public capacity, as a peace officer, justice of the peace, constable, &c., is duly authorised to do so (*Rex v. Verelst*, 3 Camp. 432. *Gordon's case*, 1 Leach, 515; S. C. 1 East, 312, 315; 6 H. & N. 145; 27 L. J. Ex. 176); and that even in a case of murder, by *Buller, J. in Berryman v. Wise*, 4 T. R. 366. So, proof that a person fills the office of churchwarden is *primâ facie* evidence of his having been lawfully appointed, even where the question turns upon his title to the possession of land in the capacity of such churchwarden. *Granville v. Utting*, 9 Jur. 1081. *Doe d. Bowley v. Baines*, 15 L. J. Q. B. 79. The maxim, *omnia presumuntur rite esse acta*, does not apply, however, to give jurisdiction to magistrates or other inferior tribunals. *Carrate v. Morley*, 1 Q. B. 18. *R. v. Totness*, 11 id. 80. *R. v. Bloomsbury*, 4 E. & B. 520. *Dempster v. Parnell*, 4 Scott, N. R. 30. Accordingly, where a mutiny act gave justices power to take the examination of a soldier quartered at a place where the examination should take place, the Court of Queen's Bench held that an examination which did not show on the face of it that the soldier was quartered there was not admissible to prove a settlement, unless it were shown by evidence that he was so quartered at the time. *R. v. All Saints, Southampton*, 7 B. & C. 785.

Sanity is always presumed, even when the accused is on his trial on a capital charge. 8 Scott, N. R. 595; 1 C. & Kir. 131; 3 id. 185; 3 C. B. (N. S.) 87. But where a devise is set up in answer to the claim of an heir at law, and evidence is offered respecting the sanity of the devisor, if the effect of the evidence is to leave the fact doubtful, the presumption of sanity will not prevail. *Sutton v. Sadler*, 3 C. B. 87. See *Symes v. Green*, 28 L. J. P. & M. 83.

The court will presume that a place in England is parochial if nothing to the contrary appears (*Reg. v. St. Margaret, Westminster*, 7 Q. B. 569), so that an instrument was drawn at the time of its date. 3 C. B. (N. S.) 442; 27 L. J. C. P. 76.

A recruit received enlisting money, knowing it to be such, from a soldier who was employed by a non-commissioned officer in the recruiting service, and who had belonged to a regiment for a longer period than that within which he ought to have been attested according to the Mutiny Act:—*Held*, that such soldier must be presumed to have been regularly attested. *Walton v. Gavin*, 16 Q. B. 48; 20 L. J. Q. B. 73.

Where, in an action for money lent, the only evidence was, that the defendant having asked the plaintiff for some money, the latter handed him a note, which was believed to be a bank-note, but the amount of which did not appear; the jury were directed to presume it to have been a note for 5*l.* as being the smallest note in circulation. *Lawton v. Sweeney*, 8 Jur. 964, Ex.

In an action on a promissory note made by the defendant payable to J. H., and indorsed by J. H. to the plaintiff, it appeared that there were two persons of the same name, father and son, and there was no evidence to show to which of them the note had been given, but it appeared that the indorsement was in the handwriting of J. H. the son. The court held that, although *primâ facie* the presumption would be that J. H. the father was meant, that presumption was rebutted by the son's indorsement. *Stebbing v. Spicer*, 8 C. B. 827.

When the presumption is one which the policy of the law and the ends of justice require to be made, such as the existence of moduses and other immemorial rights from uninterrupted modern user, the jury should be told that they *ought* to make the presumption, unless evidence is given to the contrary: it should not be put to them as a matter for their discretion. *Pilots of Newcastle v. Bradley*, 2 E. & B. 431. *Jenkins v. Harvey*, 1 C., M. & R. 877; but see *Brune v. Thompson*, 4 Q. B. 543; Best, *Evid.* 428.

[1] If no interest had been paid on a bond, or any other payment made on account of it, for twenty years, the presumption is that it has been paid (6 Mod. 22; and *see* 1 Burr. 434; 2 Stra. 826; 2 Ld. Raym. 1270; 1 Camp. 27; 2 id. 327. *See* vol. ii. p. 526); and even a shorter period, coupled with other circumstances, such as a subsequent settlement of accounts between the parties, in which no mention of the bond was made or the like, will be sufficient to raise the presumption. 1 T. R. 270; 1 Camp. 27. But this presumption may be rebutted by showing that the obligor

(*c*) *Particular Rule as to Property.*[1]
(*d*) „ „ *Grants, Deeds, &c.*[2]
(*e*) „ „ *Birth. See* vol. ii. p. 384; 30 L.J.Ch. 498.
(*f*) „ „ *Duration of Life.*[3]

has been abroad, so that no proceedings could be had in order to compel payment (1 Stark. 101, 108), by any evidence of a payment, or of an acknowledgment of the debt within the time above-mentioned (*see* 2 Camp. 321); so that a judgment has been satisfied may, it seems, be presumed in like manner from lapse of time. 1 id. 217. But in all other cases, if a debt be proved to have existed, the presumption is that it still continues unliquidated, unless the contrary be proved. 2 id. 50.

[1] Where a party is in possession the presumption is that he has the right of property. Therefore the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover. *Armorie v. Delamire*, 1 Stra. 805. *Graham v. Pent*, 1 East, 243. *Sutton v. Buck*, 2 Taunt. 302. So it has been held that an agister of cattle may maintain trespass against a person for wrongfully taking them away. 2 Roll. Abr. Trespass (M). And the principle applies to criminal as well as civil cases. On a prosecution for larceny, the property of the goods may be laid in the person who had possession at the time, and proof of the mere possession will support the indictment. This has been determined in the case of a bailee of cattle (*Woodward's case*, 2 East, P. C. 563), and in the case of a coachman who drove the stage-coach by which the goods were sent. *Deakin's case*, id. 653. So in an action on a policy of insurance, the mere fact of possession of a ship by the plaintiff as owner is sufficient *primâ facie* evidence of ownership; and though it should appear on the cross-examination of one of the witnesses for the plaintiff that the plaintiff derived his ownership under a bill of sale, executed by the witness himself, it could not on that account become necessary for the plaintiff to produce the bill of sale. The proof of possession will be sufficient without the aid of any documentary proof, unless such further evidence is rendered necessary in consequence of some contrary proof on the other side. *Robertson v. French*, 4 East, 130.

Proof of the possession of land or the receipt of rent from the person in possession is *primâ facie* evidence of a seisin in fee, but a recovery in trover for a parcel of lead dug out of a mine affords no evidence of the plaintiff's possession of the mine. Bull. N. P.

Where small rents had been paid without any variation for a long period to the lord: —*Held*, that it afforded no evidence of title to the land, the presumption being that they were quit-rents. *Doe d. Whittick v. Johnson*, 1 Gow, 173. So, an ancient extent of crown lands found in the proper office, and pursuing the directions of the stat. 4 Edw. 1, the court would presume to have been taken under proper authority. *Rowe v. Brenton*, 8 B. & C. 747.

In an action against a performer for non-fulfilment of a contract, it is to be presumed that the theatre is licensed. *Rodwell v. Redge*, 1 C. & P. 220.

The principle regulating the presumption that there are documents in support of beneficial enjoyment is, that where there has been a long enjoyment of any right which could have had no lawful origin except by deed there in favour of such enjoyment, all necessary deeds may be presumed if there is nothing to negative such presumption. *Lyon v. Reed*, 13 Mee. & W. 285; 13 L. J. Ex. 377.

[2] In the case of an old satisfied term, it shall be presumed to have been surrendered. 7 T. R. 2; 2 id. 684; 5 East, 138; 2 B. & Ad. 720; Sug. V. & P. 446. *See* 8 & 9 Vic. c. 112, s. 1. So, in the case of a plain trust, where the trustees were directed to convey to a devisee on his attaining the age of twenty-one, it was holden that a conveyance should be presumed. 4 T. R. 682. So, in the case of ancient deeds, thirty years old or upwards, the execution of them shall be presumed, if they have been accompanied by possession, or be otherwise satisfactorily accounted for, and do not import fraud (Bull. N. P. 255; Gilb. Evid. 160, 161. *Doe d. Burdett*, 4 Ad. & E. 19); and even an ancient copy of a deed, under such circumstances, the original being proved to be lost, has been holden sufficient to raise the presumption that the original deed was regularly executed. Gilb. Evid. 97. The date which appears on the face of a document is *primâ facie* its true date. *Malpas v. Clements*, 19 L. J. Q. B. 435. *Poley v. Glossop*, 2 Ex. 191. *Laws v. Rand*, 3 C. B. (N. S.) 442; 27 L. J. C. P. 76.

[3] Where a person is once shown to have been living, the law, in the absence of proof that he has not been heard of within the last seven years, will presume that he is still alive, unless after a lapse of time considerably exceeding the ordinary duration of human life. 1 Tayl. Evid. sec. 124. The book of a tithe-collector, written seventy-four years before, has been admitted, without proof that any inquiries had been made for the writer. *Jones v. Waller*, 1 Price, 229. See *Doe v. Davies*, 16 L. J. Q. B. 218. Where feoffments for terms varying from ninety-nine to eighty years have been made to particular tenants, the possibility of their surviving the expiration of the terms has been rejected in determining the nature of the remainders. *Weal v. Tower*, Pollex. 67.

(*g*) *Particular Rule as to Enjoyment of Lights, and other Easements;*[1] and *see* Easements, *ante*, p. 149.

(D) *Hearsay Evidence when Admissible, and its Effect.*

(*a*) *General Rule.*[2]

Napper v. Sanders, Hutt. 119. *Lord Derby's case*, Litt. Rep. 370. But where the term was for sixty years only, the court took into consideration the possibility of the termor living after its expiration. *Beverley v. Beverley*, 2 Vern. 131. And the deposition of a witness taken sixty years before the trial has been rejected, no search having been made for the party, and no account being given of him. *Benson v. Olive*, 2 Stra. 920. *Manby v. Curtis*, 1 Price, 225.

In an action of ejectment, where the lessor of the plaintiff, to prove his title, put in a settlement one hundred and thirty years old, by which it appeared that the party through whom he claimed had four elder brothers, the jury were allowed to presume not only that these persons were dead, but, in the absence of all evidence to the contrary, that they had died unmarried and without issue. *Doe v. Wolley*, 8 B. & C. 22. *Doe v. Dakin*, 3 C. & P. 402; but *see Doe v. Griffin*, 15 East, 293.

Although the presumption of life will continue for a period exceeding sixty years, if no inquiry has been made for the party whose death is relied upon, this presumption will be founded within far shorter limits, if proof be given of his continuous unexplained absence from home, and of the non-receipt of intelligence respecting him. In such case, after the lapse of *seven years*, the presumption of life ceases, and the burden of proof is devolved on the other party. *Hopwell v. De Pinna*, 2 Camp. 113. *Rust v. Baker*, 8 Sim. 443. *Loring v. Steinman*, 1 Madd. 204. The statute relating to the punishment of bigamy contains a proviso that nothing therein contained shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time. 24 & 25 Vic. c. 100. *See* Bigamy, vol. ii. p. 397, n. [1]. But no presumption arises as to the *time* of death: if material to establish the precise period of death, that must be done by evidence. *Doe v. Napean*, 5 B. & Adol. 86. *Napean v. Doe d. Knight* 2 Mee. & W. 894. *In the Goods of W. Peck*, 29 L. J. P. & M. 95. *Lamb v. Orton*, 29 L. J. Ch. 286. Nor is there any presumption from age or sex, or other circumstances, as to the survivorship of one out of several who are destroyed by the same calamity (*Wing v. Angrove*, 30 id. 65); or a party being found in water is not *primâ facie* evidence of his having been drowned. 6 Jur. N. S. 759. *See post*, p. 314.

[1] An adverse enjoyment of lights, or of right of way or other easement, or of a pew in a church, or of a market, or the like, for twenty years, uninterrupted and unexplained, raises a presumption of a right by grant or prescription, and no other title than the twenty years' enjoyment need be proved. 3 & 4 Wm. 4, c. 42; 2 Saund. 175, n. 2; 3 East, 294; and *see* 5 T. R. 296; 1 Camp. 463; 1 Taunt. 279; 2 B. & A. 662; 11 East, 488. Although, before the 2 & 3 Wm. 4, c. 71, the period of enjoyment fell short of twenty years, a presumption in favour of the plaintiff's right might have been raised from other circumstances, it is by the 6th section enacted that no presumption shall be allowed in support of any claim upon proof of the exercise of the enjoyment of the right or matter claimed for less than twenty years. *See post*, Prescription. So, in other cases, a right shall be presumed from length of possession: thus, where an enjoyment of a right of common for a length of time was proved, a right of common was thereupon presumed; and it was holden that acts of ownership by the lord, such as making leases of the common, and the like, did not rebut the presumption. 1 Stark. 102; and *see* id. 349. So, a right may be presumed from continued acts of ownership. *See* 2 B. & A. 554; 1 Camp. 309. So, on a question whether a creek was a navigable river or not, instances of persons going up it for the purpose of cutting reeds and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, was holden to be evidence from which the jury might presume it to be a public river. 1 Marsh. 313. So, where toll has been taken immemorially for passing upon a certain highway, a grant of the soil originally to the public may be presumed as a consideration for the toll, proof being given that the soil through which the highway passed, and the tolls, were before the time of legal memory in the same hands, though severed since. 1 T. R. 660; *post*, Tolls. So, where a man has received rent for premises during twenty years or upwards, it shall be presumed (in the absence of other evidence) that he is seised of the fee. Cowp. 595; 3 Wodeson, 333. *See* Common, vol. iii. p. 151. So, where two manors have been formed out of one, proof of the customs of one is presumptive evidence of the customs of the other. And for a similar reason the customs of one manor, relative to the tenure, have been holden admissible evidence of the customs of another, in any of the three northern counties, because anciently they made one earldom. Fortesc. 41, 44.

[2] It is a general rule of evidence, that hearsay is inadmissible, since it is the mere repetition of evidence not given under the sanction of an oath, and without the test of

(*b*) *When Admissible with respect to Testimony given at a former Trial.*[1]

truth, which is afforded by a cross-examination in open court. The law never gives credit to the bare assertion of any one, however high his rank or pure his morals, but always requires the sanction of an oath. *Meers v. Lord Stourton*, 1 P. Wms. 146. *Lord Shaftesbury v. Lord Digby*, 2 Mod. 99; *vide* 2 Sta. Tr. 809; 3 id. 141; 5 id. 98; Kel. 12. It further requires his personal attendance in court, that he may be examined by the different parties, and, therefore, in cases depending on parol evidence, the testimony of persons who are themselves conusant of the facts they relate must in general be produced; for the narrative of one who has no other knowledge of the subject than the information he has received from others is not a statement upon oath; and, moreover, the party against whom such evidence should be permitted would be precluded from his benefit of cross-examination. The few instances in which this general rule has been departed from, and in which hearsay evidence has been admitted, will be found, on examination, to be such as were in their very nature incapable of positive and direct proof. Of this kind are all those which can only depend on reputation. The excluding of hearsay evidence in questions of pedigree, prescription, or custom, would prevent all testimony whatever, for the evidence of any living witness of what passed within the short time of his own memory would often be insufficient in the former instance, although in the latter, and there is no other way of knowing the evidence of deceased persons, than by the relation of others of what they have been heard to say. In these cases, therefore, the law departs from its general rule, and receives evidence of the declarations of deceased persons, who, from their situation, were likely to know the facts; and also the general reputation of the place or family most interested to preserve in memory the circumstances attending it. Anything which shows such reputation is, on a question of this sort, received in evidence, although oftentimes wholly inadmissible in other cases.

To prove that W. F. of L. was dead, his will, dated in the year 1817, from the Prerogative Court, was produced, and an examined copy of the register of burials of L. of the year 1817, containing an entry of the burial of a "W. F. of L.;" and it was stated by a niece of W. F. that he was dead, and that she had received a legacy of 100*l.* under his will, but was not at the place when he died:—*Held* to be sufficient evidence of the death of W. F. *Doe d. Graham v. Penfold*, 8 C. & P. 536.

Although the presumption of the common law does not attach to the mere lapse of time short of seven years (*Watson v. King*, 1 Stark. R. 121; 4 Camp. 272), yet the jury may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur; as if the party, when last heard of, was aged and infirm, or ill (*R. v. Harborne*, 2 Ad. & E. 544), or had since been exposed to extraordinary peril, such as a storm and probable shipwreck. *Watson v. King*, 1 Stark. R. 121; 4 Camp. 272.

As to the presumption of survivorship in cases of persons perishing by the same calamity, the common law lays down no rule on the subject. *R. v. Hay*, 1 W. Black. 640. *Mason v. Mason*, 1 Meriv. 308. *In the Goods of Wainwright*, 28 L. J. P. & M. 2. It has, however, been said that a presumption of priority of death may be raised from the comparative age, strength, and skill of the parties. *Sillick v. Booth*, 1 You. & C. 117; *see ante*, 313, *contra*. The prerogative courts adopted the presumption that both sufferers perished together, and that, therefore, neither could transmit rights to the other. *Wright v. Netherwood*, 2 Salk. 593, n. a. *Wright v. Samuda*, 2 Phil. Ec. R. 266. *Taylor v. Diplock*, id. 261. *Selwyn's case*, 3 Hagg. Ec. R. 748. *In the Goods of Wainwright, supra.*

As to the presumption of survivorship in cases of persons drowned in the same shipwreck, or other calamity, with reference to administration, *see* vol. i. p. 168, n. [1].

The rule respecting hearsay evidence will even exclude declarations of a deceased subscribing witness to a deed or will in disparagement of the evidence afforded by his signature. If it were otherwise, the security of solemn instruments would thereby become much impaired, and the rights of persons under them would be liable to be affected at remote periods by loose declarations of the attesting witnesses, which could neither be explained nor contradicted by the testimony of the witnesses themselves. In admitting such declarations, too, there would be no reciprocity; for, although the party impeaching the instrument would thereby have an equivalent for the loss of his power of cross-examination of the living witness, the other party would have none for the loss of his power of re-examination. 1 Mee. & W. 615.

[1] Where a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself cannot be called, be admitted in any subsequent suit between the same parties, and those claiming under them, provided it relate to the same subject, or substantially involves the same material questions. Bull. N. P. 239. *Mayor of Doncaster v. Day*, 3 Taunt. 262. *Strutt v. Bovingdon*, 5 Esp. 56. *R. v. Joliffe*, 4 T. R. 290. *Pike v. Crouch*, 1 Ld. Raym. 730. *Wright v. Doe d. Tatham*, 1 Ad. & E. 3. *Attorney-General v. Davidson*, M'Clel. & Y. 160. *Steinkeller v. Newton*, 8 Dowl. 579; 8 Scott, N. R. 148.

If, therefore, there has been a previous trial between the same parties, and the point at issue was the same, the testimony of a deceased witness, given upon oath at the

former trial, is admissible on the subsequent trial, and may be proved by a person who heard him give evidence.

Per Cur. If a witness swear in a cause and die, on another trial, one that heard him may upon oath repeat his testimony, and it shall be good evidence. *Rex v. Carpenter*, 2 Show. 48. *Buckworth's case*, T. Raym. 170. *See* 2 P. Wms. 563; 1 Ld. Raym. 730; 6 T. R. 290; 3 Taunt. 262; Vin. Abr. Evid. T. C. 88; but see *Ennis v. Donisthorne*, 1 Ph. Ev. 215.

In *Green v. Gatewick*, Bull. N. P. 245, a witness was sworn in a trial at bar in C. B., between the same parties on the same issue, and he was subpœnaed by the defendant to appear at a second trial in K. B., and his charges given him; but he not appearing, persons were admitted to swear what he swore in C. B., for the Court said they would presume he was kept away by the plaintiff's practice. This supposition was strengthened by his having been produced by the plaintiff at the former trial.

And in *Lord Palmerston's case*, trial at bar, cited 4 T. R. 291. *Per Lord Kenyon:* "Chancery depositions taken in one cause are frequently read in court; so, in courts of law, the evidence which a witness gave on a former trial may be read on a subsequent one, if he die in the interim, as I remember was agreed on all hands in the instance of Lord Palmerston; but as the person who wished to give his lordship's evidence could not undertake to give his words, but merely to swear to the effect of them, he was rejected."

Per Pratt, C. J. "The bare producing the *postea* is no evidence of the verdict, without showing a copy of the final judgment; because it may happen the judgment was arrested, or a new trial granted. But it is good evidence that a trial was had between the same parties, so as to introduce an account of what a witness swore at that trial who is since dead." *Pitton v. Walter*, 1 Stra. 162.

Where a defendant, after joining the plaintiff in obtaining a commission to examine witnesses upon interrogatories, gave notice that he declined to proceed with the examination, whereupon the plaintiff sent him word that he would apply for a commission *ex-parte*, which he accordingly did, the court held that the examinations taken under this order were admissible in evidence, although the defendant had received no notice of the time and place of taking them. *M'Combie v. Anton*, 6 Man. & G. 27.

Where a witness testified in a suit wherein A. and several others were plaintiffs, and B. defendant, his testimony was, after his death, held admissible in a subsequent action relating to the same matter, brought by B. against A. alone. *Wright v. Doe d. Tatham*, 1 Ad. & E. 3.

Where a witness on a former trial of an issue out of Chancery died, and a new trial was granted, parol evidence of what such witness had sworn was held admissible, notwithstanding an order for reading the depositions in equity of such witnesses as had died since the first trial. *Tod v. Earl of Winchelsea*, 3 C. & P. 387.

A deposition taken on a charge either of assault and robbery, or of stabbing, or of doing grievous bodily harm, can, after the death of the witness, be read upon a trial for murder where the two charges relate to the same transaction. *R. v. Delmore*, 6 Cox, C. C. 52. *R. v. Beeston*, 24 L. J. M. C. 5. *R. v. Smith*, R. & R. 339; 2 Stark. R. 208. See *R. v. Edmunds*, 6 C. & P. 164. *R. v. Ledbetter*, 3 C. & Kir. 108.

To admit depositions in evidence, the parties must have been parties in both suits; because the right to use evidence other than admissions being co-extensive with the liability to be bound thereby, the adversary in the second suit has no power to offer evidence in his own favour which, had it been tendered against him, would have been clearly inadmissible. *Doe v. Derby*, 1 Ad. & E. 783. *Atkins v. Humphreys*, 1 M. & R. 523. See *Brickell v. Halse*, 7 Ad. & E. 456.

But it has been held that the depositions of a woman who was so near her confinement as to be unable to attend a trial could not be received. *R. v. Savage*, 5 C. & P. 143.

If, however, from the nature of the illness, or other infirmity, no reasonable hope remains that the witness will be able to appear in court on any future occasion, his deposition is admissible both in civil and criminal proceedings. *Jones v. Jones*, 1 Cox, 184. *Fry v. Wood*, 1 Atk. 445. *Corbett v. Corbett*, id. 335. *Andrews v. Palmer*, 1 Ves. & B. 221. *R. v. Hogg*, 6 C. & P. 176. *R. v. Edmunds*, id. 165. *R. v. Wilshaw*, Car. & M. 145. *R. v. Cockburn*, 1 Dears. & Bell, 203; 7 Cox, C. C. 265.

And by 11 & 12 Vic. c. 42, regulating the mode of taking depositions before committing magistrates, it is by the 17th section provided, that "if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, *or so ill as not to be able to travel*, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witnesses; then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it be proved that such deposition was not, in fact, signed by the justice purporting to sign the same."

Under this section, the deposition of a witness suffering under a temporary indisposition has been admitted. *R. v. Harvey*, 4 Cox, C. C. 441; but see *R. v. Durant*, 6 id. 466. The statute required that the accused should have had an opportunity of cross-examining the witness whose deposition is tendered, and accordingly it has been ruled, that where a deposition was

(*c*) *When Admissible with respect to Dying Declarations.*[1] *See* also Dying Declarations, *ante*, p. 147.

(*d*) *When Admissible with respect to Contemporaneous Declarations.*[2]

taken in the absence of the prisoner, and was afterwards read over to the witness in his presence. *R. v. Day*, 6 id. 55. It is also doubtful whether a deposition could be read in a case where the prisoner has abstained from asking any questions, in consequence of the witness being too ill to bear further examination. *R. v. Hyde*, 3 Cox, C. C. 90. The fact that the witness is to ill to travel should be strictly established. See *R. v. Harris*, 4 id. 440. *R. v. Ulner*, id. 442. *R. v. Riley*, 3 C. & Kir. 116.

It is in general prudent, if not necessary, to have the testimony of a medical man. Mere proof that the witness was confined to his bed some days before will not suffice. *R. v. Riley*, *supra*.

The depositions of witnesses who are examined before the coroner are rendered admissible as secondary evidence by the 7 Geo. 4, c. 64, s. 4. It is doubtful, however, whether this provision has not been repealed by 11 & 12 Vic. c. 42, s. 34; 1 Tayl. Evid. 429, 3d ed. The deposition must, as it would seem, be proved by calling the coroner who subscribed it, or by proving his signature thereto, and showing by his clerk, or by some person who was present at the inquiry, that the forms of law have been duly complied with. *R. v. Wilshaw*, Car. & M. 145. The authorities are not agreed as to whether such depositions will be receivable if taken in the absence of the prisoner. *See* 1 Tayl. Evid. 429; 2 Stark. Evid. 384. 2 Phil. Evid. 742; Russ. C. & M. 892.

See, as to depositions taken under the Merchant Shipping Act, 17 & 18 Vic. c. 104, s. 449. Under the Annual Mutiny Act, *see* 17 & 18 Vic. c. 4, s. 98. *See ante*, Deposition; *post*, Witness.

Neither the issue delivered, nor the Nisi Prius record, in an action between the same parties, are admissible as proof of the facts stated in the pleadings where no judgment has been had; *semble*, *aliter* if it had been signed. *Holt v. Miers*, 9 C. & P. 191. But where admissions were made previous to the former trial: — *Held*, that they were receivable on a new trial, notwithstanding a notice by the opposite party that no admissions would be made. *Doe d. Wetherall v. Bird*, 7 id. 6. So, evidence at Nisi Prius that the action had originally been brought in the Palace Court, and that the defendant let judgment go by default, and removed the cause by *habeas corpus:—Held* admissible. *Tidmos v. Lees*, 5 id. 233.

[1] The circumstances under which such declarations are made may fairly be assumed to afford a guarantee for their truth, at least equal to an oath taken in a court of justice. Hence, the dying declarations of a child of tender years will be rejected unless he appears to have that degree of religious knowledge which would render his oath receivable; as likewise will those of an adult whose character shows him a person not likely to be affected with a religious sense of his approaching dissolution. Best, Evid. 619, 3d ed.

Evidence of this description is admissible in no civil case, and in criminal cases only in the single instance of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration. *R. v. Mead*, 1 Mee. & W. 624. *R. v. Lloyd*, 4 C. & P. 233. *Doe v. Ridgway*, 4 B. & A. 53. *Hobart v. Dryden*, 1 Mee. & W. 624. *R. v. Baker*, 2 M. & Rob. 53. Thus, where a prisoner was indicted for administering drugs to a woman with intent to procure abortion, her statements *in extremis* were held to be inadmissible. *R. v. Hutchinson*, 2 B. & C. 608.

It is essential to the admissibility of these declarations, first, that when they were made the declarant should have been in actual danger of death; secondly, that he should then have had a full apprehension of his danger (*R. v. Bonner*, 1 M. C. C. 97. *R. v. Spilsbury*, 7 C. & P. 287. *R. v. Christie*, 2 Russ. C. & M. 754. *R. v. Hayward*, 6 C. & P. 157. *R. v. Crockett*, 4 id. 544. *R. v. Fagent*, 7 id. 238. *R. v. Megson*, 9 id. 418. *R. v. Howell*, 1 C. & Kir. 689. *R. v. Van Butchell*, 3 C. & P. 629. *R. v. Reaney*, 1 Dears. & Bell, 157; 26 L. J. M. C. 43); and lastly, that death should have ensued.

[2] When hearsay evidence is introduced, not as a medium of proof, in order to establish a distinct fact, but as being itself a part of the transaction in question, it is then admissible, for to exclude it might be to exclude the only evidence of which the nature of the case is capable.

Surrounding circumstances, therefore, may always be shown to the jury along with the principal fact, provided they constitute parts of what are termed the *res gestæ*; and whether they do so or not must, in each particular case, be determined by the judge in the exercise of his sound discretion, according to the relationship which they bear to the fact. *Rawson v. Haigh*, 2 Bing. 104. *Per Parke, J.: Ridley v. Gyde*, 9 id. 349.

Thus, declarations made by a trader at the time of his absenting himself from home are admissible on a question as to his bankruptcy, to show the motive of his absence. *Bateman v. Howard*, 5 T. R. 512; Bull. N. P. 40. So, in an action for criminal conversation, the declarations of a wife at the time of her elopement, that she fled from immediate terror of personal violence from her husband, seem to be evidence against him. See *Aveson v. Kinnaird*, 6 East, 193. And where in a similar action the defence was, that the plaintiff had connived at his wife's elopement, evidence was received on behalf

(e) When Admissible with respect to Questions of Legitimacy and Pedigree.[1] *See post*, Pedigree.

of the plaintiff, of the wife's declarations as to her intentions in going. *Hoare v. Allen*, 3 Esp. 276. *See* 8 Bing. 376. In an action for breach of promise of marriage, if the defendant relies upon the general bad character of the plaintiff, a witness may be examined as to representations made to him by third persons. *Foulkes v. Selway*, 3 Esp. 236.

But evidence of the declarations of a man, since dead, as to a fact done by himself is not admissible. See *Garnons v. Barnard*, 1 Anstr. 299.

On an indictment for manslaughter, a statement made by the deceased immediately after he was knocked down, as to how the accident happened, has been held admissible. *R. v. Foster*, 6 C. & P. 325. See *Thompson v. Trevanion*, Skin. 402.

Where an action of trover was brought against the assignees of a bankrupt, and it appeared that the plaintiff, at the recommendation of the bankrupt, had sent some goods to a dyer, and had told him that the bankrupt would call and give directions about them, it was held that these directions should have been submitted to the jury on behalf of the assignees, as affording some evidence of a dealing with the goods, if not of the consent of the true owner to such dealing. *Sharp v. Newsholme*, 5 Bing. N. C. 713.

In an indictment for highway robbery, the fact that the prosecutor, a few hours after the attack made upon him, complained to a constable that he had been robbed, will perhaps be admissible, though the witness cannot further be asked whether the prosecutor, on making the complaint, mentioned the name of the prisoner. *R. v. Wink*, 6 C. & P. 397. See *per Cresswell, J.: R. v. Osborne*, Car. & M. 624.

In no case, however, can the particulars of the complaint be disclosed by witnesses for the crown, either as original or confirmatory evidence; but the details of the statement can only be elicited by the prisoner's counsel on cross-examination. *R. v. Walker*, 2 M. & Rob. 212. *R. v. Osborne*, C. & M. 622.

Declarations, though admissible as evidence of the declarant's knowledge or belief of the facts to which they relate, and of his intentions respecting them, are no proof of the facts themselves; and, therefore, if it be necessary to show the existence of such facts, proof *aliunde* must be laid before the jury; and it seems that in strict practice the proof should be given in the first instance, before the court be called upon to receive evidence of the declarations. For example, the fact of insolvency must be established before statements of the insolvent will be admitted to show that he was aware of the embarrassed circumstances. *Thomas v. Connell*, 4 Mee. & W. 267. *Craven v. Halliday*, id. 270. *Vacher v. Cocks*, M. & M. 353. See *Rouch v. Great Western Railway Co.* 1 Q. B. 63.

And although acts, by whomsoever done, are *res gestæ*, if relevant to the matter in issue, yet if they be irrelevant, declarations qualifying or explaining them will, together with the acts themselves, be rejected. 1 Tayl. Evid. p. 483.

Although concurrence of time must always be considered as material evidence to show the connexion, it is not essential to constitute a declaration part of the *res gestæ*. If connecting circumstances exist, a declaration may, even at a month's interval, form part of the whole *res gestæ*. *Ridley v. Gyde*, 9 Bing. 349; 2 M. & Scott, 448. See *Rouch v. Great Western Railway Co.* 1 Q. B. 61; 4 Per. & D. 686. *Rawson v. Haigh*, 2 Bing. 104; 9 Moore, 217. And where a trader had absented himself from home during the latter half of February and the commencement of March, two letters written by him on the 16th of January, in which he had asked for time on some bills of exchange payable in February, were admitted in evidence, as tending to throw light on the cause of his absence. *Smith v. Cramer*, 1 Bing. N. C. 585; 1 Scott, 541. But an act cannot be varied, qualified, or explained, either by a declaration which amounts to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. 1 Tayl. Evid. 485. *Peacock v. Harris*, 5 Ad. & E. 449. *Lees v. Martin*, 1 M. & Rob. 210.

The declarations of a conspirator or accomplice are receivable against his fellows only when they are in themselves acts, or when they accompany and explain acts for which the others are responsible, but not when they are in the nature of narratives, descriptions, or subsequent confessions. See *R. v. O'Connell*, Armst. & Tav. 257. *R. v. Murphy*, 8 C. & P. 305. *R. v. Blake*, 6 Q. B. 126. *See* vol. iii. pp. 173, 181.

[1] It was long doubtful whether the declarations of servants, friends, and neighbours might not be received; but the settled rule of admission is now restricted to hearsay, proceeding from persons who were *de jure* related by blood or marriage to the family in question, and who consequently may be supposed to have had the greatest interest in seeking the best opportunities for obtaining, and the least reason for falsifying, information on the subject. *Johnson v. Lawson*, 2 Bing. 86; 9 Moore, 183. *Crease v. Barrett*, 1 C., M. & R. 928. *Monkton v. Attorney-General*, 2 Russ. & Mylne, 159; and *see* 2 F. & F. 35.

There seems to be no limitation in the rule as to blood relations; but with regard to relationship by affinity it is different. It seems to be confined to declarations by a husband as to his wife's relations: *per Parke, B., Davies v. Lowndes*, 7 Scott, N. R. 188. *See* 5 H. & N. 472; 29 L. J. Ex. 267; 7 H. L. C. 1.

It is doubtful whether the declarations of

(*f*) *When Admissible with respect to Public Rights, Boundaries, &c.*[1]

a person deceased, asserting his own illegitimacy, can be received, excepting as admissions against himself, and those who claim under him, by some title derived subsequently to the statements being made. *R. v. Rishworth*, 2 Q. B. 487: *per Wightman, J.*

No valid objection can be taken to evidence of this kind, on the ground that it is hearsay upon hearsay, provided all the declarations come from different members of the same family, or do not directly appear to have been derived from strangers. 1 Tayl. Evid. 525. Thus, the declaration of a deceased widow respecting a statement which her husband had made as to who his cousins were, as also the declaration of a relative, in which he asserts generally that he has heard what he states, have been received. *Doe v. Randall*, 2 M. & P. 20. *Monkton v. Attorney-General*, 2 Russ. & Mylne, 165. *Slaney v. Wade*, 7 Sim. 611. See *Davies v. Lowndes*, 7 Scott, N. R. 211. *Robson v. Attorney-General*, 1 Mylne & C. 355.

A pedigree, whether in the shape of a genealogical tree or map, or contained in a book or mural or monumental inscription, if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced: *per Lord Denman, C. J.*, 7 Scott, N. R. 211; 6 Man. & G. 525.

As to the admission of ancient documents in support of ancient possessions, *see* Ancient Documents, vol. i. p. 348.

The commencement of a controversy, and not of the situation from which it springs, is the commencement of the *lis jucta*, and terminates the admissibility of family declarations. See *R. v. Cotton*, 3 Camp. 444.

A declaration made expressly with a view to a probable future contest is admissible *quantum valeat;* not so, however, if made in a prior cause on the some subject-matter. A prior cause carried on between the same parties, will not be a *lis* so as to exclude declarations, unless the very point subsequently in dispute, upon which it has brought such declaration to bear, was then in litigation. *Shedden v. Patrick*, 2 Sw. & Tr. 170; 30 L. J. P. & M. 217. *See post*, p. 320.

In the *Sussex Peerage case*, where the claimant, Colonel d'Este, was required to prove that his parents, the Duke of Sussex and Lady Augusta Murray, were legally married, declarations contained in the duke's will, and affirming most solemnly the fact of marriage, as also statements to the same effect made by his royal highness in conversation, were rejected, it appearing that some years previously to such declarations and statements being made a suit had been instituted by the Crown to annul the prince's marriage, and it not being shown, as in truth it could not be, that the marriage was not the very marriage on which the claimant relied. 11 Clark & Fin. 85. See *Berkeley Peerage case*, 4 Camp. 401.

[1] In questions of public or general rights or prescription, or of boundaries, reputation is good evidence, if it come from an unsuspected quarter. *Weeks v. Sparke*, 1 M. & S. 680. *Nicholls v. Parkes*, 14 East, 331. *Barnes v. Mowson*, 1 M. & S. 81. So of customary rights. 1 T. R. 466; 5 id. 26; 2 Ves. 512; 12 East, 62; 14 id. 372, n.

"The law of England," said *Lord Campbell, C. J.*, in *Reg. v. the Inhabitants of Bedfordshire* (4 E. & B. 541), "lays down the rule, that on the trial of issues of fact before a jury hearsay evidence is to be excluded, as the jury might often be misled by it, but makes exceptions where a relaxation of the rule tends to the due investigation of truth; and the attainment of justice. One of these exceptions is where the matter relates to matters of public or general interest. The term 'interest' here does not mean that which is interesting from gratifying curiosity, or a love of information or amusement, but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected. The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon, viz. at distant intervals of time, because direct proof of their existence ought therefore not to be required, because in local matters, in which the community are interested, all persons living in the neighbourhood are likely to be conversant, because common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true, because conflicting interests would lead to contradiction from others if the statements were false. And thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject. But the relaxation has not been, and ought not to be, extended to questions relating to matters of mere private interest, for respecting these direct proof may be given, and no trustworthy reputation is likely to arise. We may remark, however, that although a private interest should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded, or thus relaxation of the rule against the admission of hearsay evidence would often be found unavailing."

If a dispute were to arise respecting the existence of a local custom, in which all the tenants of a manor were interested, evidence of reputation would be admissible, not only from any deceased tenant, but from any deceased resident within the manor; for it might fairly be presumed that the residents, being persons conversant with the neighbourhood, would be acquainted with the local customs. *Earl of Dunraven v. Llewellyn*,

15 Q. B. 809: *per Parke, B.* So where the question related to the custom of mining in a particular district, persons under whose estates the minerals lay, with respect to which the custom was said to exist, were held to be sufficiently connected with the subject to make their declarations evidence, as they were more likely than others living at a distance to become adventurers, and consequently to be subjected to the operation of the custom. *Crease v. Barrett*, 1 C., M. & R. 919. *See* also *Duke of Newcastle v. Broxtowe*, 4 B. & Adol. 273. *Rogers v. Wood*, 2 id. 245. *Evans v. Taylor*, 7 Ad. & E. 617.

Evidence of reputation has been admitted where the question related to a custom of a corporation to exclude foreigners from trading within a town (*Davies v. Morgan*, 1 C. & J. 587); the limits of a town (*Ireland v. Powell*, Pea. Evid. 16. See *R. v. Bliss*, 7 Ad. & E. 555); the boundary between counties, parishes, hamlets, or manors (*Brisco v. Lomax*, 8 id. 198. *Evans v. Rees*, 10 id. 121. *Plaxton v. Dare*, 10 B. & C. 17. *Thomas v. Jenkins*, 6 Ad. & E. 525); or even between a reputed manor; that is, an estate which, from some intervening defect, has ceased to be an actual manor and the freehold of a private individual (*Doe v. Sleeman*, 9 Q. B. 298); or between old and new land in a manor (*Barnes v. Mewson*, 1 M. & S. 81); the fact whether a road was public or private (*R. v. Bliss, supra*); a prescriptive liability to repair sea walls (*R. v. Leigh*, 10 Ad. & E. 398) or bridges (*R. v. Sutton*, 8 id. 516; 3 Nev. & P. 569); a claim of highway (*Crease v. Barrett*, 1 C., M. & R. 929); a right of ferry (*Pim v. Curell*, 6 Mee. & W. 234); the fact whether land on a river was a public landing-place or not (*Drinkwater v. Porter*, 7 C. & P. 181); the existence and rights of a parochial chapelry (*Carr v. Mostyn*, 5 Ex. 69); a right by immemorial custom claimed by the deputy daymeters of London to measure, shovel, unload, and deliver, all oysters brought by boat for sale within the limits of the port of London (*Laybourn v. Crisp*, 4 Mee. & W. 320); a prescriptive right of toll on all malt brought by the West-country barges to London (*Duke of Beaufort v. Smith*, 4 Ex. 450); a claim of heriot custom in respect of freehold tenements within a manor held in fee-simple (*Damerell v. Protheroe*, 10 Q. B. 20); and a prescriptive right of free warren, as appurtenant to an entire manor. *Earl of Carnarvon v. Villebois*, 13 Mee. & W. 313.

Evidence of reputation has been rejected where the question was whether the sheriff of the county of Chester, or the corporation of the city of Chester, was bound to execute criminals (*R. v. Antrobus*, 2 Ad. & E. 793); whether certain tenants of a manor had prescriptive rights of common for cattle levant and couchant (*Earl of Dunraven v. Llewellyn*, 15 Q. B. 791. But see *Williams v. Morgan*, id. 782); what was the boundaries of a waste, over which many of the tenants of a manor claimed a right of common appendant (*Earl of Dunraven v. Llewellyn, supra*); whether the lord of a manor had a prescriptive right to all wreck within his manorial boundaries (*Talbot v. Lewis*, 1 C., M. & R. 495; 5 Tyr. 1); whether the plaintiff was exclusive owner of the soil, or had a right of common only (*Richards v. Bassett*, 10 B. & C. 663); whether a farm *modus* existed, and what was its nature (*Wells v. Jesus College*, 7 C. & P. 284. *Wright v. Rudd*, 1 Ph. Evid. 241. *White v. Lisle*, 4 Madd. Ch. R. 214. But see *Webb v. Petts*, Noy. 44. *Donnison v. Elsley*, 3 Eag. & Y. 1396, n.); whether the tenants of a particular manor had the right of cutting and selling wood. *Blackett v. Lowes*, 2 M. & S. 494.

The question whether evidence of reputation is admissible to prove or disprove a *private prescriptive right* or liability, is involved in some doubt. See *Prichard v. Powell*, 10 Q. B. 589. On the trial of an indictment against the inhabitants of a county for the non-repair of a public bridge, to which the defendants pleaded that certain persons named were liable to repair the bridge *ratione tenuræ*, evidence of reputation was admissible to support the plea. *R. v. Bedfordshire*, 4 E. & B. 535. *R. v. Cotton*, 3 Camp. 444.

Reputation is not receivable as evidence of the privilege of cutting wood (2 M. & S. 494); or of the boundaries between two estates (14 East, 331); although it has been ruled admissible to show whether or not a place is parcel of a sheep-walk (2 Chit. 535; 4 B. & A. 588); and to show that rent is payable by a parol demise from Lady-day was meant, by the custom of the country, to be payable from Old Lady-day. And the declarations of deceased tenants (2 T. R. 53) are admissible to show that particular pieces of land are part of an estate which they occupied, and proof that they exercised acts of ownership upon it, when not resisted by contrary evidence, is decisive.

In *Morewood v. Wood*, 14 East, 327, upon a motion for a new trial, the question was whether such evidence was admissible to prove a prescriptive right annexed to a particular estate of digging stone upon the waste of the lord of the manor; the Court were divided upon the point, *Kenyon, C. J.* and *Ashurst* being of opinion against the evidence, *Buller* and *Grose, J.J.* for it. In *Blacket v. Lowes*, 2 M. & S. 494, where one question was, whether evidence of reputation was admissible to show the right of customary tenants to cut down wood on the plaintiff's estate, *Lord Ellenborough* said that reputation was out of the question; but a new trial was in that case granted, on the ground that evidence of an old agreement between a former lord of the manor and his customary tenants, by which the former agreed to set out yearly sufficient wood for repairing their houses, and the latter agreed not to cut down wood, &c. had been rejected. In *Barnes v. Mawson*, 1 id., it was held that the lord of a manor might show that there was a known distinction in the manor between old and new land, and might prove the right of the lord to take the coals under freehold parcels of the new lands, as well by acts of enjoy-

ment as by *reputation*. In *Didsbury v. Thomas*, 14 East, 323, evidence of reputation was held to be inadmissible to prove that lands devised by A. to the defendant in ejectment had formerly belonged to J. S., the father of A. B., under whose will, made upwards of fifty years before, the plaintiff claimed, although the reputation was coupled with corroborative evidence. In *Clothier v. Chapman*, 14 East, 331, n., evidence of reputation that a peculiar waste was parcel of a particular farm, was rejected at Nisi Prius. In *Reed v. Jackson*, 4 East, 357, *Lord Kenyon* said that reputation was evidence with respect to public rights claimed, but not with respect to private rights. In *R. v. Eriswell*, 3 T. R. 723, *Lord Kenyon* denied that reputation to prove a particular fact, *i.e.* the presentation to a benefice, was admissible. In *Withnill v. Gartham*, 1 Esp. C. 324, where the question was as to the mode of electing a schoolmaster by the vicar and churchwarden of Skipton, *Lord Kenyon* held that tradition as to the usage was admissible, the distinction being between public and private rights.

On the other hand, in Bull. N. P. 295, it is stated generally, and without qualification, that in questions of prescription it is allowable to give hearsay evidence; and that, therefore, where the issue was on a right of way over the plaintiff's land, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right of way was acknowledged. In *Webb v. Potts*, Noy. 44, the court held that such evidence was admissible to prove a *modus* for a particular farm. *Morewood v. Wood*, 14 East, 327. *Buller* and *Grose*, *JJ.*, were of opinion that such evidence was admissible. *See* also the observations made by the judges in the case of *R. v. Eriswell*, 3 T. R. 709, where *Grose*, *J.*, observed generally that reputation was evidence to prove prescriptive rights, although persons permitted to give evidence of what they have heard from dead persons concerning the reputation of the right are not permitted to state facts of the exercise of the right which the deceased persons said they had seen.

In *Price v. Littlewood*, 3 Camp. 288, in an action for the disturbance of the plaintiff's pew, claimed in right of a messuage, an old entry in the vestry-book, signed by the churchwardens, stating that the church had been new-leaded and repaired at the expense of the parish, with the exception of the two galleries, which had been repaired at the costs and charges of A. and B. (under one of whom the plaintiff claimed), in consideration of their using the galleries; *Lord Ellenborough* held that this was admissible, as it showed the reputation of the parish on the right; but he added also as a reason, that it was made by the churchwardens upon a point within their own official authority. In the case of the *Bishop of Meath v. Lord Belfield*, Bull. N. P. 295; 1 Wils. 215, after the plaintiff in a *quare impedit* had given in evidence an entry in the register of the diocese of the institution of one H., a blank being left in the register for the name of the patron, he adduced parol evidence of a general reputation in that country that he had been presented by one under whom the plaintiff claimed; and it was held, upon a bill of exceptions tendered, that such evidence was admissible, on the ground that the presentation might be by parol, and that what commenced by parol might be transmitted to posterity by parol.

Reputation being admissible evidence to establish a public right, is equally admissible to show that they have not that right. Upon a question, therefore, whether land on a river was a public landing-place or not, reputation that it was the private landing-place of the defendant and his predecessor, held inadmissible. *Drinkwater v. Porter*, 7 C. & P. 181.

So, where the baptismal entry in the registry stated the child to be the "illegitimate son" of the mother:—*Held*, admissible, although the jury were to judge of its weight, and it could only be treated as evidence of the reputation of the parish. *Cope v. Cope*, 1 M. & Rob. 269.

In an action against the hundred of Broxstowe for the felonious demolition of Nottingham Castle, the question being whether the castle was or was not locally situate within that hundred, certain orders of magistrates, made from the year 1654 to 1660, stating the castle to be so situate, were received in evidence. The court held them admissible on the ground of reputation, the magistrates being persons supposed to be cognisant of the facts as to this local description, and that local description not being at that time a matter in dispute. *Duke of Newcastle v. Broxstowe*, 4 B. & Adol. 273; 1 Nev. & M. 598. Statements of old persons, still alive, cannot be admitted as proof of reputation. 1 Ad. & E. 117.

The declarations upon which reputations ought to be founded must not have been made after the question to which it relates had become a matter of controversy. *Berkeley Peerage case*, 4 Camp. 401, n. *Freeman v. Phillips*, 4 M. & S. 486.

It is clear, however, first, that declarations will not be rejected in consequence of their having been made with the express view of preventing disputes. *Goodright v. Moss*, 2 Cowp. 591. *Berkeley Peerage cas*, 4 Camp. 418. *Monkton v. Attorney-General*, 2 Russ. & M. 147. *Slaney v. Wade*, 1 Mylne & C. 338. *Reilly v. Fitzgerald*, 1 Ir. Eq. R. 335. Secondly, that they are admissible if no dispute has arisen, though made in direct support of the title of the declarant. *Doe v. Davies*, 10 Q. B. 314. Thirdly, that the mere fact of the declarant having stood, or having believed that he stood *in pari jure* with the party relying on the declaration, will not render his statement inadmissible. 1 Tayl. Evid. p. 517, 3d ed.

Reputation as to the existence of particular facts is rejected. For example, if the question be whether a road be public or private, declarations by old persons, since dead, that

(*g*) *When Admissible with respect to Ancient Documents.*[1]
(*h*) „ *with respect to Statements made by Persons having no Interest to Misrepresent.*[2]

they had seen repairs done upon it, will not be admissible (*R. v. Bliss*, 7 Ad. & E. 552); or that a deceased person had planted a tree near the road, and had stated at the time of planting it that his object was to show where the boundary of the road was when he was a boy. (Id.) So, evidence that old persons had been heard to say that a stone was erected, or boys whipped, or cakes distributed at a particular place, will not be admissible on a question relating to boundary. (Id.) So, if the existence and amount of a parochial *modus* be in issue, hearsay evidence of the payment of a specific sum in lieu of tithes by a deceased occupier will be inadmissible, though general evidence of reputation that it has always been customary to pay that sum for all the lands in the parish will be received. *Moseley v. Davies*, 11 Price, 162. *Chatfield v. Fryer*, 1 id. 253. *Carnous v. Barnard*, 1 Anstr. 298; 3 Eag. & Y. 380. *Wells v. Jesus College*, 7 C. & P. 284. *Deacle v. Hancock*, M'Clel. 85; 13 Price, 226.

In *Weeks v. Sparke*, 1 M. & S. 687, *Lord Ellenborough, C.J.*, said, "The question here is whether this is a case of a public or merely private right; and, supposing it to be merely a private right, whether reputation can be received? It has not been controverted in argument to-day that, in the case of public rights, reputation is to be received. As to the nature of the right in question (whether the defendant had a prescriptive right of common), I think it may be said, in some sense, to partake of the nature of a public right; although one individual only stands upon it in this instance, yet it is understood that there are others standing *in pari jure* with the defendant; therefore it may be considered in this view as a question between the plaintiff and a multitude of persons; though in other views, perhaps, it is hardly fair so to consider it where the record shows it to be a question between individuals only, and not between a multitude of litigants. As to those cases where the evidence of perambulations is admitted, it is certainly, in the nature of hearsay evidence, not of particular acts done, as that such a turf was dug, or such a post put down in a particular spot, for that would amount to evidence of ownership; but it is evidence of the ambit of any particular place or parcel, and of what the persons accompanying the survey have been heard to say and do upon such occasions."

But in questions of boundaries, the fact of a perambulation having taken place being considered in itself evidence of the exercise of a right, it follows that statements made by perambulators may be regarded as declarations accompanying acts which will be admissible in evidence, provided they are not confined to particular circumstances. 1 Phil. Ev. 248. *Taylor v. Devey*, 7 Ad. & E. 415. *Weeks v. Sparke*, *supra*.

In all cases involving matters of public or general interest wherein reputation is evidence, a verdict or judgment on the matter directly in issue, though pronounced in a cause litigated between strangers to the parties on the record, is admissible; not as tending to prove any specific fact existing at the time, but as evidence of the most solemn kind of an adjudication by a competent tribunal upon the state of facts, and the question of usage at that time. *Pim v. Curell*, 6 Mee. & W. 266. *Earl of Carnarvon v. Villebois*, 13 id. 313. *Brisco v. Lomax*, 8 Ad. & E. 198. *R. v. Brightside Berlow*, 13 Q. B. 933. *Petrie v. Nuttall*, 11 Ex. 569. *Ford v. Lucy*, 2 F. & F. 354.

[1] Where the contents of an ancient deed or document raise a presumption of a particular fact, evidence of such deed or instrument is admissible as proof of the fact. Thus, where the question was whether certain lands within a manor were subject to a right of common, counterparts of old leases, preserved among the muniments of the lord of the manor, by which the land appeared to have been demised by the lord free from such charge, were allowed to be evidence for the plaintiff, claiming under the lord of the manor, to prove that, at the time of their respective dates, the lord had granted free from common, though possession under the leases was not shown. *Clarkson v. Woodhouse*, 5 T. R. 412, n. So, in *Rogers v. Allen*, 1 Camp. 309, where the question was whether the plaintiffs were entitled to a prescriptive right of exclusive fishery in a navigable river, which they claimed under the lords of the manor, they were allowed to give in evidence old entries of licenses on the court-rolls of the manor, stating that the lords of the manor had the several fishery, and had granted the liberty of fishing for certain rents; nor was it thought necessary to prove payment under these licenses, as they were of such an ancient date that evidence of payment could not reasonably be expected. The old licenses were, therefore, admitted; but it was added that they would not be entitled to any weight, unless payment under similar licenses could be proved in later times, or that the lords of the manor had exercised other acts of ownership, which had been acquiesced in.

In a suit between a copyholder and the lord, where the point in issue was whether a certain customary fine was to be assessed by the jury of the lord's court, depositions taken in an ancient suit against a former lord, where the controversy turned upon the amount of such fine, in which depositions the fine was mentioned as assessable by the lord, were admitted as evidence to negative the existence of any custom for the jury to interfere. *Freeman v. Phillips*, 4 M. & S. 486. *Gee v. Ward*, 7 E. & B. 509. *See* vol. i. p. 348.

[2] What a man writes or says for himself cannot be evidence for himself or his representatives; therefore, declarations made by

(i) When Admissible with respect to Statements made by Persons Speaking against their own Interest.[1]

a deceased person under whom the defendant claims, acknowledging the receipt of rent for the premises in question, are not admissible evidence for the defendant (*Outram v. Morewood*, 5 T. R. 123); nor declarations of a former owner of real estate as to the validity of his marriage. *Plant v. Taylor*, 31 L. J. Ex. 289; *see* 30 L. J. Mat. C. 217. And a survey of a manor or estate made by the owner is not evidence against a stranger in favour of a succeeding owner, that particular lands are parcel of the estate. *Anon.* 1 Stra. 95. But a survey delivered by the owner to a purchaser of part of his estate would be evidence against such former owner, and against a purchaser of the other part. *Bridgman v. Jennings*, 1 T. Raym. 734.

[1] The declarations of deceased persons made against their interest are receivable in evidence. Hence entries made by a deceased steward of money received by him from different persons, are evidence to prove the right of the master in an issue as to the ownership of the land. *Barry v. Bebbington*, 4 T. R. 514. *Hooper v. Brook*, 3 Wood. 332.

So, letters containing statements contrary to the writer's interest are receivable in evidence. *Doe d. Brune v. Rawlings*, 7 East, 279. *Doe v. Jones*, 1 Camp. 367; *see* 14 East, 328; 15 id. 33; 3 Camp. 288; 16 East, 334; 4 Taunt. 787; 5 id. 752.

To render declarations against interest admissible, it must appear either by proof or by presumption that the declarant is dead. *Doe v. Michael*, 17 Q. B. 276. *Phillips v. Cole*, 10 Ad. & E. 106. *Spargo v. Brown*, 9 B. & C. 935. The interest must be of a pecuniary or proprietary nature. *Sussex Peerage case*, 11 Clark and Fin. 102.

An oral declaration against interest is, it appears, admissible. *Stapylton v. Clough*, 2 E. & B. 933. *Fursdon v. Clogg*, 10 Mee. & W. 572. And the rule of admission embraces all written statements, whether made at the time of the fact declared, or on a subsequent day. *Doe v. Turford*, 3 B. & Adol. 898. *Short v. Lee*, 2 J. & W. 475.

It is no objection to the admissibility of an entry charging the person who made it with the receipt of money for another, that it formed part only of a general debtor and creditor account, the balance of which was in favour of the receiver. *Reg. v. Worth*, 4 Q. B. 134. *Williams v. Geaves*, 8 Car. & P. 592. *Rowe v. Brenton*, 3 M. & R. 267. *See* further as to entries charging the person making them with the receipt of money, *Davies v. Humphreys*, 6 Mee. & W. 153. *Percival v. Nanson*, 7 Ex. 1. *Marks v. Lahee*, 3 Bing. N. C. 137. *Rudd v. Wright*, 4 You. & C. 294.

If an account be rendered by a steward containing on one side items charging himself with the receipt of monies, and on the other items discharging him, by showing how the monies received had been disbursed, the discharging entries will not be admissible in evidence, unless they are necessary to explain the charging entries, or are expressly referred to by them. *Doe v. Beviss*, 7 C. B. 456; 18 L. J. C. P. 128. *Knight v. Marquis of Waterford*, 5 You. & C. 283.

Where the entries are made by persons acting for others in the capacity of agents, stewards, or receivers, some proof of such agency is generally required previous to their admission. *Mant v. Curtis*, 1 Price, 225. *Short v. Lee*, 2 J. & W. 466. *Davies v. Morgan*, 1 C. & J. 590. But if ancient books come from the proper repository, slight proof of the official character of the entry will usually be sufficient: and if they bear strong internal evidence of being that which they purport to be, they may, it seems, on that ground alone, be submitted to the jury. *Mayor of Exeter v. Warren*, 5 Q. B. 773. *Doe v. Michael*, 17 Q. B. 276. *Doe v. Thynne*, 10 East, 206.

In *Ivat v. Finch*, 1 Taunt. 141, the question was, whether some horses, which had been taken by the defendant under a heriot custom, belonged to the plaintiff, or to one A. B., a deceased tenant of the defendant. Declarations by A. B. were offered in evidence, for the purpose of proving that the horses belonged to the plaintiff before A. B.'s death, in which declarations A. B. stated, that he had given up his farm and all his stock to the plaintiff. This evidence was rejected at *nisi prius;* but the Court of Common Pleas, on a motion for a new trial, held that the declarations ought to have been admitted, since they were against the interest of the person who made them, and might have been given in evidence against him in his lifetime, if the plaintiff had brought an action for the horses.

In *Haddow v. Parry*, 3 Taunt. 303: *per Lawrence, J.*, "It is admitted that, in an action against third persons, this bill of lading would have been evidence of the receipt of the dollars by the master: would it not, then, have been equally evidence of property in the consignee, in an action of trover for them against a third person, and not against the captain only?" 5 L. T. (N.S.) 309.

A declaration made by a deceased occupier of land that he rented it of a certain person, is evidence of that person's seisin. *Peacoable v. Watson*, 4 Taunt. 16. So of a wife as to the state of a husband's family. *Shrewsbury Peerage*, H. L. C. J.

Entries made by a deceased collector of rents, charging himself with the receipt of money, and made by him in the public books of his office, are admissible against his surety to prove the receipt. *Goss v. Watlington*, 3 B. & B. 132. So, entries in the land-tax collector's books, stating A. B. to be rated for a particular house, and his payment of the sum rated, are evidence to show that A. B. was occupier of the premises at the time. *Doe d. Cartwright*, 1 R. & M. 62.

So, entries by a deceased shopman or

(*k*) *Entries and Delarations made in the course of Business.*[1]

servant in his master's books stating the delivery of the goods, are evidence for the master of such delivery. *Price v. Torrington*, 1 Salk. 285; 2 Ld. Raym. 873. In *Digby v. Stedman*, 1 Esp. 328, the question was, whether the defendants had delivered to Sir J. M. a gold watch, which the plaintiff had sent them to be repaired, and which he had directed them to deliver to Sir J. M. A witness having sworn that he saw the watch delivered by one of the defendants to Sir J. M., an entry made by one of the defendants in the usual course of business of the delivery of the watch to Sir J. M., which entry the witness had seen soon after it was made, was allowed to be read in evidence, in confirmation of the testimony of the witness. *Lord Kenyon* observed, "that the entry should regularly be in the handwriting of the witness; but when the entry was made in the handwriting of another, and the witness saw it soon after it was made, and the entry had corresponded with what he had himself then observed, that such was tantamount to an entry made by himself." *See* 3 B. & Ad. 898.

In *Clerk v. Bedford*, Bull. N. P. 382, where the plaintiff, to prove the delivery of wine to the defendant, produced a book belonging to his cooper, since dead, whose name was subscribed to several articles, which it was proposed to read after proof of the handwriting, *Lord Raymond, C. J.*, would not allow it, saying it differed from *Price v. Torrington*. *See* 3 B. & Ad. 898.

In an action by a tavern-keeper (*Wiltzie v. Adamson*, 1 Phil. Ev. 213), it appeared that the defendant belonged to a club which was held at the plaintiff's house, and that in a room where the club met a book used regularly to be kept open, in which the plaintiff's servants entered the articles as they were ordered by the members of the club, who had thereby an opportunity of inspecting and correcting the account. *Lord Kenyon* admitted the book as evidence of the delivery, though it was not proved that the servants who made the entry were dead, nor was their absence accounted for, and only their handwriting was proved. The daily account in the book was in this case considered as tantamount to a bill delivered and admitted by the defendant.

It is to be observed, that in such cases the declaration does not depend so much on the credit due to the party who makes it, as to its connexion with the circumstances. In the instance of a bankrupt, the declaration which he makes at the time of leaving his house, of his intention of so doing, is founded, not upon his character for veracity, but on the presumption arising from experience, that where a man does an act his contemporary declaration accords with his real intention, unless there be some reason for misrepresenting his real intention; its connexion with the act gives the declaration greater importance than that which is due to a mere assertion of a fact by a stranger, or a declaration by the party himself at another time. Such evidence does not rest upon the credit due to the declarant, but might be admissible, even although the declarant in ordinary cases would not be believed upon his oath. Stark. Evid. See *R. v. Worth*, 4 Q. B. 132.

But in general to make such entries or declarations admissible, the death of the party must be clearly proved; showing him to be dangerously ill is of no avail. *Harrison v. Blades*, 3 Camp. 457. *Manby v. Carter*, 1 Price, 225. *Cooper v. Marsden*, 1 Esp. 1. *Butler v. Mountgarret*, 7 H. L. C. 633.

And where the effect of the entry is not to charge the servant, it is not evidence. Thus, where the action was on an agreement for the hire of a pair of coach-horses, *Lord Kenyon* held, that an entry made in the plaintiff's books by a servant since deceased, of a contract made with the defendant, was not admissible in evidence to prove the terms of the contract, because the entry did not, as in the case of *Price v. Torrington*, charge the clerk. *Calvert v. Archbishop of Canterbury*, 2 Esp. 646.

An entry made by a tradesman, stating a debt due from himself to a third person, is manifestly good evidence of the debt, as a statement against his interest; thus, entries by a bankrupt, and an account signed by him before his bankruptcy, charging himself with a balance, are admissible as evidence of the petitioning creditor's debt in an action by the assignees. *Watts v. Thorpe*, 1 Camp. 376. *Hoare v. Coryton*, 4 Taunt. 560. It is essentially necessary in such cases to prove the signing of the account, or the making of the entry before the act of bankruptcy, and to prove this by extrinsic evidence.

Entries by a deceased rector or vicar as to the receipt of ecclesiastical dues are admissible for his successor, on the ground that he has no interest to mis-state the fact. *Le Grose v. Lovemoor*, 2 Gwill. 529. *Armstrong v. Hewitt*, 4 Price, 218. And even where the entries have been made by deceased impropriate rectors, they have been admitted as evidence for their successors, though objected to as coming from the owners of the inheritance (*Anon.* Bunb. 46. *Illingworth v. Leigh*, 4 Gwill. 1618); but the reception of this evidence has given rise to much observation.

[1] Another exception to the rule excluding hearsay evidence is allowed in favour of written or oral (11 Clark & Fin. 113; 2 E. & B. 933) statements and entries made in the ordinary course of business or professional employment; for with respect to them, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct: such entries usually form a link in a chain of circumstances which mutually corroborate each other; false entries would be likely to bring clerks into disgrace with their employers: further, as most entries in the course of business are subject to the inspection of several persons, an error

(E) *Admissions.* *See* Admissions, vol. i. p. 195, *et seq.*

(F) *Notice to Admit.*

(*a*) *Of the Notice to Admit.*

Either party may give notice to admit documents, and if the other party refuse, he is liable for the costs of proving the document.[1]

By the 15 & 16 Vic. c. 76, s. 117, "either party may call on the other party, by notice, to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed, unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the master, a saving of expense."

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would be exposed to speedy discovery; and lastly, as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth. See *Poole v. Dicas*, 1 Bing. N. C. 653. *Price v. Torrington*, 1 Salk. 285. *Rowcroft v. Basset*, Pea. Add. R. 199. *Pitman v. Maddox*, 2 Salk. 690; 1 Ld. Raym. 732. *See* Tayl. Ev. s. 489; 1 Stark. Ev. 348; 1 Phil. Ev. 319.

Where the question was, whether a notice to quit had been served, the indorsement of service upon a copy of the notice made by the attorney who served it was held after his death to be admissible as proof of that fact, it being shown to be the ordinary course of business in his office to preserve copies of such notices, and to indorse the service thereon. *Doe v. Turford*, 3 B. & Ad. 890. *R. v. Cope*, 7 C. & P. 726. *Slapylton v. Clough*, 2 E. & B. 933. *R. v. Dukinfield*, 11 Q. B. 678.

The books of the messenger of a bank, and of the clerk of a notary, have been held admissible to prove the dishonour of a bill of exchange by the acceptor, and notice to the indorser upon proof that the entries were made in the usual routine of business. *Poole v. Dicas*, 1 Bing. N. C. 649; 1 Scott, 600. *Sutton v. Gregory*, Pea. Add. R. 150.

The letter-book of the plaintiff, who was a merchant, in which a deceased clerk had inserted what purported to be the copy of a letter to the defendant, and had further made a memorandum stating that he had sent the original letter, has been admitted, upon proof that it was according to the ordinary course of business, as evidence of the fact of sending the letter, as also of its contents, the defendant having been served with notice to produce the original. *Hopedown v. Reid*, 3 Camp. 379. See *Champneys v. Peck*, 1 Stark. R. 404. *Doe v. Langfield*, 16 Mee. & W. 497. *Eastern Union Railway Co. v. Symonds*, 5 Ex. 237. 11 Clark & Fin. 113; 30 L. J. Ch.; 28 Beav. 370.

An entry of a receipt of rates by the deceased clerk of a collector who was duly appointed, has been received as evidence of the payment of the rates. *R. v. St. Mary, Warwick*, 22 L. J. M. C. 109. But in an action for the price of coals which had been sold at the pit's mouth, an entry was rejected which appeared to have been made in the following manner. In the ordinary course of business it was the duty of one of the workmen at the pit, named Harvey, to give notice to the foreman of the coal sold; and the foreman, who was not present when the coal was delivered, and who was unable to write, used to employ a man named Baldwin to make entries in the books from his dictation. Baldwin read over these entries every evening to the foreman. At the time of the trial Harvey and the foreman were dead, and Baldwin was called to produce the book, with the view of proving thereby the delivery of the coal in question, but the court held that it was inadmissible. *Brain v. Preece*, 11 Mee. & W. 773. And unless the entry is made in the course of duty it is inadmissible. *Davies v. Lloyd*, 1 C. & Kir. 275. *R. v. Worth*, 4 Q. B. 132.

The entry must have been made contemporaneously with the act to which it relates. *Doe v. Beviss*, 18 L. J. C. P. 128; 7 C. B. 456. *Doe v. Skinner*, 3 Ex. 88. *Doe v. Turford*, 3 B. & Adol. 897.

And "whatever effect may be due to an entry made in the course of office, reporting facts necessary to the performance of a duty, the statement of extraneous circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances." *Chambers v. Bernasconi*, 1 C., M. & R. 368: *per Lord Denman, C. J.* See *Percival v. Nanson*, 7 Ex. 3: *per Pollock, C. B.*

In *R. v. Worth*, 4 Q. B. 132, it became necessary to show that a contract of service had been for less than a year. In order to do this proof was given that the employer, who was dead, had in the course of his business been in the habit of hiring farm-servants, and that his practice when he did so was to enter the time and terms of such hiring in a book kept by him for the purpose. This book, which contained entries of the service in question, and showed that the servant had been engaged for half a year only, was tendered in evidence; but the court held that it was inadmissible, on the ground that although it might be the practice of the master to make such entries, it was not his duty to do so. Hearsay is sometimes admitted to satisfy the mind of the court upon a preliminary inquiry, although the facts proved would not be evidence in the cause. *Reg. v. Braintree*, 28 L. J. M. C. 1.

[1] By Reg. Gen. H. T. 1853, r. 30, "in all cases of trial, writs of inquiry, or inquisitions of any kind, either party may call upon the

By sect. 118, "an affidavit of the attorney in the cause, or his clerk, of the due signature of any admissions made in pursuance of such notice, and annexed to the affidavit, shall be in all cases sufficient evidence of such admissions." Admissions so made proved by affidavit of attorney or his clerk as to signature.

(*b*) *Form of Notice to Admit.*[1]

other party by notice to admit documents in the manner provided by and subject to the provisions of the Common-Law Procedure Act, 1852; and in case of the neglect or refusal to admit after such notice given, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial or inquisition the judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the master, a saving of expense."

The act applies to every document intended to be produced in evidence, though it is not in the possession or control of the party intending to produce it (*Rutter v. Chapman*, 8 Mee. & W. 391), or though it is not within the kingdom. *Story v. Houlditch*, 1 Scott, N. R. 211. "The practice," said *Parke, B.*, "established by the rule, of giving each of the parties to the cause an opportunity before the trial of preventing by timely admissions the costs of proving documents intended to be given in evidence by the adverse party, is one of a most salutary nature, and the fact of the document not being in the possession or power of the party who seeks to adduce it in evidence works no hardship upon his adversary, because, in order to obviate any mischief or hardship arising from the difficulty of access to it, the judge has always the power to say that the document is not one which the party ought reasonably to be called upon to admit, and the result would be that the costs of proving it would be then costs in the cause." *Rutter v. Chapman*, *supra*.

It is no excuse for not giving the notice that the attorney of the party being applied to to admit the document refused to do so. *Spencer v. Barough*, 9 Mee. & W. 425.

Neither is it any excuse for dispensing with the notice that the identity of the persons signing the documents must be admitted or shewn. *Rutter v. Chapman*, *supra*. And the notice ought to be given, notwithstanding the document is alleged to be a forgery, and its validity is directly put in issue by the pleadings. *Spencer v. Barough*, *supra*.

Where executors sue, and the defendant considers the probate of the will essential to his defence, he should obtain an office copy, and then call upon the plaintiff to admit, for the costs of an exemplification will not be allowed. *Goldstone v. Tovey*, 8 Scott, 562.

Where a witness is necessary for other purposes than merely proving the genuineness of a document which might have been made the subject of admission, it is not necessary to give the notice to admit, and his costs will be allowed. *Story v. Houlditch*, 1 Scott, N.R. 206. So, the expense of a witness called to translate and explain ancient records, and watch and explain those produced on the other side, and the expenses of obtaining copies and translations of such records, will be allowed, though no notice to admit has been given. *Bastard v. Smith*, 10 Ad. & E. 213.

The notice to admit, with admission thereon, does not obviate the necessity of producing the document at the trial. *Vain v. Whittington*, 2 Dowl. N. S. 757; 1 Car. & M. 484. And where a copy of a letter is admitted to be a true copy, it is still necessary to account for the original before the copy can be given in evidence. *Sharp v. Lamb*, 11 Ad. & E. 805.

Where the documents are not in the possession of the party giving the notice, the expense of going to inspect them should be tendered. *Smith v. Bird*, 3 Dowl. 641.

The demand ought to be confined to the authenticity of the signatures. "If one party applies to the other to admit documents, all that he has a right to ask is, that the due execution of the documents shall be admitted. If he asks at the same time for an admission of the authority by which they were written, the party called on to make the admission is not bound to do so. The party asking the admission must take care that he does not ask too much:" *per Pollock, B., Oxford Railway Co. v. Scudamore*, 1 H. & N. 666.

[1] By Reg. Gen. (Pr.) H. T. 1853, r. 29, the following form is prescribed of

Notice to admit Documents.

A. B. *v.* C. D.

Take notice, that the { plff. / deft. } in this cause, proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the { deft. / plff. } his attorney or agent, at on between the hours of and the { deft. / plff. } is hereby required, within forty-eight hours of the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified to be copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this case.

Dated, &c.

G. H. Attorney } Plff.
or Agent for } Deft.

To E. F. Attorney } Deft.
or Agent for } Plff.

(*c*) *Admission thereupon.*[1]

Here describe the Documents, the manner of doing which may be as follows :—

ORIGINALS.

Description of Documents.	Date.
Deed of covenant between A. B. and C. D., first part, and E. F., second part	1st January, 1848.
Indenture of lease from A. B. to C. D.	1st February, 1848.
„ of release between A. B. and C. D., first part, &c. . .	2d February, 1848.
Letter of defendant to plaintiff	1st March, 1848.
Policy of insurance on goods by ship *Isabella* on voyage from Oporto to London	3d December, 1847.
Memorandum of agreement between C. D., captain of the said ship, and E. F.	1st January, 1848.
Bill of exchange for 100*l.* at three months, drawn by A. B. on and accepted by C. D., and indorsed to E. F. and G. H. . . .	1st May, 1849.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of baptism of A. B. in the parish of X.	1st January, 1804	
Letter of plaintiff to defendant . .	1st February, 1848	Sent by general post, 2d February, 1848.
Notice to produce papers . . .	1st March, 1848 .	Served 2d March, 1848, on defendant's attorney, by E. F. of
Record of a judgment of the Court of Queen's Bench in an action J. S. and J. N.	Trinity Term, 10 Vic.	
Letters patent of King Charles II. in the Rolls Chapel	1st January, 1680.	

[1] The party called on to admit may signify his admission by indorsing it on the notice thus :—

"I hereby make the admissions of the documents specified in the within notice as thereby required, saving all just exceptions. Dated," &c.

Where some of the documents only are admitted, these should be specified. The attorney, or perhaps the managing clerk, may sign the admission. *Taylor v. Willans*, 2 B. & Adol. 845.

If by inadvertence a party has made an admission he did not mean to make, he may, under special circumstances, obtain a judge's order to withdraw it. *Elton v. Larkins*, 5 C. & P. 385; 1 M. & Rob. 196. *Wilkes v. Hopkins*, 1 C. B. 737.

The party called upon to admit cannot object to any immaterial variance in the notice which is not calculated to mislead. *Bittleston v. Cooper*, 14 M. & W. 399. *Field v. Fleming*, 5 Dowl. 450.

An admission made for one trial binds the party on any new trial, though in the meantime he expressly repudiate the admission. *Hope v. Beadon*, 17 Q. B. 509. *Doe v. Bird*, 7 C. & P. 6. *Elton v. Larkins*, 5 id. 385.

The party admitting the handwriting of a bill may on the trial object to it for want of a proper stamp. *Vane v. Whittington*, 2 Dowl. N. S. 757; 1 Car. & M. 484.

It has been held that the admission of a letter as dated the "10th August," prevented its being objected at the trial that the date was written on an erasure. *Poole v. Palmer*, 1 Car. & M. 69. So, a deed admitted cannot be objected to on the ground that it has an interlineation not accounted for by evidence, unless it appear that the interlineation was made after the admission. *Freeman v. Steggall*, 14 Q. B. 202. So, a party admitting a document as the counterpart of a lease cannot afterwards object that it was only a lease with a counterpart stamp. *Doe d. Wright v. Smith*, 8 Ad. & E. 255. Admitting a "bill accepted by A. for B." has been held to preclude B. from disputing the authority of A. to accept, though that fact was expressly put in issue. *Wilks v. Hopkins*, 1 C. B. 737. And where the defendant admitted the acceptance of a bill on which he was sued to be in his handwriting, but afterwards added a plea denying the acceptance, this admission was held to constitute a *primâ facie* case against him, and to dispense with the production of the bill at the trial. *Chaplin v. Levy*, 9 Ex. 531. But where a letter described as "a letter of A. respecting King's Pond Field, then in possession of the plaintiff," was admitted by the

(G) *Records.*

By Reg. Gen. H. T. 1853, r. 32, "no subpœna for the production of an original record shall be issued, unless a rule of court or the order of a judge shall be produced to the officer issuing the same and filed with him, and unless the writ shall be made conformable to the document described in such rule or order." Rule of court or order of a judge must be obtained for production of original record.[1]

(*a*) *Statutes.*[2]

defendant, he was held not to have admitted the possession of the plaintiff. *Pilgrim v. Southampton & Dorchester Railway Co.* 18 L. J. C. P. 330.

It is not necessary to prove that the admitting party examined the documents mentioned in the notice, provided he had an opportunity of doing so, nor that the document admitted is the identical document produced, if it purport to be so. *Doe v. Smith*, 8 Ad. & E. 274. But it is prudent, with a view to avoid any objection, to mark the document at the time it is examined, or to ask the party to put his signature upon it. *Clay v. Thackrah*, 9 C. & P. 53. *Doe d. Tindal v. Roe*, 5 Dowl. 420. *See* vol. iii. p. 323.

[1] The general records of the realm, which are placed under the custody of the Master of the Rolls, may be proved by copies purporting to be certified by the deputy-keeper of the records, or one of the assistant record-keepers, and to be sealed or stamped with the seal of the Record Office. 1 & 2 Vic. c. 94, s. 12.

[2] Public statutes are never required to be proved at the trial, for the same reason that they are not set forth in the pleadings, namely, because the court are bound *ex officio* to take notice of them; and therefore, when the printed copy of a public statute is produced at a trial, as is frequently the case, it is not to be deemed to be produced in evidence, but rather in aid of the memory of the court and jury. *See* Gilb. Evid. 10. By stat. 41 Geo. 3, c. 90, s. 9, the statutes of Ireland prior to the Union, printed and published by the king's printer, shall be received as conclusive evidence in any court of Great Britain. These, however, are the statutes of another kingdom; but the statutes relating to Ireland, which have been made since the Union, are taken notice of *ex officio* by the court, and need not be pleaded or proved.

Private statutes and particular customs, on the contrary, must be proved at the trial, for the same reason that they are required to be set forth in pleading. A private statute is proved by a copy purporting to be printed by the queen's printer (8 & 9 Vic. c. 113, s. 3, *post* p. 328), or by an examined copy. Gilb. Evid. 12; *see* 12 East, 479.

Private statutes may be given in evidence, not only when the matter of them is directly put in issue, but also if they become necessary incidentally. As, where the issue was whether certain lands passed by a grant of King Henry VIII., by which it is enacted that lands should pass by that king's grants, notwithstanding any misrecital of them in the patents. Hob. 226, 227; Gilb. Evid. 42. Also, where the printed copy of a public statute was produced as proof of certain facts recited in the preamble, the court held that it was admissible evidence for that purpose. 4 M. & S. 532.

The distinction between public and private statutes is this: a general or public act is a universal rule, that regards the whole community; but special or private acts are rather exceptions than rules, being those which operate upon private persons and private concerns. 1 Bl. Com. 86; Gilb. Evid. 45. If a statute relate to all the subjects of the realm, it is a public statute. 8 Co. 138. But a statute which relates to particular persons (*see* 1 Salk. 168); or to particular places, as to one or more particular manors or towns, &c. (4 Co. 76, b); as for instance, the stat. 3 John 1, c. 5, which gives the benefices of recusants in particular counties to the universities (R. 10 Co. 57, b); and the stat. 18 Eliz. c. 6, relating to colleges in the universities (4 Co. 76, a), and the like, are private statutes. See *Richards v. Easto*, 15 Mee. & W. 244. *Colk v. Gent*, 12 id. 234. *Burnett v. Cox*, 9 Q. B. 617. All statutes which concern the king (R. 8. Co. 28, a; R. 4. Co. 13, 77, a; Hob. 227), or the queen (8 Co. 28, b), are public statutes. Plowd. 65; 13 Edw. 4, 8, b. So, a statute relating to all spiritual persons, such as the stats. 21 Hen. 8, c. 13; 13 Eliz. c. 10; 18 Eliz. c. 11, and the like, is a public statute (R. 4 Co. 76, a; 120, b; 1 Brownl. 208; 2 Roll. Abr. 465); but a statute which concerns a part of the spirituality only, such as bishops, or any particular bishop, is a private act. 4 Co. 76, a; R. 5. Co. 2, a; 13 Edw. 4, 8, b. A statute that relates to all lords, such as the stat. Marlb. c. 3, 4 Co. 76, b; 10 Edw. 4, 7, b; Gilb. Evid. 45; or the stat. 2 R. 2, c. 5, *De scandalis magnatum* (R. 4. Co. 13), is a public act; but a statute which concerns one set of lords merely, such as the lords temporal, is a private act. 4 id. 76, b; 13 Edw. 4, 8, b; Doct. Pl. 338. A statute that relates to all officers in general, such as the statute Westm. 1, c. 26, that no sheriff or other minister shall take a reward, &c., is a public act; but a statute which concerns a particular set of officers, such as sheriffs, or the like, is, it seems, a private act. 4 Co. 76, b; 2 Saund. 154; Plowd. 65; 1 Sid. 24, 439; *cont. per Holt*, 1 Lev. 83; *semb. cont. per Hale*, 2 id. 103. However, the stat. 23 Hen. 6, c. 9, as to the sheriffs' bonds, whatever doubt might formerly be enter-

All statutes, journals of parliament, &c. are provable by any copy purporting to be printed by the Queen's printer.

8 & 9 Vic. c. 113, s. 3, enacts, "that all copies of private, and local, and personal acts of parliament, not public acts, if purporting to be printed by the Queen's printer, and all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by either or any of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."

(*b*) *Records of the Queen's Courts.*[1]

(1) *By Production of Record itself.*[2]

(2) „ *Exemplification.*[3]

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tained about it, as appears from the authorities just cited, is now decidedly treated as a public statute; for, since the sheriff has been enabled to assign such bonds by a public statute, the court feel themselves bound officially to take notice of the statute that enables him to take such bonds. 2 T. R. 569; 15 East, 322; *see* Bail, vol. ii. p. 74. A statute which relates to trade in general is a public act; but, if it concern a particular trade merely, or an individual of that trade, it is a private act. 4 Co. 76, b; *see* 2 Lutw. 1410. But if a statute relating to a particular trade create a penalty, and give that penalty to the queen, it thereby becomes a public act. Skin. 429. So, all statutes relating to the public revenue (Bac. Abr. Stat. F.; 12 Mod. 249); or to the king's forests, or chases, &c. (8 Co. 138, b); are public acts. So, although a statute relate to a particular matter, yet if it concern all persons generally, as a statute concerning elegits, attaints, assizes, appeals, &c. it is a general act. 4 id. 76, b. So, although the words of a statute be particular, yet, if the intent be general, it is a public statute (10 id. 101; 1 Sid. 209); and on the other hand, if the intent of a statute be particular, it shall be deemed a private act, notwithstanding the words are general. Plowd. 204. So, a part of a statute may be public, part private. R. 10; Co. 57, b. So if a statute, which would otherwise be private, contain a clause directing that it shall be deemed a public act, and which is very usual, it must be treated accordingly. *See post*, Statutes.

[1] A record of the queen's courts is proved either by producing the record itself, or by an exemplification of it under the great seal, which is of itself a record, and needs no further proof (Gilb. Evid. 14; 10 Co. 93); or by an exemplification of it under the seal of the court, whether of a court at common law, or of one created by act of parliament (2 Sid. 146; Gilb. Evid. 17, 19; 10 Co. 93; and *see* Hardr. 120); and which needs no further proof (Gilb. Evid. 19); or by an examined copy (10 Co. 92, b; 2 Roll. 678, c. 45; R. Hardr. 119); according to circumstances.

[2] Upon an issue of *nul tiel record*, the record, if of the same court, is produced and inspected by the court (Tidd. 801); if a record of an inferior court, it is proved by the tenor of the record, certified under a writ of *certiorari*, issued out of Chancery and transmitted thence by writ of *mittimus*. (Id.)

[3] Copies of records are either exemplifications, or copies made by an authorised officer, or sworn copies. Exemplifications are either, as stated in the next paragraph, under the great seal, or under the seal of a particular court.

1st. *Of exemplifications under the great seal.*—The reason of admitting a copy to be evidence in such cases is the inconvenience to the public of removing such documents, which may be wanted in two places at the same time. Bac. Abr. 620. A record to be exemplified under the great seal must either be a record of the Court of Chancery, which is the centre of all the courts, or must be removed thither by *certiorari*. Bac. Abr. Evid. F.; Bull. N. P. 3 MS. 173; 10 Co. 93, a. Nothing but records can be given in evidence exemplified under the great seal, for these are presumed to be preserved by the court free from erasure or interlineation, to which private deeds are subject (Bull. N. P. 227; Bac. Abr. Evid. F.; 3 Inst. 173; Gilb. Evid. 12; which are in the hands of private persons. Where any record is exemplified, the whole must be exemplified; for the construction must be gathered from the whole taken together. 2 Inst. 273; Gilb. Evid. 17; Bull. N. P. 217. An exemplification under the broad seal is of itself a record of the greatest authenticity. Gilb. Evid. 14; Bac. Abr. Evid. 610; Sid. 145; Hardr. 118; Plowd. Com. 411, n.

2d. *Under the seal of the court.*— The seals of the queen's courts of justice are of public credit, and are part of the constitution of the courts, and supposed to be known to all (Gilb. Evid. 10, 17, 20; Co. 93, a): and this, whether the court has existed from time beyond memory, or has been recently created by act of parliament. Sid. 148; Gilb. Evid. 10. But the seals of private courts and persons are not receivable in evidence, unless proved to be the seals of the respective courts. Gilb. Evid. 20; id. 17, 18, 19. In general, the exemplification of any record under the seal of one of the queen's courts of justice is sufficient. 10 Co. 93, a. So is an exemplification of a commission and return under the seal of the Exchequer (*Tooker v. the Duke of Beaufort*, Say. 297); of a record of the great sessions in Wales, or in a county palatine under the

(3) *By an Examined Copy.*[1]
(4) „ *Office Copy.*[2]
(5) *Copies made by Authorised Officers.*[3]

seal of the court (*semb.* Hard. 120); of the proceedings of the ecclesiastical courts. 1 Fords. MSS. 166. So is an exemplification of the pope's bull under the seal of a bishop, Hard. 118. So, the exemplification of the enrolment of a fine or recovery in Wales, and in the counties palatine, under the appropriate judicial seals, are evidence of such fines and recoveries, by the stat. 27 Eliz. c. 9, s. 8. *Olive v. Gwyn*, 2 Sid. 145.

With respect to both kinds of exemplifications, they are proved by mere production, since the judges are bound to take judicial notice of the seals attached to them. 8 & 9 Vic. c. 113, s. 3, *ante*, p. 328.

Where a document purporting to be an exemplification of a commission temp. Eliz. was produced from the proper custody, but the seal was gone from the usual slip of parchment annexed, the court held that it would presume it a complete exemplification. *Beverley v. Craven*, 2 M. & Rob. 140.

[1] When the record is complete, an examined copy will be evidence, unless upon the issue of *nul tiel record*. Records are not perfect until delivered into court in parchment; therefore, a minute book, from which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not a record. *Rex v. Bellamy*, 1 R. & M. 171. So, the judgment in paper, signed by the master, is not evidence, for it is not yet become permanent.

The copy of a record must be proved by a witness who has examined it line for line with the original, or who has examined the copy while another person read the original. *Reid v. Margison*, 1 Camp. 469. *M'Niel v. Perchard*, 1 Esp. 263. It is not necessary for the person examining to exchange papers and read them alternately. *Rolf v. Dart*, 2 Taunt. 52. *Gyles v. Hill*, 1 Camp. 469. It ought to appear that the original came from the proper place of deposit, or out of the hands of the officer in whose custody the records were kept. *Adamthwaite v. Synge*, 1 Stark. 183; 4 Camp. 372. But where an ancient record has been lost, a copy may be read without proving it a true copy. *Anon.* 1 Vent. 257. *Thurston v. Slatord*, 1 Salk. 284. In such cases the instrument must be according to the rule of the civil law, *vetustate temporis aut judiciaria cognitione roboratum*. Gilb. Evid. 19. If the lost record be modern, the court, on application, will allow it to be supplied by a new entry. 2 Burr. 722; 2 Stra. 833.

An officer or other person cannot be examined as to the contents of a record, although he may as to the condition in which the records are in such place generally. 1 Stra. 210.

[2] That is, a copy made out by the officer in whose custody the record, &c. is, is also in some cases evidence, without proof of having been examined. The rule upon the subject is this: if an officer be authorised by law to deliver out copies of records, &c. to the parties, his office copy is evidence without further proof; but if it in strictness form no part of the duties of his office to make out such copies, although he actually do make them for the convenience of parties and their solicitors, such copies are no evidence, unless they are proved to have been examined with the record. Gilb. Evid. 23. But the chirograph of a fine is evidence, for it is the duty of the officer to make out copies of the concords lodged with him of records for the parties. Plowd. 110, b; Gilb. Evid. 24; Bull. N. P. 229.

An office copy is in the same court, and in the same cause, equivalent to a record; but in another court, or in another cause in the same court, the copy must be proved. *Denn d. Lucas v. Fulford*, 2 Burr. 1179. *Appleton v. Lord Braybrook*, 2 Stark. 6. *Black v. Lord Braybrook*, id. 7. But the office copy of an affidavit made in another cause in the same court has been admitted as good evidence. *Wightwick v. Banks*, Forr. 153.

[3] It is a general rule, that where a copy of a record is given in evidence, it must be a copy of the whole record, because the omission of part might have the effect of altering the sense and import of the residue. Gilb. Evid. 23; 3 Inst. 173. Thus, to prove a verdict you must give in evidence an examined copy of the whole record, including the judgment (Bull. N. P. 234; Gilb. Evid. 37); for, otherwise, it would not appear but that judgment had been arrested, or a new trial granted. Bull. N. P. 234; 1 Stra. 162. This rule, however, does not hold in the case of a verdict on an issue out of Chancery, because it is not usual to enter up judgment in such a case; and the decree of the Court of Chancery is equally proof that the verdict was satisfactory and conclusive. Bull. N. P. 234; Bac. Abr. Evid. F. So, if it be required to prove merely that a trial was had between the parties (Barnes, 449); or even the amount of the damages given (2 Stark. 364), the *nisi prius* record, with the *postea* indorsed upon it, and regularly stamped and marked, is sufficient evidence for that purpose. And in an action for a moiety of the money paid by the plaintiff, under a verdict recovered by A. in a suit against the plaintiff and defendant, the *nisi prius* record and *postea* have been held to be evidence of the verdict and damages in the former suit, without proof of the judgment. *Foster v. Compton*, 2 Stark. 365. So it was held by *Lord Kenyon*, that the production of the *postea* in a former cause between the same parties, would support a plea of set-off to the extent of the verdict (*Garland v. Scoones*, 2 Esp. 648): but see *Pitton v. Walter*, 1 Stra. 162. In an action for words spoken

(*c*) *Letters Patent.*[1]

(H) *Written Instruments* quasi *of Record.*

(*a*) *Proceedings in Parliament.*[2]

(*b*) „ *Courts of Equity.* *See* also vol. iii. p. 73.

Proceedings in Court of Chancery proved by copy sealed with the Chancery common-law seal.

By 12 & 13 Vic. c. 109, s. 13, "every document sealed with the Chancery common-law seal, and purporting to be a copy of any record or document of any description, shall be deemed to be a true copy, and shall, without further proof, be admitted in evidence before all courts and persons, in like manner and to the same extent and effect as the original record or document would be admissible, as well for the purpose of proving the contents of such record or document, as of proving that such record or document belongs to the Court of Chancery, but not further or otherwise."

(1) *Bill.*[3]

(2) *Answer.*[4] *See* vol. i. p. 373; vol. iii. p. 73.

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of an attorney with reference to his conduct in the management of a former cause, the proceedings in that cause must be proved by the production of such proceedings, or by a copy of the roll, if the cause has advanced so far, although all the papers be in the hands of the defendant, who has had notice to produce them. 1 Esp. 399.

It was held that the time of enrolment indorsed by the clerk of enrolments on a deed of bargain and sale, was conclusive evidence of the date. *Rex v. Hopper*, 3 Price, 495.

An office copy of a rule of court is evidence, for it is the duty of the clerk of the rules to make out a copy for the use of the parties. *Selby v. Harris*, 1 Ld. Raym. 745. *Duncan v. Scott*, 1 Camp. 101. So an office copy of depositions sworn before a judge is evidence, for it is the duty of the judge's clerk to make out such copies. *Duncan v. Scott*, *supra*.

The day-book kept at the judgment-office is not, however, evidence of the time of signing judgment. *Lee v. Meecock*, 5 Esp. 177. *Ayrey v. Davenport*, 2 N. R. 474.

[1] By 15 & 16 Vic. c. 83, s. 2, all courts, &c. shall take notice of the seal of the Commissioners of Patents, and receive copies, extracts, &c. under their seal; and by s. 33, copies by queen's printers are evidence.

[2] Copies of the journals of either house of parliament, purporting to be printed by the printers to the Crown, or to either house of parliament, are admissible in evidence, without any proof that such copies were so printed (8 & 9 Vic. c. 113, s. 3, *ante*, p. 328); or by examined copies from the minute-books of the House. *Jones v. Randall*, Cowp. 17. *Rex v. Lord George Gordon*, 2 Dougl. 593. *Rex v. Holt*, 5 T. R. 445. *Rex v. Franklin*, 9 St. Tr. 259.

Lord Coke says the journals of the House of Commons are records. The book of the clerk of the House of Commons is a record. This is affirmed by act of parliament, in 6 Hen. 8, c. 46; 4 Inst. 23. The words of the act to which Coke refers are, "except the same be entered of record in the book of the clerk of the parliament appointed or to be appointed for the Commons House." That the clerk's book means the journals, is clear from several old entries. Journ. H. of Com. 25th Feb. 1623, 1624, vol. i. p. 673, col. 2; 1st March, 1623, 1624, id. 676; col. 1; 12th March, 1623, id. 683, col. 2. See *Jones v. Randall*, B. R. H. 14 Geo. 3; Cowp. 17.

A resolution of either House is not evidence of the truth of facts there affirmed; and, therefore, in the case of Titus Oates, who was charged with having committed perjury on the trial of persons supected of the popish plot, a resolution in the journals of the House of Commons asserting the existence of the plot was not allowed to be evidence of that fact. 4 St. Tr. 39; *see* id. 376; and 2 Salk. 509.

An entry in the journals of the House of Lords, reciting the limitations in a patent of peerage, was admitted by the committee of privileges, without producing the patent itself. *Lord Dufferin's case*, 4 C. & F. 568.

[3] A bill in equity is proved by an examined copy, or by a copy sealed with the Chancery common-law seal. 12 & 13 Vic. c. 109, s. 13. *supra*. It is admissible in evidence no further than to show that such a bill did exist; it is no evidence whatever of matters stated in it by way of surmise in order to obtain a discovery (Bull. N. P. 235), nor even of those facts on which the prayer of relief is founded. 7 T. R. 2; and *see* id. 3, n.; *see* Gilb. Evid. 49, 50; Com. Dig. Evid. c. 2; Bull. N. P. 235; 2 Sid. 221.

[4] An answer to a bill in equity is proved by an examined copy, or copy under the seal of the court. 1 B. & A. 182; 3 Camp. 401. But before it can be admitted in evidence, the bill must be proved. Where, however, the bill had been diligently searched for in the office, and could not be found, the court allowed the answer to be read without it. (Id.)

If, on the proof of the copies of bill and answer, the names and characters of the parties correspond, that is sufficient *primâ*

(3) *Depositions.*[1]

(4) *Decree.*[2]

facie evidence of the identity of the parties; and the burden of repelling the presumption lies on the objecting party. *Hennell v. Lyon*, 1 B. & A. 183. But it is otherwise in a criminal proceeding on an indictment for perjury, or in an action for a malicious prosecution. *See* 1 B. & A. 185; 16 East, 348.

As to the effect of the answer when admitted in evidence, *see* vol. i. p. 373; vol. iii. p. 73.

[1] Depositions in equity are proved by examined copies. An office-copy is evidence in Chancery, but will not be admitted in a court of common law without examination with the roll (Bull. N. P. 229), unless under the seal of the court. *See ante*, p. 330.

To render depositions evidence, an examined copy, or a copy duly sealed (12 & 13 Vic. c. 109, s. 13, *ante*, p. 328) of the bill and answer (unless the two latter are lost) must be produced. *Barley's case*, 5 Mod. 210. *Blower v. Hollis*, 1 C. & M. 396. *Nightingal v. Devisme*, 5 Burr. 2589. For if there were no cause depending the depositions are but voluntary affidavits; and if there were one, the depositions cannot be read unless the cause was against the same parties, or those claiming in privity with them. *Laybourn v. Crisp*, 4 Mee. & W. 326. It must be proved that the deponent is dead (*Tilley's case*, 1 Salk. 286; 2 Ld. Raym. 1008. *Benson v. Olive*, 2 Stra. 920); or that he is abroad, or out of the jurisdiction of the court (1 M. & S. 4); or that he has been diligently sought for and cannot be found, or that he has been subpœnaed, but fell sick by the way (1 Show. 363; 2 Stra. 920), or the like. *See* 2 Ld. Raym. 1166.

In order to render depositions evidence, the opposite party must have had an opportunity of cross-examining the deponent, and therefore depositions taken *de bene esse* before answer cannot be read. *Piercy v. Piercy*, T. Jones, 164. See Hardw. 472; Hob. 155; 2 Roll. Abr. 679; 1 Vern. 413; Ch. R. 90. Even although the suit in equity were for the purpose of perpetuating testimony (*Dutton's case*, T. Raym. 535; *see* 1 M. & S. 4; 1 Salk. 279; 1 Show. 363); but it suffices if he has the power to cross-examine (*Howard v. Tremaine*, 4 Mod. 147; Show. 363; Salk. 278; Carth. 265) whether he really exercised the privilege of examining the witnesses or not. *Cazenove v. Vaughan*, 1 M. & S. 4. And it has been held that depositions in a suit instituted for the purpose of perpetuating testimony were not objectionable, on the ground that interrogatories, in answer to which they were made, were leading interrogatories, and such as could not regularly be put on the examination of a witness. *Williams v. Williams*, 4 M. & S. 497. It seems clear that depositions taken *in perpetuam rei memoriam* cannot be given in evidence, unless there be an answer put in and produced (T. Raymond, 335, 336); or even though the witness, after examination by order of the court, dies before the answer comes in (*Brown's case*, Hardr. 315); unless the defendant appear to be in contempt (Bull. N. P. 240). In the report of this case, Carth. 265, it is said that the plaintiff had not taken out any process of contempt; but it appears by S. C. 1 Salk. 278, that the defendant was in contempt, and that the plaintiff thereupon had a commission to examine his witnesses, and that the defendant joined in the commission, and cross-examined some of the witnesses; and therefore (S. C. 1 Show. 367) *Gregory, J.*, held them to be good evidence.

But if the bill have been dismissed as being irregular—as, for instance, where a bill of revivor was filed instead of an original bill (Ch. Ca. 175), depositions taken in the cause can never after be given in evidence (Gilb. Evid. 63); but when dismissed for want of equity, or on the merits, they may. 2 Lord Raym. 735.

Depositions are not to be admitted in evidence for a party to the suit against a stranger who was not a party, nor claims under either of the parties (Hob. Rep. 155; 2 Roll. Ab. 679, pl. 8; 1 Vern. 413. *Cooke v. Fountain*); nor can they be used by a stranger against one of the parties. *Rushworth v. Countess of Pembroke and Currier*, Hardr. 472. An exception has been made in cases where the question is on the existence of a custom, or on the right to tolls, or where hearsay and reputation would be good evidence (Bull. N. P. 239); and in such cases depositions are admissible in evidence in a suit between other parties, provided they have not been made *post litem motam*. But if the question at issue is precisely the same in both suits, the depositions in the former suit cannot be admitted. *Berkeley Peerage case; Freeman v. Phillips*, 4 M. & S. 486.

[2] A decree in equity, if it remain in paper, may be proved by an examined copy, together with an examined copy of the bill and answer; but if it has been enrolled, it must be proved by a copy sealed with the Chancery common-law seal (12 & 13 Vic. c. 109, s. 13), or by an exemplification under the great seal, either of which is evidence of itself without further proof. *See* 2 Tayl. Ev. s. 1131.

If a decree is offered merely to prove that it was in fact made, no proof of any other proceeding is required. *Jones v. Randall*, 1 Cowp. 18. *Blower v. Hollis*, 1 C. & M. 393. And if the bill and answer are fully recited in the decree, the necessity for their production will be dispensed with, although the object be to prove the adjudication. *Wharton v. Perr*, 12 Clark & Fin. 301.

A decree is evidence only in actions between persons who were parties to the suit

(*c*) *Proceedings in Courts of Law not being of Record.*

(1) *Rules of Court.*[1]

(2) *Judge's Order.*[2]

(3) *Affidavit.*[3]

(4) *Depositions upon Interrogatories.*[4]

(5) *Writ.*[5]

(*d*) *Proceedings in the Ecclesiastical Courts.*

(1) *Libel.*[6]

in equity, or their privies. Bac. Abr. Ev. F.

In an action of trespass by a copyholder against the lord of a manor, where the question in issue turned upon the existence or non-existence of a particular manorial custom, two documents were tendered on behalf of the plaintiff; the first purported to be a copy of all the decrees of the Court of Chancery in an action between a copyholder and the lord establishing the custom; and the court held that, inasmuch as the document had been found among the papers of a deceased lord, that fact furnished some evidence of its having been recognised as a true copy, and they consequently allowed it to be read as secondary evidence of the decree, proof having been given of an ineffectual search for the original. They added, however, that it was inadmissible as primary evidence, since the mere circumstance of its having been deposited among the papers of the deceased lord was not such a dealing with it as to be equivalent to an admission upon the lord's part that it contained a true account of the customs of the manor. The second document tendered in evidence was an office copy of another decree, and as there was some evidence to show that this had been given to a witness by the lord as proof of the custom of the manor, the court regarded it in the light of an admission, and held that it was admissible as primary evidence of those customs. *Price v. Woodhouse*, 3 Ex. 616.

[1] Rules of court are proved by office copies. 1 Ld. Raym. 745; 1 Camp. 102. It is not necessary to have them examined.

[2] A judge's order may be proved by the production of the order itself, and the courts will judicially notice the signature if it purport to be that of one of the equity or common-law judges of the superior courts at Westminster. 8 & 9 Vic. c. 113, s. 2, *ante*, p. 296. A judge's order may also be proved by the rule making it a rule of court. *Still v. Halford*, 4 Camp. 18.

[3] Affidavits, being admissions on oath, are evidence as such against the parties who made them. If filed, they may be proved by examined copies, or produced. If not filed, they can be proved only by production, and by parol evidence of their having been sworn; or if not proved to be sworn, yet perhaps they may be received as admissions of the deponents upon proof of their handwriting. Gilb. Ev. 56. An affidavit can be no evidence in favour of the person who made it, nor is the affidavit of a third person admissible in evidence, for the opposite party had no opportunity to cross-examine him; yet, after his death, perhaps it would be received to prove a custom, pedigree, or the like, where general reputation is evidence. *See* 1 Stra. 35.

[4] Depositions taken on interrogatories under a commission are not evidence without production of the commission, unless the depositions are of long standing. *Bayley v. Wylie*, 6 Esp. 85. It must also be proved that the witness is dead, insane, or absent. *Benson v. Olive*, 2 Stra. 920. *Falconer v. Hanson*, 1 Camp. 172. But where the witness had actually sailed on a voyage the depositions were allowed to be read, though the vessel was, at the time of trial, driven back into port by contrary winds (*Fonsick v. Agar*, 6 Esp. 92); but it is not sufficient that the witness is a seafaring man, and that he lately belonged to a vessel lying at a certain place, without proving that some effort has been recently made to procure his attendance. *Falconer v. Hanson, supra;* and 15 & 16 Vic. c. 86, s. 10.

Where the interrogatories, upon proper search, could not be found:—*Held*, that the answers might be read, subject to any obscurity which might arise from want of the questions destroying their effect. *Rowe v. Brenton*, 8 B. & C. 765. As to oral examination in Chancery, *see* 15 & 16 Vic. c. 86.

[5] Where a writ is the gist of the action, it must be proved by a copy of the record after its return; but where it is only inducement to the action, it may be proved by production of the writ itself, if it has not been returned. Bull. N. P. 234.

A copy of the judgment-roll, containing an award of an *elegit*, and the return of the inquisition, is evidence of the *elegit* and inquisition in an action for use and occupation. *Ramsbottom v. Buckhurst*, 2 M. & S. 565.

Vendee under an execution may, in an action against the sheriff, prove the writ without giving evidence of the judgment. *Doe d. Batten v. Murless*, 6 id. 110.

As to secondary evidence of a writ, see *Edmondstone v. Plaisted*, 4 Esp. 160.

[6] The libel, answer, depositions, and sentence in the ecclesiastical courts, in matters within their jurisdiction, are provable in the same manner, and are evidence in the same cases and under the same circumstances, as the bill, answer, depositions, and decree in courts of equity. *See ante*, p. 330; Com. Dig. Ev. c. 3; but *see* Bac. Abr. Ev. F.;

(2) *Answer.* *See* note[6], *ante.*

(3) *Depositions.*[1]

(4) *Sentence.*[2]

(*e*) *Proceedings in Court of Probate.*[3]

(1) *Proof of Probate.*

(2) „ *Grant of Letters of Administration.*[4]

Bull. N. P. 242; 2 Roll. Abr. 679; Lit. Rep. 167.

[1] It has frequently been held that depositions taken in a spiritual court cannot be used, even by consent (March. 120), in a court of common law (Litt. Rep. 167; Bull. N. P. 242; 2 Roll. Abr. 679; Bac. Abr. Ev. 628; 2 Hale, 285; March. 120; 1 Hawk. c. 42; Vin. Abr. Ev. A. b. 31), because it is not a court of record; yet the same objection applies to depositions in Chancery. In *Breedon v. Gill*, Ld. Raym. 222, *Lord Holt* expressed an opinion that depositions before commissioners of excise might, if the witnesses died, be afterwards read before the commissioners of appeals. And depositions under the statutes of Philip and Mary are read upon trials for felony, although they are not of record. *See* 2 Hale, 284. And it is to be observed that these statutes do not expressly direct that these depositions shall be evidence; they were, indeed, originally intended for a different purpose, and they became evidence as authorised proceedings in the course of the same prosecution. In *Welsh's case*, 2 Hale, 285, *Lord Hale* assigns two reasons why, upon an indictment for a forcible marriage with Mrs. Puckering, the depositions of Mrs. Puckering before commissioners appointed to dissolve the marriage, if they thought fit, should not be read: first, because it was a proceeding according to the civil law, in a civil cause; secondly, because she was interested; and does not hint that it was an objection that the court was not a court of record.

With respect to depositions in the Ecclesiastical Court, C.B., Gilbert lays it down that they may be read when taken in a cause over which they have jurisdiction, as far as relates to that cause, since they are lawful oaths; and a man may be indicted for a violation of them. Gilb. Ev. 60. When, indeed, they are taken in a cause over which they have no authority, as where the realty is concerned, they clearly are not admissible. Gilb. Ev. 60; 2 Roll. Abr. 679; Litt. Rep. 167; March. 120.

[2] The testamentary jurisdiction of all ecclesiastical, peculiar, manorial, and other courts having authority to grant or revoke probate of wills or letters of administration, has been abolished by the 20 & 21 Vic. c. 77, s. 3, and the jurisdiction and authority of granting or revoking probate, &c., vested in the Court of Probate thereby established, to which all the powers then vested in any court or persons for those purposes is transferred. By the 23d section of the act, this court is to have the same powers, and its grants and orders the same effect, in relation to the personal estate of deceased persons, as the Prerogative Court had within the province of Canterbury at the time of the passing of the act; and by the 25th section, it is invested with the same power of enforcing its decrees and orders as the Court of Chancery.

When the ecclesiastical courts possessed the jurisdiction in matrimonial causes, the temporal courts received the sentences of the ecclesiastical courts upon each question as conclusive evidence of the fact (*Bunting's case*, 4 Rep. 29, a), upon the principle that the judgment of a court of exclusive jurisdiction, directly upon the point, is conclusive upon the same parties, upon the same matter coming incidentally in question in another court for a different purpose. *Duchess of Kingston's case*, 20 How, St. Tr. 538, 540. *Jones v. Bow*, Carth. 225. See *Blackham's case*, 1 Salk. 290; and Harg. Law Tracts, 451.

[3] Where the title to personal property, under a will, is in question, the original will cannot be read in evidence without some indorsement upon it, for the purpose of authentication; but the probate must be produced. *Rex v. Barnes*, 1 Stark. 243. As to realty, the probate is now evidence. 20 & 21 Vic. c. 77, s. 62.

A probate is conclusive till it be repealed, and no court of common law can admit evidence to impeach it. *Allen v. Dundas*, 3 T. R. 125; *see* Harg. Law Tracts, 459. And on this ground the payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor of the intestate, though the probate be afterwards declared null. (Id.) But letters of administration are not evidence of any fact which can only be inferred from them, as the intestate's death. *Thompson v. Donaldson*, 3 Esp. 63, 20; How, St. Tr. 533. The stat. 20 & 21 Vic. c. 77, establishing the new Court of Probate, is silent on the subject of proving an executor's title. It is clear, however, that an executor may prove his title, either by the production of the probate or by an exemplification by a registrar or district registrar of the Probate Court. *See* Rules of the Probate Court, and forms 11, 12. Probably, also, as under the repealed jurisdiction, by producing the act-book containing an entry that the will was proved and probate granted, or even an examined copy of such book. *Cox v. Allingham*, Jac. R. 514.

[4] The granting of administration may be proved by producing either the letters of administration under the seal of the court, or the act-book or register containing a record

(*f*) *Proceedings in the Court of Admiralty.*
(1) *Libel, Answer, Depositions.*[1]
(2) *Sentence.*[2]
(*g*) *Proceedings in Inferior Courts not of Record.*[3]
(*h*) „ *before Justices of the Peace.*[4]

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of the grant, or an examined or certified copy of such record, or an official certificate of the grant. 20 & 21 Vic. c. 77, s. 69.

The opposite party may show that the letters of administration have been revoked (2 Sid. 359); but it is not sufficient to show that subsequent letters of administration have been granted to another, without showing that the first have been recalled. 8 East, 187.

[1] The libel, answer, depositions, and sentence in the Admiralty Court, are proved in the same manner as the bill, answer, depositions, and decree of a court of equity, by examined copies. *See* Com. Dig. Evidence, C. 1.

[2] Upon questions of prize the Court of Admiralty has exclusive jurisdiction, and, therefore, a sentence of condemnation in that court is conclusive; and being a proceeding *in rem* it binds all the world. *Kindersley v. Chase*, Park. Ins. 490, 6th ed. *Sterling v. Vaughan*, 2 Camp. 228. *See ante*, vol. i. p. 193. The sentence of a foreign Court of Admiralty also is, by the comity of nations, held to be conclusive upon the same question arising in this country. *Hughes v. Cornelius*, 2 Show, 232. *Bolton v. Gladstone*, 5 East, 160. But the sentence of a Court of Admiralty sitting under a commission from a belligerent power in a neutral country will not be recognised in our courts. *Havelock v. Rockwood*, 8 T. R. 268. *Donaldson v. Thompson*, 1 Camp. 429. The sentence is only evidence of what is positively affirmed in it, not of what is to be gathered by inference from it. *Fisher v. Ogle*, 1 Camp. 418; but see *Lothian v. Henderson*, 3 B. & P. 525. If the property be condemned on the ground of its not being neutral, the sentence is conclusive evidence of that fact. *Barzellay v. Lewis*, Park, Ins. 469, 6th ed. So, where no special ground is stated, but the ship is condemned generally as good and lawful prize, it is to be presumed that the sentence proceeded on the ground of the property belonging to an enemy, and the sentence will be conclusive evidence of that fact. *Saloucci v. Woodmass*, Park, Ins. 471. But where there is some ambiguity in the sentence of a foreign Court of Admiralty, so that the precise ground of the determination cannot be collected, the courts here may examine the cause on which the sentence proceeded. *Bernardi v. Motteaux*, Dougl. 574.

[3] A judgment of an inferior court, not of record, is usually established by the production of the book containing the minutes of the proceedings of the court from the proper place of deposit, proved to be such by oral testimony. Copies of court-rolls, and of proceedings in the ecclesiastical and inferior civil courts, are also evidence, since the originals are public documents. 12 Vin. Abr. A. b, 26, pl. 49. And it is said that, as it is not usual for inferior courts to draw up their records in form, but only short notes, copies of those short notes are good evidence: *per Hale*, in *Rex v. Hains*, 12 Vin. Abr. A. *supra;* Comb. 337. *Pitcher v. Rinter*, 12 Vin. Abr. A. b. 48, *contra.* It appears also, that in the case of an inferior court, such as a court-baron, or hundred court, evidence should be given of the proceedings previous to the judgment, as well as of the judgment itself (Com. Dig. Evid. C. 3; 2 Black. 836; 14 East, 216); in order to show that the proceedings were regular. 3 Wils. 297; Willes, 36; 2 Mod. 272. In an action for a malicious arrest, on process out of the Sheriff's Court in London, it was held that, in order to prove the averment that the former suit was wholly ended, &c., it was sufficient to show an entry in the minute-book of "withdrawn" by the plaintiff's order, opposite the entry of the plaint, and to prove that it was the course of the court to make such an entry upon an abandonment of the suit by a plaintiff. 14 East, 216.

Copies of court-rolls, and especially presentments in manor courts (*Evans v. Rees*, 10 Ad. & E. 151. *Damerell v. Protheroe*, 10 Q. B. 20), stating the customs or boundaries of a manor, depositions of conventionary tenants of a manor, taken in an authorised inquiry and representing the rights of the lord (*Gee v. Ward*, 7 E. & B. 509. *Crease v. Barrett*, 1 C., M. & R. 919); and other similar documents, have been admitted as evidence of reputation. See *Evans v. Taylor*, 7 Ad. & E. 626. *Daniel v. Wilkin*, 7 Ex. 429. But unless it be satisfactorily proved, or at least reasonably inferred, that the proceedings were conducted in a legal and regular manner, it will seldom be prudent to run the risk of a new trial by tendering such evidence. See *R. v. Leigh*, 10 Ad. & E. 411.

[4] It has been contended, that when actions are brought against justices of the peace they must show the regularity of their convictions, and that the informations upon which their convictions were founded must be produced and proved in court. Stra. 710. But it seems that the conviction itself, when proved under the hand and seal (if necessary) of the magistrate, is sufficient evidence that the judgment which it recites was given: *per Holt, C. J., Fuller v. Fotch*, Holt, 287; Carth. 346; Hardw. 478. And provided the adjudi-

(*i*) *Proclamations, &c. of Foreign States or British Colonies, and Legal Documents of Foreign and Colonial Courts.*

Copy admissible if purporting to be authenticated by seal of state or court, without further proof.[1]

14 & 15 Vic. c. 99, s. 7, enacts, "that all proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned: that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing in the said copy, that the court whereof he is a judge has no seal: but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of a seal where a seal is necessary, and of the signature, or of the truth of the statement attached thereto, where such statement and signature are necessary, or of the judicial character of the person appearing to have made such signature and statement."

(I) *Written Instruments partly of a Public and partly of a Private Nature.*[2]

(*a*) *Surveys of the Royal Ports.*[3]

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cation, when read in connexion with the other proceedings, shows either expressly, or by fair and necessary inference, that the justice had jurisdiction over the subject-matter, it will furnish conclusive evidence of the truth of the facts stated in it, even if these facts were necessary to give him jurisdiction. *Taylor v. Clemson*, 2 Q. B. 1031; S. C. (H. L.) 11 Clark & Fin. 610. *Brittain v. Kinnaird*, 1 B. & B. 437. *Aldridge v. Haines*, 2 B. & Adol. 408. In the case of *Massey v. Johnson*, 12 East, 67, it was held, that a magistrate might justify, by virtue of a conviction of the plaintiff as a vagrant, although the warrant of commitment alleged that the plaintiff had been charged on the oath of T. S., and, in fact, no charge had been made by T. S.; but the defendant had been convicted upon the information of another person, and although the conviction itself was informal. But it was observed, that the case would have assumed a very different shape if there had been no information to ground the conviction: *per Le Blanc, C. J.*, id. In the case of *Gray v. Cookson and others*, 16 East, 13, it was held, that the defendants, having jurisdiction over the subject-matter, were protected by a conviction drawn up after the commencement of the action. *See* 5 H. & N. 472; 29 L. J. Ex. 281.

[1] The copies of proceedings in foreign courts are not evidence unless authenticated by the seal of the court (14 & 15 Vic. c. 99, s. 7), or by actual exemplification under seal, or examination by a witness who is called. *Appleton v. Braybrook*, 6 M. & S. 34. *See* 29 L. J. Mat. 57. An examined copy of a charter deposited in the proper public office at Madrid was held sufficient proof of the plaintiffs being a corporation according to the laws of Spain. *National Bank St. Charles v. De Bernales*, 1 R. & M. 190; 1 Car. & P. 569. As to ascertaining and proving laws of foreign states, *see* 24 Vic. c. 11.

[2] It has been held that a judge at *nisi prius* has no power to compel a witness to produce documents connected with affairs of state, if their production would be injurious to the public service, and that question must be determined, not by the judge, but by the head of the government department having the custody of the documents. *Beatson v. Skene*, 5 H. & N. 838.

[3] That a certain place is situate within one of the ports of the kingdom may be proved by ancient survey of the king's ports to be found in the Exchequer, which ascertains their extent. Gilb. Evid. 77.

(*b*) *Prison-Books.*[1]

(*c*) *Poll-Books.*[2]

(*d*) *Copies of Documents of Corporations, Joint-Stock Companies, &c., and Public Documents, purporting to be Sealed or Signed in compliance with a Statute.*

Copies of documents of corporations, joint-stock companies, &c. and public documents, purporting to be sealed or signed in compliance with a statute, are admissible without further proof.[3]

8 & 9 Vic. c. 113, s. 1, after reciting that "whereas it is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations, and of joint-stock and other companies, and certified copies of documents, bye-laws, entries in registers, and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes; and whereas the beneficial effect of these statutes has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine; and it is expedient to facilitate the admission in evidence of such and the like documents," enacts, "that whenever by any act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation, or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall be respectively admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone as required, or impressed with a stamp, and signed as directed by the respective acts made, or to be hereafter made, without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

(*e*) *Certified Copies or Extracts of or from Books or Documents of a Public Nature.*

The contents of a book or

14 & 15 Vic. c. 99, s. 14, "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the

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[1] The day-book of a public prison, containing a narrative of the transactions of the prison, has been received as evidence of a prisoner's commitment or discharge. *Rex v. Aickles*, 1 Leach, C. C. 391. But it would not be admissible to prove the cause of his commitment, of which the *committitur* itself is the best evidence. *Salte v. Thomas*, 3 B. & P. 188.

[2] The poll-books taken at an election for members of parliament, or at the election of a mayor, are admissible in evidence. *Mead v. Robinson*, Willes, 422. *Brocas v. Mayor of London*, 1 Stra. 307.

[3] By 14 & 15 Vic. c. 99, s. 10, "every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes, in any court of justice in England or Wales, or before any person having, in England or Wales, by law or by consent of the parties, authority to hear, receive, and examine evidence, without proof of the seal or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same." The same in Irish courts of documents so admissible in the courts in England and Wales.

"Every certificate of the qualification of an apothecary which shall purport to be under the common seal of the Society of the Art and Mystery of Apothecaries of the City of London, shall be received in evidence in any court of justice, and before any person having, by law or by consent of parties, authority to hear, receive, and examine evidence, without any proof of the said seal, or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales." 14 & 15 Vic. c. 99, s. 8.

proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

document of a public nature may be proved by a certified copy or extract.[1]

(*f*) *Certificate of Conviction or Acquittal.*

14 & 15 Vic. c. 99, s. 13. "Whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person; but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof." *See* vol. ii. p. 68.

On a criminal charge, a previous conviction or an acquittal may be proved by a certified copy of the indictment, &c.

(*g*) *The Registry of British Vessels or an Examined or Certified Copy is* primâ facie *Evidence of what it Contains and Recites.*

By 14 & 15 Vic. c. 99, s. 12,[2] "every register of a vessel kept under any of the acts relating to British vessels may be proved in any court of justice, or before any person having, by law or by consent of parties, authority to hear, receive, and examine evidence, either by the production of the original or by a copy thereof, purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy upon payment of the sum of one shilling; and every such register or such copy of a register, and also every certificate of registry granted under any of the acts relating to the registry of British vessels, and purporting to be signed as required by law, shall be received in evidence in any court of justice, or before any person having, by law or by consent of parties, authority to hear, receive, and examine evidence as *primâ facie* proof of all the matter contained or recited in such register, when the register or such copy thereof as aforesaid is produced, and of all the matters contained or recited in or indorsed on such certificate of registry, when the said certificate is produced."

(*h*) *Ancient Surveys, Maps, and Terriers.*[3]

[1] The register of voters at an election is within the act (6 H. & N. 75); so are bye-laws of a railway company. 7 C. B. (N. S.) 558; 29 L. J. C. P. 357. If a certified copy is rejected, it may be received as an examined copy. 29 L. J. Ex. 452.

[2] *See* also 17 & 18 Vic. c. 104, s. 107, an enactment to the same effect; and 18 & 19 Vic. c. 91; and s. 280 of 17 & 18 Vic. as to log-books.

[3] Maps and surveys of estates are evidence to show the extent of a man's estate when made with the privity and consent of the owners of the adjoining lands (*Bridgman v. Jennings*, 1 Ld. Raym. 734), but it is clear that no entry, or survey made or taken by an owner, would be evidence either for himself or for one who claimed through him against a party who did not claim in privity, since it might encourage persons to include in surveys more than belonged to them (*Outram v. Morewood*, 5 T. R. 123); and, therefore, survey-books of a manor, although ancient, unless signed by the tenants, or unless they appear to have been made at a court of survey, are not evidence: they are mere private memorials. 12 Vin. Abr. 90, pl. 12: *per Bacon*, Exon. Sum. 1719. An old map of lands has been allowed in evidence, where it came along with the writings, and agreed with the boundaries adjusted in an ancient purchase. Gilb. Evid. 78. It does not clearly appear under what circumstances this old map was held to be evidence; but it seems that one ingredient essential to its admissibility was, its agreement with boundaries adjusted in an ancient purchase, that

(*i*) *Corporation-Books.*[1]

is, with some other instrument; and the term "adjusted" seems to imply some privity on the part of the owners of adjoining property, if the vendor was not himself the owner. Property may be identified by the books of a deceased steward, or of a person from whom both plaintiff and defendant derive title. *Doe v. Scotin*, 2 Ad. & E. 171.

A customary of a manor, which appeared to be of great antiquity, and delivered down with the court-rolls from steward to steward, although not signed by any person, is good evidence to prove the course of descent within the manor. 1 T. R. 466. So, parchment writings, preserved among the muniments of a manor, dated 1698 and 1717, purporting to be signed by several copyholders of the manor, stating an unlimited right of common in the commoners, which having been found inconvenient, they had agreed to stock the common in a certain restricted manner, were admitted by the court as evidence of reputation as to the general right of common. 13 East, 10.

If ancient maps tendered in evidence are not proved to have been prepared by persons who were deputed to make them by some one interested in the question, or who themselves appear to have had some knowledge of their own on the subject, or who at least are shown to have been in some way connected with the district, so as to make it probable that they possessed the requisite information, they cannot be received, whatever their age or apparent accuracy may be. *Hammond v. Bradstreet*, 10 Ex. 390; 23 L. J. Ex. 332. But if it be shown that they were either made or have been recognised by persons having adequate knowledge on the subject, they will, it seems, be receivable as evidence of reputation. *R. v. Milton*, 1 C. & Kir. 58. *Alcock v. Cook*, 1 Phil. Evid. 251, n. 1: but see *Pollard v. Scott*, Pea. R. 19.

On an issue whether or not a lane in a certain hamlet was a common highway, a paper signed by several inhabitants of the hamlet, since dead, stating that the lane was not a highway, was received as slight evidence of reputation, although it had been drawn up at a public meeting convened for the sole purpose of considering the propriety of repairing the road, and although the opinions expressed in the document did not appear to have been founded on reputation received from others. *Barraclough v. Johnson*, 8 Ad. & E. 99; 28 L. J. Q. B. 12.

But where, in order to prove the boundaries of a manor, an ancient survey was produced from the proper custody, which purported to have been made in the reign of Queen Elizabeth by a deputy-surveyor appointed by the Crown, and to have been founded on the presentments of certain tenants of the manor, whose names were appended to it, the court rejected the document on the ground that no proof had been given that the deputy-surveyor had any authority to institute the inquiry; and, stripped of this authority, he not only had no right to make any kind of return, but the presumption that he did make one fell to the ground. The paper might have been written by any clerk idling in the office where it was found from his own imagination, or completed, possibly, by some interested person in furtherance of a sinister object of his own. *Evans v. Naylor*, 7 Ad. & E. 617. *See* also *Duke of Beaufort v. Smith*, 4 Ex. 450. *Daniel v. Wilkin*, 7 Ex. 429.

Upon a question as to the boundaries of a manor conterminous with those of the county, a topographical county history was held inadmissible. *Evans v. Getting*, 6 C. & P. 586.

[1] Corporation-books, containing an account of the privileges or public transactions of the body, are evidence in a suit between the several members on the same footing as manor-books between the tenants of a manor. But they are not evidence in favour of a corporation to support a claim of right against a stranger. But books containing entries of the proceedings of joint-stock companies, and purporting to be signed by the presiding chairman, and to be sealed with the seal of the company, are *primâ facie* evidence not only of the proceedings of the meeting entered, "but of such meetings having been duly convened, and of the persons making or entering such orders or proceedings being shareholders or directors, and of the signature of the chairman." 7 & 8 Vic. c. 110, s. 32. Further, registers of shareholders in joint-stock banking companies and in companies subject to the provisions of the Companies ClausesConsolidation Act, furnish *primâ facie* evidence of the defendant being a shareholder, and of the number and amount of his shares in all actions for calls brought by the company. 7 & 8 Vic. c. 113, s. 36; 8 & 9 Vic. c. 16, s. 28.

Entries in corporation-books, and in the books of public companies, relating to things public and general, and entries in other books, may be proved by examined copies. 1 Stra. 93, 307. Entries in the books of the Custom-house, of the Bank, of the East India Company, of the South Sea Company, and the like, may be proved in this manner. *See* 2 Ld. Raym. 851; 2 Stra. 954, 1005; Hardw. 128; 2 Dougl. 593, n. 3; Peake, 30; 4 Taunt. 787. But instruments of a private nature, such as a letter found in the corporation chest (1 Stra. 401), or the like, must be proved in the ordinary way as any other private instrument. So, the books of a private company must be produced, and they cannot be proved by examined copies; and it may be necessary to add that entries, even in the public books of a corporation or public company, of matters relative to any property or right claimed by them, can never be evidence for them (3 B. & A. 142), unless made so by act of parliament. 1 M. & S. 569.

To render corporation-books admissible, it ought to be shown that they have been regularly kept by the proper officer of the corporation. *Rex v. Mothersell*, 1 Stra. 93. The legislature, we have seen, has in many

(*k*) *Vestry-Book.*[1]

(*l*) *The Gazette, Public Acts of State, &c.*[2]

(*m*) *Articles of War.*[3]

(*n*) *Public History.*[4]

(*o*) *Bishop's Register.*[5]

(*p*) *Orders of Poor-Law Commissioners.*[6]

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instances made copies of entries in books, &c. of a public or semi-public nature, evidence where authenticated by a seal, stamp, or signature, as required by the act. The seal, stamp, or signature does not require to be proved. 8 & 9 Vic. c. 113, s. 1, *ante*, p. 336.

[1] In an action for the disturbance of the plaintiff in the use of his pew at church, an old entry made in the vestry-book by the churchwardens, stating that the pew had been repaired by the owner of a messuage, under whom the plaintiff claimed, was admitted as evidence of the entry having been made as to a fact within the scope of the churchwarden's office, and being evidence of the reputation in the parish as to the right. *Price v. Littlewood*, 3 Camp. 288. See *Cooke v. Banks*, 2 C. & P. 498. An entry in a vestry-book has also been admitted to prove an averment in an indictment for a libel that the prosecutor had been elected treasurer at a vestry duly held in pursuance of notice. *R. v. Morton*, 5 M. & R. 277; 5 C. & P. 441; 2 Camp. 100.

By the 17 Geo. 2, c. 38, s. 14, copies of all rates and assessments for the relief of the poor are to be kept in a book by the churchwardens and overseers of every parish, which is to be kept in a public place in the parish, and to be produced at the sessions when any appeal is to be heard.

By the 42 Geo. 3, c. 46, the churchwardens and overseers are to keep a book containing the names of all parish apprentices, and of the other particulars required by the act; the entries are to be signed by the justices who assent to the indentures, and when the latter are proved to have been destroyed or lost, such register is to be deemed sufficient evidence in all courts of law, in proof of the existence of such indentures, and of the other particulars specified in the register; and each entry, if approved, is to be signed by the justices; such book may be inspected at all seasonable hours, and a copy taken if the indentures are lost or destroyed.

[2] The *Gazette*, printed and published by the queen's printer, is evidence of all acts of state (5 T. R. 436); therefore, a *Gazette* which stated that addresses had been presented to his majesty from several bodies of his subjects, expressive of their loyalty, was holden to be evidence of that fact. Id.; *see* 2 Camp. 513. The *Gazette* is also evidence of matters advertised in it. *See* 1 Stark. 418. But in order that such evidence should affect a third person, it is necessary to prove that he was in the habit of reading the *Gazette*. Id. 186. And in the case of an advertisement in a newspaper, the newspaper cannot be offered in evidence until it be first proved that the party takes it in, or is in the habit of reading it. Id. 186, 418; 2 Camp. 157. The king's proclamations in the *Gazette* are also evidence. 8 Price, 89; 1 Ld. Raym. 283.

[3] Articles of war, printed by the queen's printer, are receivable. 5 T. R. 442, 446. *See* vol. i. p. 562.

[4] A public history, or chronicle, may be given in evidence to prove a matter relating to the kingdom in general. Skin. 623; 1 Salk. 281. Thus, Speed's *Chronicle* was admitted in evidence to prove the death of Isabel, queen dowager of Edw. 2. Skin. 15. But it cannot be admitted to prove a particular right; and, therefore, where the question was whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town, or in a certain place only, Camden's *Britannia* was refused to be received as evidence. Skin. 623; 1 Salk. 281. So, the almanack annexed to the Common-prayer Book (6 Mod. 81) is evidence that such a day of the year was Sunday, or the like. Cro. Eliz. 227; 1 Leon. 242; 1 Sid. 300; 6 Mod. 41. *See* Almanacks, vol. i. p. 308.

[5] The bishop's register is admissible in evidence. 12 Clark & Fin. 641; 12 Ad. & E. 512. *Arnold v. Bishop of Bath and Wells*, 5 Bing. 316. If the vicar of a parish be applied to for an extract of the parish register of a particular date, and he state that there is no register-book of that year, this is not sufficient proof of loss of the book to let in secondary evidence of the contents of the register without calling the vicar; but if the vicar had produced to the applicant a book as the original register, the judge at the trial would have held it to have been so, unless the contrary was shown. *Semble*, that the returns made annually of transcripts of parish registers to the registry of the diocese, under the 70th canon, are not receivable in evidence instead of the original register, or an examined copy of it, without proof of the loss of the original register; but *semble*, that if the original be proved to have been lost, examined copies of these returns would be admissible. But if the returns were made under the stat. 52 Geo. 3, c. 14, ss. 6, 7, *semble*, that examined copies of them would be evidence without proof of the loss of the original register. If an original parish register be produced on a trial, that certain entries in it should be read, the jury may look at the book to see whether the entries which have been read are in their proper places or not, but for no other purpose. *Walker v. Beauchamp*, 6 C. & P. 552.

[6] The poor-law orders and regulations

(K) *Written Instruments of a strictly Private Nature.* *See* Contract; Deed; Will, &c.

(*a*) *Letters.*[1]

(*b*) *It is not necessary to call an Attesting Witness to Prove a Document which does not require Attestation.*

It is not necessary to call an attesting witness to prove a document which does not require attestation.[2]

By 17 & 18 Vic. c. 125, ss. 26, 103, "it shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto."

See Attesting Witness, vol. ii. p. 3.

IV. Mode of Conducting the Proceedings in Court, on Evidence being adduced to Prove the Necessary Facts.[3]

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may be proved by a copy printed by the queen's printer. 7 & 8 Vic. c. 101, s. 71.

[1] Where the practice of the defendant's counting-house was that the clerk, after copying a letter into the letter-book, returned it to the defendant to seal, and that he or another clerk carried all letters to the post-office; but there was no particular place of deposit in the office for such letters, and neither of the clerks had any recollection of the particular letter offered in evidence, though they swore that they uniformly carried all the letters given them to carry:—*Held*, that the entry in the clerk's writing in the letter-book of a letter to the plaintiff could not be read as proof of such letter having been sent to the plaintiff. *Toosey v. Williams*, 1 M. & M. 129; *see* 30 L. J. Mat. Ca. 217; 1 L. J. Ch. 338; 28 Beav. 370.

A defendant who puts in evidence a correspondence, consisting of several letters between himself and the plaintiff, has a right to give in evidence a letter written by him to the plaintiff in reply to the plaintiff's last letter, which bore date on the day before the defendant's letter. *Roe v. Day*, 7 C. & P. 705.

The fact of a letter having been sent to a woman some years before her death is not sufficient to raise a presumption that such letter is in the custody of her executrix then, or five years after, as the testatrix might have destroyed it in her lifetime. *Drew v. Durnborough*, 2 id. 198.

In ejectment for a cottage, alleged to be a parish house, and into which paupers had been placed by the parish officers, which the lord of the manor alleged he had done jointly with them, but which failed in proof; and it appeared that the lord had induced the pauper in possession to let him in, and he had put the defendant in:—*Held*, that a private entry of a deceased builder of repairs done, and paid by the lord, was inadmissible. *Held* also, that the lord having come in under a person occupying by leave of the parish, was estopped from disputing their title. *Doe d. Haden v. Burton*, 9 C. & P. 254.

Upon books of entries being called for and produced, and an entry read, although the party against whom it is read is entitled to have the whole of the particular entry read, he cannot insist upon reading distinct entries in other parts of the book. *Cats v. Howard*, 3 Stark. 6.

Where letters are put in bearing different dates:—*Held*, that other parts of the same correspondence sent in the interval could not be received, unless expressly referred to in those that are put in. *Sturge v. Buchanan*, 2 M. & Rob. 90. So a letter written by a party can only be made evidence for him in his own cause as a notice or demand. *Richards v. Frankum*, 9 C. & P. 221.

Where the plaintiff's agent wrote to a witness (living abroad and examined by commission) a letter, the draft of which was shown to and approved by his attorney:—*Held*, that the draft was admissible without producing the original, as evidence of an act done; but that the answer of the witness to the agent was not admissible. *Rawlins v. Desborough*, 8 id. 321. *Semble*, the date a letter bears is *primâ facie* its true date. 7 H. of L. Ca. 633.

[2] By the Merchant Shipping Act, 17 & 18 Vic. c. 104, s. 536, "any document required by this act to be executed in the presence of, or to be attested by, any witness or witnesses, may be proved by the evidence of any person who is able to bear witness to the requisite facts, without calling the attesting witness or witnesses, or any of them."

[3] It has been laid down as a general rule, that the party who has to maintain the affirmative of the issue must begin to give the evidence. *See* vol. ii. p. 386.

The course of proceeding at the trial is regulated by the 17 & 18 Vic. c. 125, s. 18, which enacts, that "upon the trial of any cause, the addresses to the jury shall be regulated as follows:—The party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing, at the close of the case of the party who begins, his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present."

Where there are several issues, some of which are incumbent on the plaintiff and others on the defendant, it is usual for the plaintiff to begin and to prove those which are essential to his case, and then the defendant does the same, and afterwards the

EX ANTECEDENTIBUS et consequentibus fit optima interpretatio. *The best Construction is attained by reference to that which precedes and follows.*[1]

EX DELICTO Action. *See* vol. i. p. 139; and *post*, Torts.

EX DOLO Malo non ovitur Actio. Cowp. 343. *A Right of Action cannot arise from Fraud.*[2]

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plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs: the defendant's counsel is entitled to a reply upon such evidence, in support of his own affirmatives, and the plaintiff's counsel to a general reply. And where the issue is on the plaintiff, it seems that, although he has had notice of the defence intended to be set up, it is not necessary to go into any evidence in anticipation of that defence until the defendant has, by his proof, called upon him for a reply. This appears to be a matter of practical convenience, subject to the discretion of the court. *Lord Tenterden, C. J.*, adopted this course, and allowed a plaintiff to give evidence in answer to a defence in an action on a bill, that there was no consideration after notice of the intended defence. *Lord Ellenborough* usually required the plaintiff under such circumstances to go at once into the whole of his case; but the settled practice is now otherwise. 1 R. & M. 254; id. 255, n. It is left to the discretion of counsel. It is possible that the defendant may not be able to establish any case, and thus time may be saved by postponing the plaintiff's reply; besides, until the defendant has adduced such evidence, it cannot be known with any certainty to what points the plaintiff is to adduce his evidence in reply. On the other hand, by not opening the whole case at once, the plaintiff loses the benefit of making the first impression.

After the senior counsel has stated the case, the witnesses to prove it are next called and examined in their order: the first is examined by the counsel next in rank to the senior, the second by the junior; if there be three counsel engaged on that side, the third by the senior, each barrister examining a witness in the order of his precedence. Whilst a witness, however, is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but after one counsel has brought his examination to a close, no other counsel on the same side can put a question to the witness. 2 Camp. 280. Where there are several defendants, who appear by separate attorneys and have separate counsel, if their defence be different or distinct from each other, the counsel of each has a right to address the jury and examine the witnesses; but if they rely on the same ground of defence, only one counsel can be heard to address the jury; and one counsel only can examine each witness upon the part of all the defendants, in the same manner as if they had appeared and defended jointly. 4 Camp. 174.

As to the burden of proof, *see* Affirmative, vol. i. p. 265; Begin, Right to, vol. ii. p. 386.

[1] It is a general rule of construction applicable to wills, deeds, &c., that the meaning and intent shall be collected by looking at the entire instrument, in order to collect from the whole, if possible, one uniform and consistent sense. The whole context must be considered in endeavouring to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause. *See* Hobart, 275. *Doe d. Marquis of Bute v. Guest*, 15 Mee. & W. 160. *Coles v. Hulme*, 8 B. & C. 568. *Burton v. Fitzgerald*, 15 East, 541. *Doe d. Meyrick v. Meyrick*, 2 C. & J. 230. Thus the recital in a deed or agreement may be looked at in order to ascertain the meaning of the parties (Shep. Touch. 76. *Marquis of Cholmondeley v. Lord Clinton*, 2 B. & A. 625; 4 Bligh, 1), and a subsequent distinct clause or stipulation be explained or qualified by such recital. *Payler v. Homersham*, 4 M. & S. 423. See *Charleton v. Spencer*, 3 Q. B. 693. *Simons v. Johnson*, 3 B. & Adol. 180. And however general the words of a covenant may be if standing alone, yet if from other covenants in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words: *per Cur. Hesse v. Stevenson*, 3 B. & P. 574. See *Smith v. Compton*, 3 B. & Adol. 200. *Igguldun v. May*, 7 East, 241. *Sicklemore v. Thistleton*, 6 M. & S. 9. *Gale v. Reed*, 8 East, 89. *Copland v. Laporte*, 3 Ad. & E. 517. *Duke of Northumberland v. Errington*, 5 T. R. 522.

[2] A court of justice will not lend its aid to enforce the performance of a contract which appears on the face of the record to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land; and this objection to the validity of a contract must, from authority and reason, be allowed in all cases to prevail. No legal distinction can be supported between the application of this principle to parol contracts and to contracts under seal. It would be inconsistent with reason and principle to hold, that by the mere ceremony of putting a seal on the instrument (that is, by the voluntary act of the parties themselves), a contract which is void in itself, as being in violation of the law of the land, should be deemed valid, and an action maintainable thereon in a court of justice: *per Cur. Gas-Light and Coke Co. v. Turner*, 5 Bing. N. C. 675. For particular examples of illegal and invalid contracts, *see* Bills, vol. ii. p. 437; Bond, id. p. 515; Contracts, vol. iii. p. 205; Covenant, id. p. 461.

EX NUDO Pacto non ovitur Actio. *A bare Agreement does not create a cause of action.*[1]

EX TURPI Causâ non ovitur Actio. *See supra*, Ex Dolo Malo non ovitur Actio.

EXCAMBIUM. In the Scottish law, an exchange of lands.

EXCEPTIO probat Regulam. "Every exception that can be accounted for is so much a confirmation of the rule, that it has become a maxim, *Exceptio probat regulam:*" *per Lord Kenyon, C. J.* 3 T. R. 722; 4 id. 793; 1 East, 647, n.

EXCEPTIO rei judicatæ. Scotch law. Plea of judgment recovered.

EXCEPTIONS out of Parcels. *See* Parcels.

EXCHANGE.

I. Of Goods and Merchandise.[2]

II. Exchange of Estates.[3]

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[1] A consideration of some description or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay anything on one side, without any compensation on the other, is totally void in law, and a man cannot be compelled to perform it. 2 Bl. Com. 445. And a mere voluntary curtesy or service will not uphold an *assumpsit*, unless moved by a previous request. *Lamplugh v. Brathwaite*, Hob. R. 105. *Reason v. Wirdnam*, 1 C. & P. 434. *See* 28 L. J. Ex. 164.

If one man promise to give another 100*l.*, there is no consideration moving from the promisee, and therefore there is nothing binding on the promisor. 2 Bl. Com. 445; Vin. Abr. Contract. But where a promise is made under seal, in law it imports a consideration; and the deed cannot be impeached by merely showing that it was made without consideration, unless proof be given that it originated in fraud. *Wallis v. Day*, 2 Mee. & W. 277. *See* vol. iii. p. 196.

[2] On agreements of this kind there is, in general, no implied warranty. 3 Camp. 351; but see *supra*. The principles and rules of construction of contracts of warranty or sale govern those of contracts of exchange. Upon an agreement between two traders to change goods for goods, after a balance is struck between them such balance is to be paid in money. 1 Stark. 185. Where two tradesmen agree to deal with each other by way of barter, if one refuses to account, the other may proceed for the whole value of the goods which he has furnished to the party refusing. 5 Taunt. 259. In contract of exchange of watch for candlesticks, warranted silver, a party cannot recover back the watch, though warranty be false. 3 Camp. 299. The contract should, in general, be declared on specially. 1 H. Black. 287; Holt, C. N. P. 179; 2 Marsh. 495. *See* Forms, B. & L. P. 87.

In *Anon.* 3 Salk. 157, it was resolved, that exchanges were the original and natural way of commerce precedent to buying; for there was no buying till money was invented. Now, in exchanging, both parties are buyers and sellers, and both equally warrant; and this is a natural rather than a civil contract. *See* 26 L. J. Ex. 232; 7 Bing. 574.

In *Power v. Wells* (Cowp. 818; Dougl. 24, n. 8) the plaintiff gave a horse of his own, and twenty guineas, for a horse of the defendant's, which was warranted sound, but proved to be unsound; the plaintiff, after tendering a return of the horse, brought the action for money had and received for the twenty guineas, and also an action of trover for his own horse. But the court held that both actions were misconceived; that money had and received was an improper action to try the warranty; and that trover could not be sustained, because the property was transferred by the exchange.

Assumpsit lies for the non-completion of a contract of exchange. *Bach v Owen*, 5 T. R. 409.

In declaring upon a contract of exchange the whole consideration must be stated. Thus, in *Cross v. Badlett*, 3 M. & P. 537, *assumpsit* on an exchange of horses, it appeared that the plaintiff agreed with the defendant to give him a horse and 25*l.* for a mare of the defendant's. The money was paid, and a receipt given by the defendant, stating that "both (the horse and mare) were warranted sound." The mare proving unsound, the plaintiff sued the defendant on his warranty, and in the declaration he omitted to state the warranty on his part. The court held that the plaintiff could not recover, as the whole of the consideration was not set forth. The plaintiff, in stating his contract, could not state a contract of exchange of horses without stating the money consideration also, and he could not state the money consideration without also stating the warranty, giving the defendant a right of action, if the plaintiff's horse proved unsound. See *Sheldon v. Cox*, 3 B. & C. 420; 5 D. & R. 277.

[3] An exchange is a mutual grant of equal interest. *See* Litt. s. 62. To constitute which five circumstances are necessary. 1st.

EXCHEQUER Bill, Stealing. 24 & 25 Vic. c. 96, s. 1; *post*, Larceny.

Forging. Id. c. 98, s. 8; *post*, Forgery.

Loss of.

By 24 Vic. c. 5, s. 14, "in case proof shall be made on the oath or oaths of one or more credible witness or witnesses, before the Lord Chief Baron and other the barons of the Court of Exchequer, or any of them, that any exchequer bill has by casualty or mischance been lost, burnt, or otherwise destroyed, before the same shall have been paid off or discharged, and if by such oath or oaths the number and sums of such bill or bills shall be ascertained, and the Chief Baron and other the barons, or any of them, before whom such oath or oaths shall be made, shall certify that he or they are satisfied with such proof, the Commissioners of the Treasury are authorised to cause the money due upon such bill or bills so lost, burnt, or destroyed, to be paid, in like manner as if the original bill or bills were brought in to be paid off: Provided that the person or persons so receiving the money do give security to the Queen, to the good liking of the person or persons appointed, or who shall be appointed, to pay off and take in the said bills, to pay into the receipt of the Exchequer for the use of the public so much money as shall be paid upon such certificate or certificates, if the bill or bills so certified to be lost, burnt, or destroyed, shall be thereafter produced."

As to loan commissioners, *see* 6 H. L. Ca. 425; 27 L. J. Ch. 145.

EXCHEQUER Chamber. The court of error and appeal from the judgments of the three superior courts at Westminster. It is constituted of the judges of the two courts other than that in whose judgment the error is alleged, or from whose decision the appeal is brought. *See* 11 Geo. 4, and 1 Wm. 4, c. 70, s. 8; *ante*, Error, p. 246.

EXCHEQUER, Court of. In addition to the concurrent jurisdiction it enjoys in common with the other superior courts, the Court of Exchequer has exclusive jurisdiction in informations at the suit of the Attorney-General to recover debts and duties due to the Crown, in actions for penalties incurred under the Stamp Acts, and generally in cases where the public revenue comes in question, and which do not amount to an indictable offence, or are not cognisable by the commissioners of assize or justices of the peace.[1]

That the estates given be equal (*Machil v. Clerk*, 7 Mod. 25); 2d. That the word "exchange" be used, which cannot be supplied by any other expression, or described by any circumlocution; 3d. That there be an execution by entry or claim in the life of the parties; 4th. That if it be of things which lie in grant, it be by deed; and, lastly, that if the lands lie in several counties, it be by deed indented; or if the things lie in grant, though they lie in one county. Inst. 51, b. Further, there cannot be an exchange at common law between more than two parties. *Eton College v. Bishop of Winchester*, 3 Wils. 468; 2 Black. 936.

Since the 29 Car. 2, every exchange must be by writing; and by 8 & 9 Vic. c. 106, s. 3, "an exchange of any tenements or hereditaments, not being copyholds, made after the 1st October, 1845, shall be void at law, unless made by deed." The practice is to effect an exchange of real estate by lease and release, statutory release, or statutory grant. *See* 4 Cru. Dig. 82; Smith, P. & R. 627.

In every deed of exchange there is an implied warranty, arising from the word *excambium*. (Id.)

All persons who are capable of conveying their lands by any common assurance may, of course, exchange them with others. 1 Inst. 50, b.

[1] Where an action has been brought in either the Court of Common Pleas or Queen's Bench, in which the interest of the Crown is concerned, the Court of Exchequer will, on the application of the Attorney-General, without affidavit, make a rule absolute in the first instance to remove the cause into the latter court. *Adams v. Fremantle*, 2 Ex. 543. In such a case two days' notice of the motion is sufficient. *Attorney-General v. Hallet*, 15 Mee. & W. 97; 3 D. & L. 685.

Formerly the Court of Exchequer had a general equitable jurisdiction; but this has been transferred to the Court of Chancery by the 5 Vic. c. 5. Its equity jurisdiction in revenue cases, however, still remains. *Attorney-General v. Halling*, 15 Mee. & W. 687. *Attorney-General v. Corporation of London*, 8 Beav. 270; 1 H. of L. C. 440.

EXCISE. *See* Customs and Excise, vol. iii. p. 542, *et seq.*

EXCOMMUNICATION. *See* 52 Geo. 3, c. 127, and *Ackerly v. Parkinson*, 3 M. & S. 411.

EXCULPATION, Letters of. In Scotch law, a subpœna of defendant's or prisoner's witnesses.

EXCUSABLE Homicide. *See* Homicide; Murder.

EXECUTIO juris non habet injuriam. 2 Inst. 482. *The Law in its executive capacity will not work a wrong.*[1]

EXECUTION.

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(*a*) *With Reference to the Persons by and against whom Execution may Issue*, p. 345.

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(2) *In Particular. See* Corporation; Executors and Administrators; Heir; Hundredors; Husband and Wife; Insolvent Debtors; Partners; Prisoners.

(3) *Relative to a Change of Parties; as by Bankruptcy. See* Bankrupt.

(4) *Relative to Death. See* Executors and Administrators.

(5) *Relative to Marriage. See* Husband and Wife.

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[1] If an action be brought in a court which has jurisdiction upon insufficient grounds, or against a wrong party, no injury is thereby done for which an action can be maintained; but if an individual, under colour of the law, does an illegal act, or if he abuses the process of the court to make it an instrument of oppression or extortion, this is a fraud upon the law, by commission of which liability will be incurred. See *per Pollock, C. B., Smith v. Mentieth*, 13 Mee. & W. 439. *Countess of Rutland's case*, 6 Rep. 53. *Stepney v. Lloyd*, Cro. Eliz. 646. *R. v. Southerton*, 6 East, 140. *Anon.* 1 Lev. 68; 1 Bl. Com. 136.

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I. In Civil Proceedings.

(A) *In General.*

(*a*) *With Reference to the Persons by and against whom Execution may Issue.*

(1) *In General.*[1]

(*b*) *With Reference to the Cases in which Execution may Issue.*[2]

(*c*) „ *Court by whom Awarded.*[3]

(*d*) „ *Party being Estopped from Suing Out.*[4]

(*e*) *Time for Suing Out Execution.*

Within six years after judgment recovered.[5]

By 15 & 16 Vic. c. 76, s. 128, "during the lives of the parties to a judgment, or those of them during whose lives execution may at present issue, within a year and a day without a *scire facias*, within six years from the recovery of the judgment, execution may issue without a revival of the judgment."

Execution may issue

By sect. 120, "a plaintiff or defendant having obtained a verdict in a cause tried out of term, shall be entitled to issue execution in fourteen days, unless the

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[1] The party in whose favour judgment has been given should sue out execution against his adversary—that is, final process against his person, his goods, or his lands. See *Capias ad Satisfaciendum; Elegit*; *Fieri Facias; Levari Facias. See post*, 348, as to form of writs. *See* Gilb. Exec. 43; Bing. Exec. 118. Where a party has been improperly made a defendant in a cause, and the defence has been conducted in his name without his authority or knowledge, the court will relieve him from execution when it appears from the circumstances of the attorney that he could have no remedy against him. *Stanhope v. Eavery*, 5 Dowl. 357; 4 Scott, 39. See *Bayley v. Buckland*, 1 Ex. 1. *Hubbart v. Phillips*, 13 Mee. & W. 702. *Hammond v. Thorpe*, 2 Dowl. 721.

In case judgment is recovered by the plaintiff in an action against husband and wife, or the verdict passes for the defendant, or the plaintiffs in an action at the suit of husband and wife are nonsuited, the wife may be taken in execution under a writ of *ca. sa.* But the court will order her discharge as a matter of indulgence if it appear that she has no separate property. *Newton v. Boodle*, 4 C. B. 359. *Same v. Same*, 9 Q. B. 948. *Benyon v. Jones*, 15 Mee. & W. 566. *Hoad v. Matthews*, 2 Dowl. 149. *Hales v. White*, Cro. Jac. 203. *Sparkes v. Bell*, 8 B. & C. 1. *Finlay v. Farquharson*, 3 C. B. 347.

[2] Where matters in dispute, being questions of account, have been decided by the court or a judge, or have been referred to an arbitrator appointed by the parties, or to an officer of the court, or a county-court judge, under sect. 3 of the 17 & 18 Vic. c. 125, the decision or order of the court or judge, or the award or certificate of the referee, is enforceable by the same process as the finding of a jury upon the matter referred.

[3] Writs of execution are judicial writs, issuing out of the court where the record or other proceeding is upon which they are grounded. 2 Wms. Saund. 27. Where the record of transcript is removed from an inferior into the superior courts, execution is issued out of the latter (*see* 19 Geo. 3, c. 70, s. 4; 1 & 2 Vic. c. 110, s. 22); but in case of error being brought, execution issues out of the court in which the original judgment was given, for the record remains there. Reg. Gen. M. V. 1854, sch. 8. And where matter of account is decided summarily by a judge, or is referred to arbitration under the Common-Law Procedure Act, 1854, the decision of the judge, or the award or certificate of the referee, is enforceable by the same process as the finding of a jury in the matter referred, and forms of writs of execution are given by the Reg. Gen. M. V. 1854, schedules 9 and 10. Execution may be issued out of the superior courts at Westminster on judgments of the Common Pleas at Lancaster (4 & 5 Wm. 4, c. 62, s. 31), or the Court of Stannaries in Cornwall. 6 & 7 Wm. 4, c. 106, s. 11.

A county-court judgment for more than 20*l.* may be removed by *certiorari* into the superior court, for the purpose of enabling the party to have execution, upon the order of a judge, granted where the judge is satisfied that the party against whom the judgment has been obtained has no goods or chattels which can be conveniently taken to satisfy the judgment. 19 & 20 Vic. c. 108, s. 49. *See* vol. iii. p. 393. Previous to this statute there was no power to remove a judgment for this purpose. *Moreton v. Holt*, 24 L. J. Ex. 169.

Execution may be sued out by an attorney other than the attorney employed to conduct the action, without an order to change. 1 Chit. Arch. by Prentice, 561.

[4] No execution can issue pending an action on the judgment. *Burdus v. Satchwell*, Barnes, 208. And proceedings in error operate as a supersedeas of execution. 15 & 16 Vic. c. 76, s. 150. Where execution issued after an injunction to stay, the court out of which it issued refused to interfere. *Foreman v. Jeyes*, 5 B. & Adol. 836. In *Johnson v. Lakeman*, 2 Dowl. 646, an action for the hire of a steamboat was referred to arbitration, and decided in favour of the defendant: another action by the same plaintiff against the same defendant for misusing the steamboat was at the same time pending, and in this the plaintiff got 80*l.* damages; but a rule *nisi* for a new trial had been granted just before the making of the award. The court refused a rule to stay the execution in the first action as premature, until steps were taken to enforce the award.

[5] A writ of execution may, by virtue of

judge who tries the cause, or some other judge, or the court, shall order execution to issue at an earlier or later period, with or without terms."

fourteen days after verdict, unless otherwise ordered.[1]

Reg. Gen. (Pr.) H. T. 1853, r. 57. "When a plaintiff or defendant has obtained a verdict in term, or in case the plaintiff has been nonsuited at the trial in or out of term, judgment may be signed thereon, and execution issued thereon in fourteen days, unless the judge who tries the cause, or some other judge, or the court, shall order execution to issue at an earlier or later period, with or without terms."

(1) *Speedy Execution.*

Execution may issue forthwith on the return of a writ of inquiry, unless other wise ordered.

By 1 Wm. 4, c. 7, s. 1, after reciting that judgment and execution, in actions brought in his Majesty's courts of law at Westminster, are often delayed by reason of the interval between the terms: now, for the prevention of such delay, be it enacted, "That any writ of inquiry of damages to be issued in or by either of the said courts, by whatever form of action the same may have been commenced, may be made returnable and be returned on any day certain in term or vacation, to be named in such writ, and such writ shall be as valid and effectual as if the same had been returnable according to the course of the common law; and thereupon, at the return thereof, a rule for judgment may be given, costs taxed, final judgment signed, and execution issued forthwith, unless the sheriff or other officer before whom the same may be executed shall certify, under his hand, upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court to set aside the execution of such writ, or one of the judges of the said courts shall think fit to

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the above section, be issued at any time within six years after the recovery of the judgment, without having the judgment revived. It has been held to apply to a judgment signed before the act passed. See *Boodle v. Davis*, 22 L. J. Ex. 69. And it seems that if execution be issued within such six years, it may be afterwards kept on foot by renewal in accordance with the 124th section, notwithstanding the judgment is more than six years old, without any necessity of the judgment being revived. *See post*, p. 352. In general it is necessary, previous to suing out execution on a judgment more than six years old, to revive the judgment. *See post*, Judgment; Revivor.

[1] In case of non-appearance, where the writ is specially indorsed, the plaintiff may sign judgment and issue execution at the expiration of eight days from the last days of appearance. 15 & 16 Vic. c. 76, s. 27.

Where execution was issued on the seventh day after the last day for appearance, instead of the eighth, it was held to be an irregularity only, and that it was therefore necessary that such irregularity should be pointed out in a rule *nisi* to set aside the execution. *Birkenhead Junction Railway Co. v. Dimmack*, 31 L. T. 213.

Should the last of the eight days fall on a Sunday, it is, nevertheless, to be reckoned in the computation. *Rowberry v. Morgan*, 9 Ex. 730. On the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return (Reg. Gen. H. T. 1853, Pr., r. 55), execution may thereupon issue. The practice is similar upon the master's indorsement of damages, where it is referred to him to ascertain them. 15 & 16 Vic. c. 76, s. 94. On the return of a writ of trial judgment may be signed and execution issue forthwith, unless there be a certificate on the trial preventing it. 3 & 4 Wm. 4, c. 42, s. 18. And where debts due to a judgment-debtor are attached in the hands of a garnishee, who admits the debts, or makes default in appearing to the summons, the judge may order execution to issue, and it may be issued forthwith accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt. 15 & 16 Vic. c. 76, s. 63. But execution must be sued out within six years after signing judgment, unless there be a stay of execution within the same period after the execution could first have been issued. After six years a *sci. fa.* is necessary (*Blanchenay v. Burt*, 4 Q. B. 707; 15 & 16 Vic. c. 76, s. 128), unless the defendant agree to waive it. *Hiscocks v. Kemp*, 3 Ad. & E. 676. *Morgan v. Burgiss*, 1 Dowl. N. S. 850.

Where there are two or more plaintiffs or defendants in a personal action, and one or more of them die within a year after judgment, execution may be had against the others without a *sci. fa.*; but the execution should be taken out in the joint names of all the plaintiffs or defendants. *Rolt v. the Mayor, &c. of Gravesend*, 7 C. B. 777. *Penoyer v. Bruce*, Ld. Raym. 244. No *sci. fa.* is necessary before issuing execution on a decree, rule, or order under 1 & 2 Vic. c. 110, s. 18, although more than a year and a day have elapsed since the making of it. *Re Spooner v. Payne*, 11 Q. B. 136.

order the judgment to be stayed until a day to be named in such order: Provided always, that in case the signing of judgment on such writ shall be postponed by reason of such certificate or order, or by the choice of the plaintiff, or otherwise, and judgment shall be afterwards signed thereon, such judgment shall be entered of record as of the day of the return of such writ, unless the court shall otherwise direct."

And at the trial of any action the judge may certify for immediate or speedy execution.[1]

By sect. 2 it is enacted, "that, in all actions brought in either of the said courts, by whatever form of process the same may be commenced, it shall be lawful for the judge before whom any issue joined in such action shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to certify under his hand on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject or not to any consideration or qualification, and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; and in all which cases a rule for judgment must be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith or afterwards, according to the terms of such certificate, on any day in vacation or term; and the *postea*, with such certificate as a part thereof, shall and may be entered of record as of the day on which the judgment shall be signed, although the writ of *distringas juratoris*, or *habeas corpora juratorum*, may not be returnable until after such day: Provided always, that it shall be lawful for the party entitled to such judgment to postpone the signing thereof."

(*f*) *With Reference to the Form of.*[2]

[1] "Speedy," or "immediate execution," or "execution forthwith," does not mean after four days, but as soon as judgment may be signed, which may be next day. *Alexander v. Williams*, 8 Q. B. 931.

A certificate for speedy execution is a matter in the discretion of the judge. It is generally refused where there was a reasonable ground of defence, or the evidence was contradictory (*Barford v. Nelson*, 5 Car. & P. 8); or if any difficult point has arisen in the course of the trial, and there is fair ground for applying to the court *in banco*. *Dresser v. Clarke*, 1 C. & Kir. 752. In many cases an affidavit ought to be made, setting forth the grounds on which the application is founded. If the defence was vexatious, or the defendant is likely to abscond, or where the action is on a bill of exchange, or for goods sold or money lent, the application will be frequently granted.

A certificate for speedy execution for the sum recovered by the verdict includes costs; but if a *ca. sa.* is issued only for the damages, a second *ca. sa.* cannot afterwards be issued for the taxed costs. *Smith v. Dickinson*, 5 Q. B. 602; 1 D. & L. 155. *Allsop v. Smith*, 7 Car. & P. 708. If a judge has made an order for speedy execution, and the defendant at once pays over the sum in question, and a motion for a new trial is afterwards made, the court has no power to order the plaintiff to pay the money he has received into court during the pendency of that rule. *Morton v. Burn*, 5 Dowl. 421. The issuing of execution does not prevent the other party from moving for a new trial, arrest of judgment, &c., and if successful, being restored against the execution. 1 Wm. 4, c. 7, s. 4. And where any application is afterwards made to the court *in banco* to set aside the speedy execution, it seems it must be made within the first four days of the ensuing term, and in other cases before judgment has been signed and execution issued. *Smith v. Kimperley*, 6 Mee. & W. 273. Where the judge has once certified for speedy execution he has no power afterwards to stay the execution. *Lander v. Gordon*, 7 id. 218.

Where the defendant as executor pleaded *non est factum* to an action on a bond given by the testator, a certificate for speedy execution was held not to entitle the plaintiff to issue execution in the first instance against the goods of the defendant. *Ward v. Thomas*, 2 Dowl. 87; 1 C. & M. 532.

[2] The writs of execution in use on judgments in personal actions are, the *fieri facias*, the *elegit*, and the *capias ad satisfaciendum*. Under the first, the goods of the judgment-debtor are seized and sold to satisfy the debt; under the second, his chattels are levied and his lands extended; and under the last, his person is arrested. Besides these, there is a writ of *levari facias*, affecting the debtor's land and chattels; which, however, has been entirely superseded by the writ of *elegit*. A new writ is given in cases of detinue to enforce the return of the chattels, without giving the defendant the option of retaining them, upon the paying the value assessed by the 78th sect. of the 17 & 18 Vic. c. 125, *ante*, p. 72. It is granted upon application to the

(1) *Form of Writ of Execution where the Court or a Judge decides on Matters of Account.*[1]

(2) *Form of Writ where Matter of Account decided on by Arbitrator, Officer of Court, or County-Court Judge.*[2]

court or a judge, and is additional to the ordinary execution against the goods of the defendant for the damages, costs, and interest in the action. *See ante*, Detinue, p. 67. All writs of execution must strictly pursue the judgment. It should agree with it in the name of the defendant, although he be described by a wrong name. *Reeves v. Slater*, 7 B. & C. 486. *Fisher v. Maynay*, 1 D. & L. 40. If there are several defendants, it must be against all, or a valid reason shown on the face of it for the omission of any one. *Raynes v. Jones*, 9 Mee. & W. 104. If execution be against the lands of a deceased defendant, his heir and terre-tenants must be made parties to the record by *sci. fa.* Tidd's Pr. 1174, 8 ed. If against a company under an act of parliament, the execution must be against the property of persons made liable by the act. *Pritchard v. the London, Birmingham, and Extension Railway Co.* 15 C. B. 331. The writ should also agree with the judgment in its statement of the amount of the debt, or show why it does not. *Webber v. Hutchins*, 8 Mee. & W. 319. *Arnell v. Weatherby*, 1 C., M. & R. 831. If there be a certificate for speedy execution as to part, it should recite the same, and direct a levy of such part only. *Smith v. Dickenson*, 1 D. & L. 155. The forms in use are contained in the schedule to the Reg. Gen. H. T. 1853, but any variance therefrom, not being in matter of substance, does not affect their validity or regularity. Writs of execution on a judgment on issues of fact tried by a judge without a jury are the same as in ordinary cases. Reg. Gen. M. V. 1854, sched. 8.

In addition to the above writs, a new form of execution is given by the Mercantile Law Amendment Act, 1856 (19 & 20 Vic. c. 97, s. 2), to enforce the delivery of specific goods upon a judgment for the plaintiff in an action for non-delivery upon a contract of sale. In such a case the court or a judge has power to order execution to issue for the delivery of the goods on payment of such sum, if any, as shall be found to have been payable by the plaintiff for the goods, without giving the defendant the option of retaining the same upon paying the damages assessed; "and if such goods so ordered to be delivered, or any part thereof, cannot be found, and unless the court or such judge or baron shall otherwise order, the sheriff or other officer of such court of record shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, or within the jurisdiction of such court of record, till the defendant deliver such goods, or, at the option of the plaintiff, cause to be made of the defendant's goods the assessed value or damages, or a due proportion thereof: Provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest of such action or suit." *See* 15 C. B. 730.

For forms of the various writs, *Ca. sa.* see vol. iii. pp. 22, 23, 24; to enforce delivery of goods sold, *see post*, Goods, Sale of; Habere facias possessionem; *ante*, Ejectment, p. 170; Elegit, p. 224; *post*, Fi. fa.; Levari facias.

[1] The following forms of writs of execution are contained in the Reg. Gen. M. V. 1854, sched. 9 and 10:—

Writ of Execution where the Court or a Judge decides on Matters of Account.

[*The same as in ordinary cases of execution on a judgment, except that, instead of the writ stating the money to be levied as having been recovered by a judgment, and omitting the direction to levy interest, say,*] £ which by a rule of our Court of Queen's Bench [*or* Common Pleas, *or* by an order of Sir Knight, one of our justices of our Court of Queen's Bench] [*or* Common Pleas, *or* one of the Barons of our Exchequer, *as the case may be*] dated the day of 18 made in pursuance of the 3d section of the Common-Law Procedure Act, 1854, in an action commenced in our said Court of at the suit of A. B. or [the said A. B., *if before mentioned*] against the said C. D., was ordered to be paid by the said C. D. to the said A. B. [*as the case may be, following the terms or substance of the rule or order*]. [*If costs were ordered to be paid, then the direction to levy them may be thus:* Together with certain costs in the said rule (*or order*) mentioned, which said costs were afterwards on the day of 18 taxed and allowed by our said Court of at £]. [*If the rule or order direct that interest shall be paid, then the direction to levy it may be thus:* Together also with interest on the said sum of £ at the rate of £ per cent from the said day of 18 *as the case may be, according to the rule or order.*]

[2] *Writ of Execution where Matter of Account is referred to and decided on by an Arbitrator, Officer of the Court, or County-Court Judge.*

[*The same as directed in preceding form; but instead of stating the levy to be of money ordered by a rule or order to be paid, say,*] £ which by an award (*or* certificate) dated the day of 18 [*date of award or certificate*] made by E. F., Esquire, an arbitrator appointed by the parties [*or* by G. F., Esquire, one of the Masters, *or other officer* (*naming his office*) of our Court

(*g*) *Proceedings before Issuing.*[1]

Proceedings need not be entered on any roll.

By Reg. Gen. (Pr.) H. T. 1853, r. 70, "it shall not be necessary before issuing execution upon any judgment whatever to enter the proceedings upon any roll."

The judgment must be shown to the proper officer, and a *præcipe* filed.

By rule 71, "no writ of execution shall be issued till the judgment, *postea*, or inquisition, as the case may be, has been seen by the proper officer, nor shall any writ of execution be issued without a *præcipe* being filed with the proper officer."

(*h*) *Of the Direction of Writs of Execution.*

They may issue into any county without reference to the venue.

By 15 & 16 Vic. c. 76, s. 121, "it shall not be necessary to issue any writ directed to the sheriff of the county in which the venue is laid, but writs of execution may issue at once into any county, and be directed to, and executed by, the sheriff of any county, whether a county palatine[2] or not, without reference to the county in which the venue is laid, and without any suggestion of the issuing of a prior writ into such county."[3]

(*i*) *Teste and Return-Day of Writs.*

The writ must be tested as

By Reg. Gen. H. T. 1853 (Pr.), r. 72, "every writ of execution shall bear date on the day on which the same shall be issued, and shall be tested in the

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of *as the case may be*] pursuant to the 3d section of the Common-Law Procedure Act, 1854, was awarded [*or* certified] to be due and payable from the said C. D. to A. B.

[1] In actions upon policies of insurance, where several defendants enter into the common consolidation rule, the plaintiff, upon obtaining a verdict and judgment, cannot sue out execution against those who entered into the rule without first obtaining leave of the court for that purpose. Tidd, 9th ed. 996; 1 Chitt. Arch. by Prent. 562. It is not necessary to obtain leave before suing out execution on a judgment entered upon an award made after a verdict for a certain sum subject to such award. *Lee v. Lingard*, 1 East, 401. *Higginson v. Nesbitt*, 1 B. & P. 97.

[2] By the 122d sect. of the 15 & 16 Vic. c. 76, "all writs of every description issuing out of the courts of common law at Westminster, to be executed in the counties palatine, shall be directed and delivered to the sheriff of such counties, and executed and returned by them to the courts out of which such writs are issued, in the same manner, in all respects, as writs are executed and returned by the sheriffs of other counties."

[3] Where a part of a county is locally within another county, it is by the 2 Wm. 4, c. 39, s. 20, to be deemed to be part, as well of the county wherein such district or place is so situate, as of the county whereof the same is parcel, and any writ or process may be directed accordingly, and executed in either of such counties. By the 7 & 8 Vic. c. 61, s. 1, such detached portions of counties are to be considered for all purposes as forming part of the county of which it is considered a part, for the purpose of electing members to serve in parliament as knights of the shire, under the 2 & 3 Wm. 4, c. 64; but by the 4th sect. no judicial proceeding, &c. shall be invalidated by reason of any error in stating the name of the county to which such detached portion originally belonged, instead of the county to which it now belongs under that act. *See* vol. iii. p. 330, n. 3.

Liberty.—If the writ is to be executed within a liberty or franchise, it must be directed to the sheriff of the county in which the same is situate. *Bowling v. Pritchard*, 14, 288.

Cinque Ports.—In the Cinque Ports all writs issued after the 30th of September, 1855, are directed and executed in the same manner as in other places (18 & 19 Vic. c. 48, s. 3); those issued prior to that date must be directed to the Constable of Dover Castle. Id. s. 2. *Frank v. James*, 5 Dowl. 723.

Berwick-upon-Tweed.—In Berwick-upon-Tweed the writ is directed to the Mayor and Bailiffs of Berwick-upon-Tweed. *Mayor of Berwick-upon-Tweed v. Shanks*, 11 Moo. 372.

If a writ which should be directed to the sheriff be directed to any other person it is void. If there are two sheriffs, and one of them is a party, the writ should be directed to the other. *Letsom v. Bickley*, 6 M. & S. 144. If there be but one, and he is a party, then to the coroners. If there be no coroners, or, being coroners, they also are parties, then to persons appointed by the court, usually called elisors. *Mayor of Norwich v. Gill*, 1 Dowl. 246. A writ directed to a sheriff who is a party will be set aside for irregularity. *Weston v. Coulson*, 1 W. Black. 506. A writ directed to the "sheriff" instead of "sheriffs" of London (*Nichol v. Boyne*, 2 Dowl. 761; *Barker v. Weedon*, id. 707), or to the "sheriffs," instead of the "sheriff" of Middlesex (*Jackson v. Jackson*, 3 id. 182), is bad. A writ cannot be directed in the alternative to A. or B. *R. v. Fowler*, 1 Ld. Raym. 586.

name of the Lord Chief Justice, or of the Lord Chief Baron of the court from which the same shall issue; in case of a vacancy of such officer, then in the name of the senior puisne judge of the said court." of the day on which it is issued.[1]

(*j*) *The Indorsement of Writs of Execution.*

(1) *Indorsement of Direction to Levy.*

By rule 76, "every writ of execution shall be indorsed with a direction to the sheriff or other officer or person to whom the writ is directed, to levy the money really due and payable, and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4*l.* per centum per annum, from the time when the judgment was entered up, or if it was entered up before the 1st of October, 1838, then from that day: Provided that in cases where there is an agreement between the parties that more than 4*l.* per centum interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed." Writ must be indorsed with a direction to levy.[2]

(2) *Indorsement of Name, &c. of Attorney.*

Reg. Gen. (Pr.) H. T. 1853, r. 73, orders, that "every writ of execution shall be indorsed with the name and place of abode, or office of business, of the And with the name and

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[1] The above rule is imperative: a writ cannot therefore now, as heretofore, when issued in term, bear teste as of the first day of term, or in vacation, as of the last day of the preceding term, but must bear the day of date of issuing the same. Writs of execution to fix bail may be tested and returnable in vacation. 17 & 18 Vic. c. 125, s. 90.

Return-day of Writ.—As to the day upon which the writ of execution must be made returnable previous to the 3 & 4 Wm. 4, c. 67, s. 2, it was imperative to make the writ returnable on a day certain in term. *Furtado v. Miller*, Barnes, 213. By that act "writs may be made returnable immediately after the execution hereof:" and now, by Reg. Gen. H. T. 1853, r. 72, they "may be made returnable on a day certain in term." It would therefore appear that the practice is now what it was before the late rule, *i. e.* that it is optional to make the writ returnable either on a day certain in term, or "immediately after the execution thereof." *Drake v. Gough*, 1 Dowl. N. S. 573. And in the latter case it is in force until completely executed. *Jordan v. Binckes*, 13 Q. B. 757. *Lewis v. Holmes*, 10 id. 896. A writ returnable on a Sunday, or a *dies non*, is a nullity. *Morrison v. Manley*, 1 Dowl. N. S. 773.

[2] The indorsement should only direct a levy of the amount then actually due under the judgment; therefore, if money has been paid on account of the judgment, the indorsement should be to levy only the balance. *Plevin v. Henshall*, 10 Bing. 24; *see* 5 L. T. (N. S.) 285; 7 Jur. N. S. 1105; 29 L. J. Q. B. 129. So, in debt on a bond conditioned to pay a sum in gross, it should be indorsed to levy only the principal, interest, nominal damages, and costs. *Amery v. Sawbridge*, 2 W. Black. 760; *see* 1 Saund. 58. By Reg. Gen. H. T. 1853 (Pr.), r. 77, "in case of an assessment of further damages pursuant to the statute of 8 & 9 Wm. 3, c. 11, it shall be stated in the body of the writ of execution that the sheriff or other officer to whom it is directed is to levy interest on the damages assessed, and costs taxed in that behalf, at the rate of 4*l.* per centum per annum, from the day on which execution was awarded, before the 1st of October, 1838, and in that case from that day." If execution be fraudulently issued for the whole amount of a judgment debt after it has been partly satisfied, the proper course is to apply to the court to set aside the judgment or the execution; no action will lie to recover the amount. *De Medina v. Grove*, 10 Q. B. 152. But if there be neither fraud nor injury, the court will not set aside the execution, though it be issued for too large a sum, but it will order the process to be amended. *M'Kormach v. Melton*, 1 Ad. & E. 331. If too much be levied, the court will compel the plaintiff to refund the overplus; and if by mistake too little has been levied, the court will, on condition, allow the plaintiff to take out a *fi. fa.* for the residue (*Hunt v. Pasmore*, 2 Dowl. 414); but this does not apply where execution has been by *ca. sa. Smith v. Dickinson*, 13 L. J. Q. B. 151.

If by mistake the plaintiff has indorsed a *fi. fa.* for less than the sum for which he has obtained judgment, and which he has a right to levy under it, the court or a judge may, upon conditions, allow him to take out a *fi. fa.* for the residue. *Hunt v. Pasmore*, *supra*. The court has refused to allow a *ca. sa.* to issue after the defendant had been already taken under one for a less amount than he should have been. *Smith v. Dickenson*, *supra*.

address of the attorney suing out the writ.[1]

attorney actually suing out the same, and in case such attorney shall not be an attorney of the court in which the same is sued out, then also with the name and place of abode, or of office of business, of the attorney of such court in whose name such writ shall be taken out; and when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ; and in case no attorney shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be."

(*a* 1) *Form of Indorsement.*[2]

(*k*) *Of the Renewal of Writs of Execution.*

Writs may be renewed within a year of their having issued.[3]

15 & 16 Vic. c. 76, s. 124. "A writ of execution issued after the commencement of this act, if unexecuted, shall not remain in force for more than one year from the teste of such writ, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal bearing the date of the day, month, and year of such renewal (such seal to be provided and kept at the office of the masters of the court out of which the writ issued), or by such party giving a written notice of the renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof."

(*l*) *Of the Succession of Writs.*[4]

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[1] See *Miller v. Bowden*, 1 C. & J. 563.

[2] The following is the

Form of Indorsement.

Levy £ [*the amount really due*], and interest at 4*l.* per cent. [*unless there have been an agreement for more interest than such interest*], from the day of 18 [*the day when judgment was entered up; if before the* 1*st of October*, 1838, *insert that date*], besides sheriff's poundage fees and expenses of the execution.

The within writ was issued by E. F. of [*here insert the place of abode or office of business of the attorney actually suing out the writ*], attorney for the within-named plaintiff [*in case the attorney actually suing out the writ is not the attorney of the court, add*, "in the name of G. H. of" *place of abode or office of business of the attorney in whose name the writ was taken out*], an attorney of the Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Common Pleas (*if sued by a town agent for a country attorney, add*, "on behalf of J. K. of" *place of abode of the attorney in the country*)], attorney to the within-named plaintiff.

[*If the writ be issued by the party himself, the indorsement will be*, "the within writ was issued by A. B. of" (*the city, town, or parish, and also the name of the hamlet, street, and number of the party's residence, if any such there be*)], the within-named plaintiff [*or* defendant] in person.

[3] Writs issued before the 24th of October, if unexecuted, did not remain in force for more than six calendar months after the 24th of October, 1854, unless they were renewed. 17 & 18 Vic. c. 125, s. 94.

[4] The judgment creditor may have several writs running at the same time, either of a different species into the same county, or of the same species into different counties (*Dunn v. Harding*, 2 Dowl. 803. *Aldridge v. Rawden*, 22 L. T. 107); but only one should be executed. *Lewis v. Morris*, 2 C. & M. 712.

Writs at the same time in the sheriff's hands are entitled to priority according to the order in which they were lodged. *Theobald v. Cotterell*, 20 L. T. 212.

The judgment creditor may abandon an unexecuted writ and sue out another. *Lawes v. Codrington*, 1 Dowl. 30. *Miller v. Parnel*, 6 Taunt. 37. If part only be levied under a *fi. fa.* or *elegit*, he may, after the return of the first writ, sue out another for the residue, but he cannot do so till after its return; and the second writ should recite the first, and state the amount levied under it. *Chapman v. Bowlby*, 8 Mee. & W. 249. *Reg. v. the Sheriff of Essex*, 8 Dowl. 5. *Hodgkinson v. Whally*, 2 C. & J. 86; *see* 5 C. B. (N. S.) 685; 28 L. J. C. P. 153.

If no land be extended under an *elegit*, another *elegit* may be issued into another county; or if lands be extended into the same county upon a suggestion that the de-

(*m*) *From what time Writ binds Property.*

29 Car. 2, c. 3, s. 16, enacts, that "no writ of *fieri facias*, or other writ of execution, shall bind the property of the goods of the party against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall, upon the receipt of any such writ (without fee for doing the same), indorse upon the back thereof the day of the month or year whereon he or they received the same."

The writ does not bind the property in the goods of the debtor until delivery of the writ to the sheriff.[1]

(1) *And as against a Purchaser without Notice, the Writ only binds Goods from the Time of Actual Seizure.*

By the Mercantile Law Amendment Act, 1856 (19 & 20 Vic. c. 97, s. 1), "no writ of *fieri facias*, or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide*, and for a valuable consideration, before the actual seizure or attachment thereof by virtue of such writ: Provided that such person had not, at the time when he acquired such title, notice that such writ, or any

And as against a purchaser without notice, the writ only binds the goods from the time of actual seizure.[2]

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fendant has other lands, and in such case no other writ than an *elegit* can be issued. *Foster v. Jackson*, Hob. 57. *Cooper v. Langworth*, Moore, 254; Bro. Abr. Elegit, 15.

If a *ca. sa.* be not executed, the plaintiff may sue out any other writ; but if executed, no other writ can in general issue, unless the defendant die in execution, in which case execution may be sued out against his lands or goods. 21 Jac. 1, c. 24.

Where under a *fi. fa.*, goods have been seized and then abandoned, a *ca. sa.* cannot be sued out till the *fi. fa.* has been returned. *Andrews v. Sanderson*, 1 H. & N. 725: 26 L. J. Ex. 208.

If the sheriff seize goods under a *fi. fa.*, but the *whole* of them are already seized under a distress for rent (*Edmond v. Ross*, 9 Price, 512; *see ante*, 104), or are already *in custodia legis*, or assigned under a bill of sale (*Dicas v. Warne*, 10 Bing. 341; 2 Dowl. 762), and he afterwards withdraw the execution, another writ of execution may be issued and executed before the return of the *fi. fa.*

Where the defendant had withdrawn from possession under a *fi. fa.*, in consequence of the defendant in the action having informed him that he had sold the goods to cheat the plaintiff: — *Held*, that the sheriff might take the defendant under a *ca. sa.* for the same debt, without previously returning the *fi. fa.* *Knight v. Coleby*, 5 Mee. & W. 274.

Where a defendant died in execution, a *fi. fa.*, tested and returnable while he was alive and in execution, and returned by the plaintiff's attorney, was held to support a *testatum* issued under 21 Jac. 1, c. 24, s. 2, into a foreign county. *Farncombe v. Kent*, 2 Dowl. 464.

Where a *fi. fa.* has issued, and a levy less than the plaintiff's debt has been made, a *ca. sa.* cannot issue till after the return-day of the *fi. fa.*, although, in fact, the sheriff has made a return to it, and the *ca. sa.* recites the writ and the sheriff's return. *Lawes v. Codrington*, 1 Dowl. 30.

[1] The lands of the debtor are bound by the judgment (as to mortgagees and purchasers, *see* 23 & 24 Vic. c. 38), his goods and chattels by the writ of execution. Notwithstanding the 29 Car. 2, c. 3, *supra*, save as to purchasers for a valuable consideration, the writ still binds the party's goods from the time of the teste (1 Saund. 219); and before the above stat. of the 19 & 20 Vic. c. 97, the sheriff might take the goods, although the defendant had assigned them, after the delivery of the writ, for a valuable consideration, provided the sale were not in market-overt (*Samuel v. Duke*, 6 Dowl. 536. *Payne v. Drew*, 4 East, 523): but now any *bonâ fide* purchaser not affected by notice is protected. The property in the goods is not altered by the writ until execution and sale. *Lucas v. Nockells*, 10 Bing. 157. The court will inquire into the fraction of a day to ascertain whether the conveyance by the defendant, or the delivery of the writ to the sheriff, had priority in point of time (*Bowen v. Bramidge*, 6 C. & P. 140), save in cases where the Crown makes a claim. *Reg. v. Edwards*, 23 L. J. Ex. 165.

Notice to the sheriff not to proceed until further order operates as a suspension of the writ. *Hunt v. Hooper*, 12 Mee. & W. 664.

Writs of *levari facias*, delivered to a bishop for the purpose of sequestrating a clerk's living, take precedence according to the times of delivery, and not according to the dates of the writs; and, therefore, a petition under 1 & 2 Vic. c. 110, s. 55, for a sequestration of an insolvent clerk's living, being under that statute on the same footing as a writ of *levari*, has priority over a previously dated writ of *levari* if the petition be first delivered for execution. *Sturgis v. the Bishop of London*, 26 L. J. Q. B. 209.

[2] The act was held not to apply to a case where the writ was lodged with the sheriff at the time the act passed. *Williams v. Smith*, 7 W. R. 503; 33 L. T. 167; 4 H. & N. 559; 28 L. J. Ex. 286.

other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner."

(2) *As between Execution from the Superior Courts and a County Court, the Writ or Warrant has Priority according to the Time of Delivery to the Sheriff, or Application to the Registrar.*

As between execution from the superior courts and a county court, the writ or warrant has priority according to the time of delivery to the sheriff, or application to the registrar.

By 19 & 20 Vic. c. 101, s. 47, "when a writ against the goods of a party has issued from a superior court, and a warrant against the goods of the same party has issued from a county court, the right to the goods seized shall be determined by the priority of time of the delivery of the writ to the sheriff to be executed, or of the application to the registrar for the warrant to be executed; and the sheriff, on demand, shall by writing, signed by any clerk in the office of the under-sheriff, inform the high-bailiff, on demand, of the precise time of the delivery of such writ, and the bailiff, on demand, shall show his warrant to any sheriff's officer; and such writing purporting to be so signed, and the indorsement on the warrant, shall respectively be sufficient justification to any high-bailiff or sheriff acting thereon."

(*n*) *Of the Execution of the Writ.*

(1) *Warrant of Execution.*[1]

(2) *Time at which Writ must be Executed.*[2]

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[1] The sheriff or his under-sheriff may execute the writ himself, or depute another by warrant in writing to do it for him. *Hunt v. Hooper*, 1 D. & L. 626. The warrant must be addressed to the officer by name, and no alteration should be made in it after it has left the sheriff's office. *Housion v. Barrow*, 6 T. R. 122. It must not be delivered till the sheriff has the writ in his custody. Step. Lush. 442. The person to whom this warrant is directed is in general a bound bailiff; that is, a bailiff usually responsible with sureties in an obligation for the due execution of his office (see *Morris v. Parkinson*, 1 C., M. & R. 163); but it may be directed to a special bailiff, nominated by the plaintiff or his attorney. *Hamilton v. Dalziell*, 2 W. Black. 952. *Porter v. Viner*, 1 Chitt. Rep. 613.

A variance between the writ and warrant will not, it seems, affect the validity of the execution of the writ, provided the warrant contains on the face of it authority to do the act directed by the writ. *Rose v. Tomlinson*, 3 Dowl. 49. The warrant must be executed by the officer to whom it is addressed. It need not, however, be his hand which actually arrests, &c., but he must be so near that he may be reasonably considered as acting therein; and he must have the warrant in his personal possession at the time. See *Plomer v. Ball*, 5 Ad. & E. 823. *Blatch v. Archer*, Cowp. 65. *Cuckson v. Winter*, 2 M. & K. 315.

A sheriff's bailiff cannot appoint a deputy. *Jackson v. Hill*, 10 Ad. & E. 484. The sheriff's bailiff must not be an infant. *Cuckson v. Winter*, *supra*.

The warrant need not specify the court out of which the writ issued. *Astley v. Goodjer*, 2 Dowl. 619.

If the warrant be altered or filled up in its direction, or otherwise, after it is issued, it is void. *Pearson v. Yewens*, 5 Bing. N. C. 489. *Jackson v. Hill*, 10 Ad. & E. 477. If the sheriff make out the warrant before he has the writ in his possession, he is liable to a penalty of 10*l.* (6 Geo. 1, c. 21, s. 53); and arrest before the delivery of the writ to the sheriff is illegal. *Hall v. Roche*, 8 T. R. 187.

Where a letter was addressed to the sheriff's officer, who held a warrant to arrest the debtor, by the attorneys who had issued the writ, informing him that an arrangement had been come to with respect to the debt, and that notice had been given to the plaintiff's attorney of the withdrawal of the writ; the court held that this was sufficient notice to the bailiff not to execute the writ of *ca. sa.*, and that in this particular case it was not necessary to show that the notice had actually reached the sheriff, it being the bailiff's duty as his agent to communicate it to him. *Futcher v. Hinder*, 3 H. & N. 757; 28 L. J. Ex. 28; *see* id. 253; 4 H. & N. 424; 2 id. 605; 27 L. J. Ex. 19; id. 29, 320.

[2] With respect to the time at which a writ must be executed, the sheriff must execute the writ within a reasonable time after he receives it; and if he neglect to do so, the party suing out the writ may maintain an action against him if he sustain damage. *Randell v. Wheble*, 10 Ad. & E. 719. *Jacobs v. Humphrey*, 2 C. & M. 413. *Airton v. Davis*, 9 Bing. 740. He cannot refuse to execute the writ if there be an opportunity of executing the same, and he is required to do so. *Mason v. Paynter*, 1 Q. B. 974. The writ, however, may be executed at any time before it is returnable; and if returnable immediately after the

(3) *Where Writ must be Executed.*[1]

(4) *How Writ must be Executed.*[2]

(*o*) *Expenses of Execution.*[3]

15 & 16 Vic. c. 76, s. 123. "In every case of execution, the party entitled to execution may levy the poundage fees and expenses of execution over and above the sum recovered."

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execution thereof, it may be executed at any distance of time, provided it be in force. *Greenshields v. Harris*, 9 Mee. & W. 774. If returnable on a particular day, it may be executed at any time of such day. *Maud v. Barnard*, 2 Burr. 812. If the defendant die after execution is sued out, the writ may be executed on his goods in the hands of his executors. *Withers v. Harris*, 2 Ld. Raym. 808. *Durnsford v. Gouldsmith*, 8 Moore, 145. If the plaintiff should die, the writ may be executed, and his executor shall have the money (*Clerk v. Withers*, 2 Ld. Raym. 10, 73); or it may be paid into court, if there be no personal representative. If, after execution sued out, the defendant be discharged from the debt under the Bankrupt Act, or be protected from the writ, it cannot be executed. Nor can the sheriff execute the writ after it has been countermanded. *Barker v. St. Quintin*, 1 Dowl. & L. 542.

[1] The writ must be executed within the county, or other place, to the sheriff of which it is directed, otherwise the execution will be irregular. *Greenshield v. Pritchard*, 8 Mee. & W. 148. It cannot be executed in the queen's presence, nor within the verge of her royal palace, unless by leave of the Board of Green Cloth (*R. v. Stobbs*, 3 T. R. 735); nor in the queen's courts of justice, while the queen's justices are there sitting (3 Bl. Com. 289); nor in the Tower. *Batson v. M'Lean*, 2 Chitt. Rep. 51.

[2] The sheriff may enter the defendant's house to execute the writ, and though neither the defendant nor his goods be there, the officer is justified, if he had reasonable ground to suspect that he or they were there. *Semayne's case*, 5 Co. Rep. 92. He may enter the house of a third person if the defendant or his goods are there, otherwise not (*Morrish v. Murray*, 13 Mee. & W. 52. *Johnson v. Leigh*, 6 Taunt. 246. *Hutchison v. Birch*, 4 id. 619); but he must not, unless with the license of the defendant or occupier, remain a longer time than is reasonably necessary for the purpose of executing the writ. *Doe v. Trye*, 5 Bing. N. C. 573. In effecting an entrance, the sheriff may enter when the outer door is open, or through any other opening; but he cannot break open a door or window (*Semayne v. Gresham*, Moore, 668), unless in the case of a writ of seisin, or *habere facias possessionem*, when he may break open the door if denied entrance by the tenant (*Semayne's case*, 5 Co. Rep. 91), and except also in cases where the execution is at suit of the queen. *Lannock v. Brown*, 2 B. & A. 592. *Sir Thomas Kemp and Windsor's case*, 4 Leon. 41. But having got peaceable entrance, he may break open any inner door, cupboards, trunks, &c., if necessary. *Hutchison v. Birch*, 4 Taunt. 619. And goods, it appears, may be taken through the windows of a house, if open. 1 Roll. Abr. 671, pl. 7. See *Sanders v. Jervis*, 28 L. J. Q. B. 156. The above rule does not extend to a barn or outhouse not connected with or within the same curtilage with the dwelling-house, the outer door of which may be broken open without any previous demand or refusal of admission (*Penton v. Brown*, 1 Sid. 181); and a prior illegal entry to execute a *fi. fa.* does not vitiate a subsequent legal entry if the first were abandoned. *Percival v. Stamp*, 9 Ex. 167. Likewise, if the defendant, after arrest on a *capias*, escape into his own or another house, the outer door may be broken open to retake him on fresh pursuit, and after a demand of admission (*Lloyd v. Sandilands*, 8 Taunt. 250. *See* vol. i. p. 536; vol. iii. p. 26); or if, upon pursuit, he has taken refuge in the dwelling-house of a third person, or if his goods have been brought there to prevent the execution, the sheriff may, on demand and refusal, break open the outer door of such dwelling-house. *Semayne's case*, 5 Co. 93, a. *Genner v. Sparkes*, 1 Salk. 79. The sheriff, or his officer, may justify breaking open the outer door in order to get out where he has been locked in (*White v. Wiltshire*, Palm. 52); or if forcibly expelled, after a lawful entry, he may break open the door to regain admission (*Aga Kurboolie Mahomed v. the Queen*, 4 Moore, 239); or to carry away goods, where he has no other means of effecting his object. *Pugh v. Griffiths*, 7 Ad. & E. 838.

A sworn and known officer need not, but a special bailiff must, if demanded, show his warrant. *Mackally's case*, 9 Rep. 69. But see *Hall v. Roche*, 8 T. R. 188.

See further, as to the execution of particular writs, under the special title of that writ:—Ca. Sa. vol. iii. p. 22; Elegit, *ante*, p. 324; *post*, Fieri Facias.

[3] The 123d sect. of 15 & 16 Vic. c. 76, does not entitle the execution-creditor to take under a *ca. sa.* the expense of a previous abortive *fi. fa. Marquis of Salisbury v. Ray*, 8 C. B. (N. S.) 193; 29 L. J. C. P. 225.

The fees to which the sheriff is entitled are those given by a table made by the judges under the authority of the 7 Wm. 4 and 1 Vic. c. 55, in addition to which he is, on executing a *fi. fa.*, entitled to 12*d.* for every 20*s.*, if the sum levied does not exceed 100*l.*, and 6*d.* for every 20*s.* over that sum (28 Eliz. c. 4); but no poundage is payable on executing a *ca. sa.* 5 & 6 Vic. c. 58, s. 31. Though put to extra trouble and expense, he cannot claim more than is given by the

(*p*) *Setting Aside Irregular Writs.*

(1) *Application to Set Aside.*[1]

(2) *Amendment of Writ.* *See* vol. i. p. 339.

(3) *Effect of Irregularity.*[2]

table of fees. *Davies v. Edmonds*, 12 Mee. & W. 31. *Phillips v. Viscount Canterbury*, 11 id. 619. *Hutchinson v. Humbert*, 8 id. 638. *Jones v. Robinson*, 2 Dowl. N. S. 1044. *Cooper v. Hill*, 6 C. B. (N. S.) 703. He cannot charge a fee for "search" or "discharge." *Masters v. Lowther*, 11 C. B. 949. He is entitled to poundage on the whole proceeds, though part be paid to the landlord for rent (*Davies v. Edmonds, supra*); but there must be a levy. *Graham v. Grill*, 2 M. & S. 296. *Colls v. Coates*, 11 Ad. & E. 826. *Brun v. Hutchinson*, 2 D. & L. 43. He is, however, entitled to his poundage, notwithstanding the parties, after seizure, enter into a compromise before the sale (*Chapman v. Bowlby*, 8 Mee. & W. 249), or although the judgment and execution be afterwards set aside for irregularity. *Rawstone v. Wilkinson*, 4 M. & S. 256.

On executing an *elegit* or *habere facias possessionem*, the sheriff is entitled to 1*s.* on every 20*s.* of the yearly value of the lands, &c. whereof possession or seisin is given, if it does not exceed 100*l.*, and 6*d.* on every 20*s.* of the yearly value above that sum. *Nash v. Allen*, 4 Q. B. 784. *Price v. Hollis*, 1 M. & S. 105.

If the sum levied is unreasonable, the court or a judge will order the excess to be returned with costs. *Benwell v. Oakley*, 2 Taunt. 174.

The costs of an interpleader rule obtained by the sheriff cannot be levied. The sheriff cannot refuse to execute a writ until his fees are paid (*Hescott's case*, 1 Salk. 330); nor is he justified in taking goods to secure his poundage after he has consented to their being delivered to a third person under a claim of property. *Goode v. Langley*, 7 B. & C. 26.

Where the sheriff has levied his fees he may retain the money; and if there has been no levy of them, he may maintain an action for them against the party at whose suit the writ was executed (*Evans v. Manero*, 7 Mee. & W. 468. *Foster v. Blakelock*, 5 B. & C. 328); but not against his attorney in the action, unless there be special circumstances raising a presumption of an undertaking on his part to pay for them, as where he has appointed a special bailiff. *Walbanke v. Quartermaine*, 3 C. B. 94. *Maile v. Mann*, 2 Ex. 608.

The stat. 23 Eliz. gives an action for treble damages in case of extortion against the sheriff (*Berton v. Lawrence*, 5 Ex. 816. *Holmes v. Sparkes*, 12 C. B. 242. *Pilkington v. Cook*, 16 Mee. & W. 615. *Wrightup v. Greenacre*, 10 Q. B. 1); besides which the party upon whom it is committed may maintain an action for money had and received against the sheriff (*Scarfe v. Halifax*, 7 Mee. & W. 288); and the party guilty of the extortion may be indicted at common law. *Smith v Mall*, 2 Roll. R. 263. *Sanderson v. Baker*, 3 Wils. 309.

The 7 Wm. 4 and 1 Vic. c. 56, ss. 3, 4, gives a remedy for extortion by summary application to the court; and it is doubtful whether an action for extortion can be brought against the sheriff for taking a greater fee than allowed by this act. *Usher v. Walters*, 4 Q. B. 553. *Curlewis v. Bird*, 1 Dowl. N. S. 755. The application may be for a rule calling upon the sheriff to show cause why he should not return the excess, as well as upon his officer to show cause why an attachment should not issue against him for his contempt in receiving the excess. *Blake v. Newburn*, 5 D. & L. 601.

The attorney is liable for the fees of the sheriff's officer employed by him to execute writs; and in general the client is not liable, there being no privity between him and the officer (*Walbanke v. Quartermaine, supra. Maile v. Mann, supra. Newton v. Chambers*, 10 D. & L. 869); and he is so liable, although the bailiff be not specially nominated. *Brewer v. Jones*, 10 Ex. 655. There is, however, no presumptive liability on the part of the attorney to the sheriff for his fees of executing writs; but the client, and not the attorney, is liable for these fees, for the sheriff's right depends upon statute and not upon contract. *Maybery v. Mansfield*, 16 L. J. Q. B. 102. *Maile v. Mann, supra.*

[1] If the writ of execution is irregular, or has been irregularly executed, the court or a judge will set it aside, and order restoration of goods or money levied, if any, or the discharge of the party, if he be taken into custody. The application for the rule or order must be made within a reasonable time, and before a fresh step has been taken. In setting aside the execution, the court frequently restrains the party from bringing any action; but it will not do so if a strong case of damage be shown. *Wentworth v. Bullen*, 9 B. & C. 840. *Stockbridge v. Sussams*, 6 Jur. 437. And the costs of the rule are not in general given, unless the applicant consent not to bring any action. *Cash v. Wells*, 1 B. & Adol. 375.

[2] The party suing out the writ, and his attorney, may justify under an irregular writ if it is not set aside; but they cannot if it is set aside. *Codrington v. Lloyd*, 8 Ad. & E. 449. Whether set aside or not, the sheriff, and those acting under him, are protected by it, however irregular (*R. v. Sheriff of Middlesex*, 5 B. & A. 746), provided it be not void on the face of it. *Bates v. Pilling*, 6 B. & C. 38. If the writ be set aside the plaintiff may issue another. *M'Cormack v. Melton*, 1 C., M. & R. 525.

(*q*) *Restitution where Judgment set aside.*[1]

(*r*) *Fraudulent Execution.*[2]

(*s*) *Of the Return.*

(1) *Of the Rule to Return.*

The rule is a four-day rule upon the sheriffs of London and Middlesex; upon other sheriffs an eight-day rule. And it issues in term or vacation.[3]

By Reg. Gen. (Pr.) H. T. 1853, r. 130, "all rules upon the sheriffs of London and Middlesex to return writs or to bring in the bodies of defendants shall be four-day rules, and upon other sheriffs eight-day rules."

By r. 131, "when the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall open. And the officer with whom it is filed shall indorse the day and hour when it was filed."

Formerly in vacation a party might obtain a judge's order instead of the rule, but now, by the 132d of the above rules, "no judge's order shall issue for the return of any writ, or to bring in the body of a defendant; but a side-bar rule shall issue for that purpose, in vacation as in term, which shall be of the same force and effect as side-bar rules made for that purpose in term."

(*a*) *Form of Rule.*[4]

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[1] If after execution the judgment is set aside or reversed, the party against whom it has issued is entitled, if a term or goods have been seized under a *fi. fa.*, to have the same restored, or if they have been sold, to have the money for which they have been sold. 2 Roll. Abr. 491; 8 Co. 19, 143. *M'Cormack v. Melton*, 1 Ad. & E. 331. If lands were extended, or chattels delivered to the party under an *elegit*, then he is entitled to the lands or chattels, and not merely the extended value. Roll. Abr. 778. *Goodyeare v. Ince*, Cro. Jac. 246.

Where restitution of the sums paid by the defendant is awarded, the plaintiff is bound to pay defendant only what has been properly paid by him. *Whalley v. Barnett*, 2 Dowl. 33.

[2] The court will not, in general, interfere summarily to compel the sheriff, in the case of a fraudulent execution, to pay over the proceeds to a *bonâ fide* creditor, but leaves the question of fraud to a jury; but in a clear case it might, it appears, interfere summarily. *Barber v. Mitchell*, 2 Dowl. 574. *Imray v. Magnay*, 11 Mee. & W. 275.

[3] The rule is a side-bar rule.

The court or a judge may enlarge the time limited by the rule for making the return. *Jones v. Robinson*, 2 Dowl. N. S. 1044. The costs of the rule in general fall upon the party obtaining it (*Hutchinson v. Humbert*, 8 Mee. & W. 638); but if the rule be not obeyed they in general eventually fall on the sheriff. A copy of the rule, indorsed with the name of the officer by whom the writ was executed, must be served personally on the sheriff or his under-sheriff or deputy (*Cave v. Price*, Barnes, 30), and the original rule shown if demanded. *Branard v. Berger*, 1 N. R. 121; Rule, Pr. 163, H. T. 1853.

It is not usual for the sheriff to return writs of execution, unless ruled to do so. Wats. *Sheriff*, 81, 2d edit. He may be ruled to return the writ, not only by the plaintiff, but also by the defendant, if he show special grounds for it. *Williams v. Webb*, 2 Dowl. N. S. 904. *Daniels v. Gompertz*, 3 Q. B. 322.

There are cases in which the sheriff cannot be ruled to return the writ, as where it has been executed by a special bailiff appointed by the plaintiff or his agent (*Palister v. Palister*, 1 Chit. R. 614, n. *Hamilton v. Dalziel*, 2 Bl. R. 952); where there has been collusion between the sheriff's officer and the plaintiff or his attorney (*Ruston v. Hatfield*, 3 B. & Ald. 204); where the action or the execution of the writ has been compromised (*Hedges v. Jordan*, 5 Dowl. 6); or where the writ is a nullity. *Brown v. M'Millan*, 7 Mee. & W. 198. But if only irregular, it appears he must return it (*Jones v. Williams*, 8 Mee. & W. 357); nor will the sheriff be ruled to return a *ca. sa.* if the defendant has become a bankrupt, and the plaintiff consents to become his assignee. *Hepworth v. Sanderson*, 8 Bing. 19. Further, the sheriff is not liable to be called upon to make a return to any writ or process, unless required to do so by a rule of court within six months after the expiration of his office. 20 Geo. 2, c. 37, s. 2. These months are lunar months, and the day upon which the sheriff quits his office is reckoned inclusive. *R. v. Alderley*, Dougl. 463. If improperly ruled to return, the sheriff should, it seems, move to set the rule aside. *De Moranda v. Dunkin*, 4 T. R. 119.

[4] The following is the form of the rule to return a writ:—

In the Q. B. [C. P. *or* Exch. of Pleas].

B. } On in term
v. } Victoria.
D. } It is ordered that the sheriffs [*or* late sheriffs] of London shall, within four days next after notice of this rule, to be given to their secondaries [*or* that the sheriff, *or* late sheriff, of the county of shall, within four days [*if in Middlesex, or*

(2) *Of the Return.*[1]

(3) „ *Attachment for not Returning.*

(*a*) *In what Cases Issued.*

An attachment will issue for disobedience to a rule to return issued in vacation, although subsequently obeyed.[2]

By Reg. Gen. (Pr.) H. T. 1853, r. 133, "in case a rule shall issue in vacation for the return of any writ of *capias, ca. sa., fi. fa., elegit, habere facias, professionem venditioni exponas*, or other writ of execution, and such rule shall have been duly served, but obedience shall not have been paid thereto, an attachment shall issue for disobedience of such rule, whether the thing required by such rule shall or shall not have been done in the meantime."

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eight days *if in any other county*] next after notice of this rule, to be given to his undersheriff, peremptorily return the writ of *fieri facias* issued between the parties.

Side bar. [Q. B. *or* Exch.] In the Treasury Chamber, at the instance of the plaintiff, *in the C. P.* By the Court.

[1] The return is made on the back of the writ; but if long, a schedule referred to in the indorsement annexed. Chit. Arch. 555. It must be certain (*Reynolds v. Barford*, 2 D. & L. 327), and must answer the whole writ up to the period when it was made. *Perkins v. Meacher*, 1 Dowl. 21.

The sheriff must sign the return with his Christian name and surname (*Dive v. Manningham*, Plowd. 63; 12 Edw. 2, c. 5); and if there are two sheriffs both must put their names, or it is not a return at all. *Lamb v. Wiseman*, Hob. 70.

Any defect in the formal part of the return will be cured by the words "In manner and form as I am within commanded." Wats. *Sheriff*, 88, 2d. edit. Writs executed in counties palatine are returned by the sheriff of the county in the same way as by sheriffs of other counties. 15 & 16 Vic. c. 76, s. 122. When the bailiff of a liberty has the execution and return of a writ, the sheriff may return that he commanded the bailiff to execute the writ; and if the bailiff has not made a return, the sheriff should return that fact accordingly; and if he has made a return, the sheriff should return it. *Boothman v. Earl of Surrey*, 2 T. R. 5; Roll. Abr. Return, n. 2.

When made on the back of the writ the return is in this form:—"By virtue of this writ to me directed and delivered, I have [*here is stated what has been done under the writ*], as by the said writ I am directed and commanded. A. B., Esquire, sheriff."

When the return is long it is made in this form:—"The execution of this writ appears in a certain schedule hereto annexed. A. B., Esquire, sheriff." And a separate piece of paper containing the inquisition is annexed to the writ.

The forms of return are the same as when Dalton wrote, except that they are in English instead of Latin. Wats. *Sheriff*, 88.

The return is conclusive between the same parties in the same action, but not against other parties in another action. *Gibson v. Brooke*, Cro. Eliz. 859. *Leonard v. Simpson*, 2 Bing. N. C. 176. The sheriff is in general concluded by his return (*Field v. Smith*, 2 Mee. & W. 388); but not his officer. *Parkes v. Mosse*, Cro. Eliz. 181. And if the return be false, the party who is injured by it may maintain an action against the sheriff. Vin. Abr. Return, O 47.

The return may in general be amended; in some cases even after execution (*R. v. Sheriff of Monmouth*, 1 Marsh. 344); and although the sheriff be not a party to the application. *Green v. Glasbrooke*, 2 Bing. N. C. 143. *Thorpe v. Hooke*, 1 Dowl. 494.

The court in one case refused to allow an amendment in the return to the writ of *venditioni exponas* upon motion (*Rowe v. Tapp*, 9 Price, 317); and in another case, after time to plead had been obtained in an action against the sheriff for a false return. *Wylie v. Pearson*, 1 Dowl. N. S. 807.

[2] If, however, the writ is ordered to be returned in term, and is returned before the application for the attachment, the attachment will, it appears, be refused. *Williamson v. Harrison*, 9 Mee. & W. 225.

If the sheriff, having been duly served with the rule for the return of the writ, does not make the return within the time limited by the rule, he will be in contempt, and subject to an attachment (*Alchin v. Wells*, 5 T. R. 470); and he will, it appears, be so subject if the return he makes be on the face of it insufficient (*Wilton v. Chambers*, 1 Har. & W. 582); but not if it be good on the face of it, but false. *Goubot v. De Crouy*, 2 Dowl. 86. And if it be only informal the court will in general allow it to be amended, and set aside the attachment on the sheriff paying the costs. *Rex v. Sheriff of Kent*, 2 Mee. & W. 316.

Where it did not appear what damage had been sustained by the creditor, the court ordered the attachment to stand over, and left the plaintiff to bring his action against the sheriff. *Arden v. Goodacre*, 11 C. B. 366.

It is no answer to a rule for an attachment that the plaintiff, after the sheriff's default, and before moving for the attachment, desired him to proceed with the execution. *Howitt v. Rickaby*, 9 Mee. & W. 52.

Where the writ was lost, of which fact the plaintiff had notice, and that the defendant was in custody, the court set aside an attachment for not returning it. *Rex v. Sheriff of Kent*, 1 Marsh. 289.

(*b*) *Motion for.*[1]
(*c*) *Form of Attachment.*[2]
(*d*) *When it will be Set Aside.*[3]
(4) *Of the Action for a False Return.*[4]
(B) *In Particular.*
(*a*) *Of the Capias ad Satisfaciendum.* *See* vol. iii. p. 22.
(*b*) „ *Habeas Corpus ad Satisfaciendum.* *See* also *post*, Habeas Corpus.

Proceedings for charging in execution a person already in prison of the court.

15 & 16 Vic. c. 76, s. 127. "It shall not be necessary in any case to sue out a writ of *habeas corpus ad satisfaciendum* to charge in execution a person already in the prison of the court; but such person may be so charged in execution by a judge's order, made upon affidavit that judgment has been signed and is not satisfied; and the service of such order upon the keeper of the prison for the time being shall have the effect of a detainer."

II. Registering Writs of.[5]

III. Execution in Criminal Proceedings.[6]

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[1] The rule for attachment is absolute in the first instance. Reg. Gen. (Pr.) H. T. 1853, r. 168. It is moved for on an affidavit stating a personal service on the sheriff or under-sheriff, or one of the clerks in his office, of a copy of the rule to return the writ, and that such rule was at the same time shown to the person served (*Harmer v. Tilt*, 2 Marsh. 251), and that a search has been made for the writ, and that it has not been returned. If the motion be for an insufficient return, a copy of the return should be annexed to the affidavit, which must verify it. *Wilton v. Chambers*, 1 Har. & W. 582.

[2] The attachment is directed to the coroner, or if he be the defendant, to elisors (*R. v. Sheriff of Glamorganshire*, 1 Dowl. N. S. 308; or if against the late sheriff, it is directed to the present sheriff.

The following is the form of an attachment:—

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the Coroner of the county of greeting:

We command you that you [*if in the Exchequer say*, omit not, by reason of any liberty in your bailiwick, but that you enter the same and] attach S. S., Esquire, sheriff of our said county, so that you may have him before us [*or if in the Common Pleas*, before our justices; *or if in the Exchequer*, before the barons of our exchequer] at Westminster, on to answer to us for certain trespasses and contempts by him lately done and committed in our court before us [*if in the Common Pleas*, of and concerning those things which in our behalf shall then and there be objected against him; *if in the Exchequer*, concerning divers trespasses, contempts, and offences, by him lately done and committed], and have there then this writ. Witness [*name of Chief Justice or Chief Baron*] at Westminster, this day of in the year of our reign.

Indorsement.

By rule of court [*if in the Exchequer say*, made on the day of] for not returning the writ of *fieri facias* issued in a certain cause, wherein A. B. is plaintiff and C. D. is defendant, pursuant to a rule of court [*if in the Exchequer add*, made in the said cause for that purpose; *if in the Queen's Bench or Common Pleas add*, with costs of attachment].

[3] If there be any irregularity in the proceedings against the sheriff, the court will set them aside with costs, and even although they be regular, if no injury has been sustained by the plaintiff by the sheriff's neglect, the court will set aside an attachment against him on payment of costs and making the return. *R. v. Sheriff of Essex*, 8 Dowl. 5. *Reg. v. Sheriff of Herts*, 9 id. 916.

[4] If the return made by the sheriff to the writ be false and the party injured thereby, he is entitled to maintain an action against the sheriff (see *Wylie v. Birch*, 4 Q. B. 566; 12 L. J. Q. B. 260; Dalton, 190); as, if the sheriff return *Non est inventus* when he has taken, or might have taken, the defendant (*Bedford v. Montague*, 2 Esp. 745), or *Nulla bona* to a writ of *fi. fa.* when he has an opportunity of making a levy. See *Slade v. Hawley*, 13 Mee. & W. 757. *Pitcher v. King*, 9 Ad. & E. 288; 1 Per. & D. 297. *Wordall v. Smith*, 1 Camp. 332. And the execution creditor is not precluded from maintaining the action by acceptance of part of the debt levied by the sheriff. *Holmes v. Clifton*, 10 Ad. & E. 673. It will be a defence to the sheriff that the judgment was void (*Lane v. Chapman*, 11 id. 966), or fraudulent. *Harrod v. Benton*, 8 B. & C. 219. *Penn v. Scholey*, 5 Esp. 243. The sheriff will not, however, be allowed on the trial to go into circumstantial evidence to impeach the judgment on the ground of a collateral fraud. *Tyler v. Duke of Leeds*, 2 Stark. R. 218. *Imray v. Magnay*, 11 Mee. & W. 276. See *Christophers v. Barton*, 3 Ex. 162. *See post*, False Return; Sheriff.

[5] By 23 & 24 Vic. c. 38, s. 4, these writs, to affect a purchaser as to judgments entered up after 23d July, 1860, must be registered and enforced within three months from the time it was registered.

[6] In fixed and stated judgments, the law

EXECUTORS and **ADMINISTRATORS.**[1] *See* also Administration, vol. i. p. 162.

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makes no distinction between a peer and a commoner. *See* 2 Hawk. P. C. c. 48, s. 2. The court may command execution to be done without any writ. Id. c. 51, s. 3. But it must be executed by a legal officer (Id. s. 6); and pursuant to the judgment, which cannot be altered, even by the Queen, as from beheading to hanging. Hale, P. C. 412. But the queen may pardon or alleviate, but cannot extend the punishment beyond the intention of the law. Fort. C. L. 269. If the judgment of the law be death, it is clear that, if a man be hanged, and come to life when cut down, he must be hung up again. *See* 2 Hawk. P. C. c. 51, s. 7.

[1] As to grant of administration, see *ante*, Administration, vol. i. p. 162. As to the grant of probate, see *post*, Probate. As to executors generally, *see* Mr. Justice Williams' valuable Treatise; Toller; Wentworth.

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I. Who may be Executors.[1]

II. Appointment of Executors.

(A) *Nature of Appointment.*[2]

(B) *Effect of Appointment.*

(*a*) *In General.*[3]

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[1] A foreigner may be an executor. 3 Bac. Ab. 6; 6 T. R. 23, 35; 28 L. J. Prob. 43. But alienage with relation to a hostile country, accompanied with residence abroad, or residence here without the Queen's permission, either express or implied, creates a disability. Ld. Raym. 282; 2 Stra. 1082; 6 T. R. 23, 35. *See* Aliens, vol. i. p. 293; 1 Wms. Ex. 126.

A child *en ventre sa mère* may be nominated an executor. Swinb. p. i. s. 635. And thus, if the mother be delivered of two or more children at the birth, they shall all be entitled. Godolph. 182; 3 Bac. Abr. 8.

A married woman is capable of the office of executrix, but she cannot act without the consent or concurrence of her husband. 3 Bac. Abr. 9; Off. Ex. 283; 2 Bl. Com. 503; Toller's Ex. 31; 1 G. & T. 460; 29 L. J. Prob. 162; 1 B. & P. 1056; *sed vide*, 1 Fonbl. 86. And although she be an infant, if her husband be of age, and assent, he shall prove the execution of the will. Off. Ex. 215.

Idiots, or those whose intellects are destroyed by age, disease, or intemperance, and such persons as, having been born blind and deaf, have always wanted the common inlets of knowledge, are all necessarily incapable of the office. 3 Bac. Abr. 7; Toll. Ex. 12; and *see* 5 Co. 27, a; Moore, 146; 1 Leon. 193; 1 And. 177.

The bankruptcy or insolvency of an executor is no reason for his appointment being negatived. *Hill v. Mills*, 12 Mod. 9; 1 Salk. 36; Comb. 185. *See* 1 Ld. Raym. 361; 1 W. Black. 458.

An infant may be appointed an executor; but, although nominated, he is, by the 38 Geo. 3, c. 87, s. 6, disqualified from acting in the executorship till he attains the full age of twenty-one years; and an administrator is substituted to act for him in the interval. *See* vol. i. p. 176. Before the passing of this act, the law deemed him capable of executing the trust at the age of seventeen. Off. Ex. 214; 11 Vin. Abr. 99; 5 Co. 29; Toll. Ex. 34. *Quære*, whether, where a person is joint-executor with a person of full age he may still act, when he arrives at the age of seventeen, inasmuch as he is not left to act according to his own discretion, which is evidently the intention of the statute to avoid? *See* vol. i. p. 176; 1 Wms. Ex. 128.

The king, it seems, may be appointed an executor; but in that case he has a right to nominate persons to execute the trust for him. So may a corporation. 1 S. & T. 516; 29 L. J. Prob. 71; 3 Bac. Abr. 5; 11 Vin. Abr. 136.

Persons excommunicated are not incapacitated from being executors (Off. Ex. 16); nor is attainder, outlawry, or conviction of felony a disqualification. 1 Wms. Ex. 130. *Smethurst's case*, Prob. Court, 1861.

[2] An executor may be expressly nominated in the will, or he may be constructively appointed, merely by the testator's recommending or committing to him the charge of those duties which it is the province of an executor to perform. As if a will direct that A. shall have the testator's personal property after his death, and after paying his debts shall dispose of it at his own pleasure; or declare that A. shall have the administration of the testator's goods, this alone constitutes A. an executor according to the tenor. 2 Bl. Com. 583; Off. Ex. 8, 9; 3 Bac. Abr. 27; 11 Vin. Abr. 136; Godolph. 83; Com. Dig. Administration (B.); Cro. Eliz. 48. *Pickering v. Sowers*, Amb. 364; Swinb. p. 4, s. 4. And even a direction to keep accounts *primâ facie* imparts a trust in the executrix. 5 Madd. 56. It is absolute where he is constituted certainly, immediately, and without any restriction in regard to the testator's effects, or limitation in point of time. It may be qualified; as where A. is appointed to be executor at a given period after the testator's death. So, a testator may make A. an executor in respect to his plate and household goods; B. in respect to his cattle; C. as to his leases; and D. in regard to his debts. Off. Ex. 10; 3 Bac. Abr. 28; 11 Vin. Abr. 136; 1 Wms. Ex. 134.

An executor may be appointed solely, or in conjunction with others. In the latter case, they are all considered by the law in the light of an individual person. Off. Ex. 95; 3 Bac. Abr. 30; Toll. Ex. 39.

[3] The effect of an appointment to an executorship is to vest in the executor a temporary and qualified interest in all the testator's personal property. The interest being, however, *en autre doit*, should the executor, for instance, commit a forfeiture, the testator's goods are not liable to be attached. *Smith v. Wheeler*, Price, 10; 1 Vent. 128; 1 Lev. 279; 1 Mod. 38. *Marlow v. Smith*, 2 P. Wms. 200.

Should the executor become insane, his testator's property is not liable to the same restriction as his own: but administration will be granted to a third person. *Hills v. Mills*, 1 Salk. 36; 1 Show. 293; 12 Mod. 9; Comb. 185; 1 Wms. Ex. 133; 27 L. J. Prob. 7.

If tenant for years die, having appointed him who has the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge, for he has the fee in his own right, and the term of years in right of his testator, and subject to his debts and legacies. 2 Bl. Com. 177. So, if he grant all his property, such as be-

(*b*) *When a Debtor or Creditor is Appointed.*[1]

longs to him in the character of executor shall not pass. Off. Ex. 86; Shep. Touch. 94; 2 Roll. Abr. 58, pl. 8. Nor can the testator's goods be taken in execution for the executor's debt, either on a recognisance, judgment, or for his debts of whatever nature (11 Vin. Abr. 272); unless there be sufficient evidence, either direct or presumptive, of the executor's having converted the goods to his own use. 4 T. R. 621. *See post*, div. Actions against Executors and Administrators; subdiv. Execution; or unless he consent to such seizure, and then it does not differ from any other alienation. 4 T. R. 625; Off. Ex.; Coop. Rep. 264; 11 Vin. Abr. 421; Plowd. 525. So, if an executrix marry, all the personal chattels of which she is possessed in her own right are, of course, absolutely vested in the husband; but in respect of the goods of the testator they are not transferred by the marriage. Off. Ex. 87.

Where A. appointed his widow executrix, who continued in possession of his goods during three months after his death, and, at the end of that time married B., and, for half-a-year after the marriage, the goods were treated by them both as the goods of B., it was held, that they might be taken in execution at the suit of B.'s creditor. *Quick v. Staines*, 1 B. & P. 293. *See* 5 C. & P. 31.

A. made a will, and appointed B., C., D., & E. executors; and in case of the death of B., F. to be executor in his place. B., C., D., & E. proved the will; B. & C. died; F. applied to have a double probate granted to him; D. & E. opposed such grant. The judge ordinary held that F. was entitled to the grant, and that the casualty was not restricted to the death of B. in A.'s lifetime. *In the Goods of H. Johnson*, 1 Sw. & Tr. 17.

Generally, the nomination of executors in a testamentary paper purporting to dispose of real property only, entitles the document to probate; but where a married woman, in execution of a power, devises real estate, only, and names executors "of this my will," she, if she survives her husband, without altering, revoking, or republishing such will, is intestate as regards any property not specifically mentioned therein, and such executors take nothing *jure representationis*. The next of kin is entitled to administration of the personal estate, on oath that the deceased died intestate except as to real estate. *O'Dwyer v. Geare*, 1 Sw. and Tr. 465.

[1] When an obligee makes the obligor his executor, who administers, the bond debt is extinguished; and this is not varied by the executor's dying without having proved the will. *Wangford v. Wangford*, 11 Mod. 38; 1 Salk. 299. Or, even by the refusal to act with his co-executors, unless he formally surrendered the office in the spiritual court. Such a renunciation, indeed, shall prevent the release of his debt, for he could no more be compelled to accept a release than a demand of payment. *See* 1 Salk. 307, 308. But the effect is different where the debt is merely suspended by the act of law. *Lockier v. Smith*, Sid. 79. And if the executrix of an obligee marry the obligor, such marriage is no release of the debt. Leon. 320; Moore, 236; Salk. 306. It seems, also, that the naming of a debtor executor *durante minoritate* is no discharge of the debt, since he is only executor in trust for the infant till he comes of age. 11 Vin. Abr. 400; Ld. Raym. 605.

A debtor, by making his creditor his executor, the action for the debt is not released unless the creditor thinks fit to act and to take upon himself the burden of the administration of the estate; and if he does act, the right of action for his debt is not discharged, unless he has legal assets in his hands sufficient to satisfy the debt, in which case he may pay himself out of such assets (*Lowe v. Peskett*, 16 C. B. 511; 24 L. J. C. P. 196), without reference to the Statute of Limitations. *Hill v. Walker*, 32 L. T. R. 71.

If a debtor make his creditor and another his executors, the creditor may sue the other for his demand, unless he has accepted the executorship. *Rawlinson v. Shaw*, 3 T. R. 557. So, if a bond is given to a *feme covert*, it is not discharged by her husband making the obligor his executor. *Checkley v. Checkley*, 2 Show. 247. So, if the executor of an obligee makes the obligor his executor, this is no extinguishment of the debt. *Gage v. Acton*, Freem. R. 513; Com. 67; Carth. 511; 1 Salk. 325; 12 Mod. 288. And the grant of administration to a debtor in execution at the suit of the intestate, is equally inefficacious in obliterating the demand. *Joan Bailey's case*, 2 Mod. 315.

If several executors be bound jointly and severally, and the obligee constitute one of them his executor, it is an extinguishment of the debt at law, and the executor is incapable of suing the obligor. Off. Ex. 31; 11 Vin. Abr. 398.

As against the testator's creditors, equity will never permit him, by constituting his debtor executor, to disappoint them. It were highly unreasonable that the claims of creditors should be defeated by a release which was absolutely voluntary. Salk. 302, 306; Off. Ex. 31; 2 Bl. Com. 512; Plowd. 186; Shep. Touchs. 497, 498; 13 Ves. 264. In respect to legatees, equity will, generally speaking, allow the appointment of a debtor executor to operate as a discharge of his debt; for the debt is considered in the light of a specific bequest or legacy to the debtor for the purpose of discharging the debt, and, therefore, though, like all other legacies, it shall not be paid or retained till the debts are satisfied, yet the executor has a right to it exclusive of the other legatees. 2 Bl. Com. 512; Harg. Co. Litt. 264 b. note. But this rule, with reference to legatees, is subject to a great variety of exceptions. In equity such debt shall not be released, even as against

III. Renouncing Probate.

(A) *Executor may Renounce Probate, and thereupon his Rights in respect of the Executorship wholly cease.*

Executor may renounce probate, and thereupon his rights in respect of the executorship wholly cease.[1]

20 & 21 Vic. c. 77, s. 79. "Where any person, after the commencement of this act, renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator, and the administration of his effects, shall and may, without any further renunciation, go, devolve, and be committed, in like manner as if such person had not been appointed executor."

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legatees, if the presumption arising from the appointment of a debtor to the executorship be contradicted by the express terms of the will, or by strong inference from its contents. But the case of an administrator is different, for he is not appointed by the deceased; and therefore it would be very unjust if it were in the power of the ordinary to release any debt due to the estate, by committing administration to the debtor.

Where the holder of a promissory note appointed the maker his executor, it was held to be extinct as a debt at law. *Freakley v. Fox*, 9 B. & C. 130. *See* 16 C. B. 511; 24 L. J. C. P. 196.

[1] An executor may in all cases renounce the office, unless he has intermeddled with the estate of the deceased; and the executor of an executor may even prove as to his testator, and renounce as to the first testator. *Wangford v. Wangford*, 11 Mod. 38; 1 Salk. 299. It has been doubted whether an executor can refuse the office after taking goods of testator *custodiæ causa*. *Parsons v. Mayesden*, Freem. Rep. 150; 1 Mod. 213; 1 Wms. Ex. 149, n.

All such acts as indicate an acceptance of the executorship amount to an administration, by which an executor may be compelled to act (3 Bac. Abr. 44; Roll. Abr. 917; 11 Vin. Abr. 205); therefore, any acts connected with the trusts of the will, other than locking up the effects, burying the deceased in a manner suitable to the estate which is left, and defraying the expense of it one's self, or out of the deceased's effects, making an inventory of his property, advancing money to pay his debts or legacies, feeding his cattle, repairing his houses, providing necessaries for his children; these, being offices merely of kindness and charity, do not render a person liable to be compelled to undertake the office. 3 Bac. Abr. 22; Godolph, 93, 94; Off. Ex. 174; Swinb. 6, s. 22, n. 2; 2 Bl. Com. 507; 11 Vin. Abr. 207.

If an executor of an executor intermeddle in the administration of the effects of the first testator, he cannot refuse the administration of the effects of the latter; but he may take upon himself the latter and refuse the former (Shep. Touch. 464), for this obvious reason, that if he administers to the first testator, he can only do so in the character of executor of his executor, and thereby he determines his election to act for the latter.

If he appear and take the usual oath before the registrar, he has made his election, and cannot afterwards divest himself of the office, but may be compelled to perform it. Swinb. 6, s. 12; 3 Bac. Abr. 42, 43; Off. Ex. 39.

If a party renounce in person, he takes an oath that he has not intermeddled in the effects of the deceased, and will not intermeddle therein with any view of defrauding the creditors; but he may renounce by proxy, and then the oath is dispensed with. Off. Ex. 38; 4 Burn's Ec. L. 198; Swinb. 6, s. 12; Roll. Abr. 907.

If an executor refuse to take the usual oath, or, being a Quaker, to make the affirmation, this amounts to a refusal of the office, and shall be recorded. 4 Burn's Ec. L. 213. *Rex v. Ranes*, Ld. Raym. 363.

If an executor be cited to accept or refuse the executorship, and doth not appear on the citation, the court may grant administration, &c., which shall be good in law till such executor hath proved the will. 1 Leon. 154; Cro. Eliz. 858. And, after a refusal and administration granted, the party is incapable of assuming the executorship during the lifetime of such administrator, but after his death might have retracted his renunciation, however formally made: but if administration be committed, in consequence merely of his failure to appear to the above-mentioned process, he has a right at any future time, even in the administrator's lifetime, to come in and prove the will. Off. Ex. 39; Com. Dig. Administrator, B. 4; 1 Wms. Ex. 168.

Before the 20 & 21 Vic. c. 77, s. 79, *supra*, where there were several executors, and there was a renunciation by one or more, and the others prove the will, the renunciation was not peremptory; and, therefore, such as refused might, at any subsequent time, come in and administer during the life or after the death of their co-executors, and were preferred before any executor appointed by them (5 Co. 28; 9 id. 36, b. *Anon.* Dyer, 160. *House v. Lord Petre*, 1 Salk. 311. *Mead v. Lord Orrery*, 3 Atk. 239. *Robinson v. Pett*, 3 P. Wms. 251. *Rex v. Simpson*, 3 Burr. 1463; S. C. 1 Bl. Rep. 256; 11 Vin. Abr. 55, 66); and if administration be granted before a refusal by the surviving executor, such administration will be void.

If there are many executors of a will, and only one of them proves the will, and takes upon himself the executorship, it is sufficient for all of them, and the rest may afterwards join with him, and intermeddle

IV. Relative to the Funeral.[1]

V. Of the Interest of an Executor or Administrator in the Property,[2] and of what are Assets.

with the testator's estate; but if all of them refuse the executorship, none of them will afterwards be admitted to prove the will before the ordinary during the life of the administrator, to whom, in this case, administration is granted with the will annexed. 9 Rep. 37; 1 id. 113; Perk. 485.

If there be several executors, they must all duly renounce before administration with the will annexed can be granted. Roll. Abr. 907.

The above acts of administration are in general similar to those which, in the Roman law, amounted to a *gestio pro hærede*, and implied an irrevocable engagement on the part of the heir to accept the succession. Dig. lib. 92, tit. 2; Domat's Civil Law, p. 2, b. 1. tit. 3, s. 1; Godolph. O. L. 100. The doctrine, however, in that law appears to have applied only to acts of intermeddling by persons who were otherwise entitled to succeed; and with this limitation it still prevails in Scotland in the succession to heritable rights. Ersk. Inst. b. 3, t. 8, s. 38, and t. 9, s. 25; Mackensie's Inst. 207. With respect to movables, the law of that country, as with us, extends the rule to the case of vicious intromission by strangers, having for its object the security of creditors, and protecting, by its penal consequences, a species of property naturally more exposed to fraudulent appropriation by strangers than heritable estates. Ersk. b. 3, t. 9, s. 25; Mackensie, 222. But an intromission *custodie causa* will not render the party chargeable agreeably to the civil law. Ersk. b. 3, t. 9, s. 26; Dig. lib. 29, t. 1, 20, s. 1. By the modern practice of the Scotch courts, the small value of the thing meddled with excuses the intromitter (Ersk. b. 3, t. 9, s. 26), although it was formerly otherwise. Mackensie, 232.

In England, smallness of value is no defence at law.

The refusal must be unqualified. An executor cannot, in part, refuse; he must refuse entirely, or not at all. 11 Vin. Abr. 139; Brownl. 82; 1 Salk. 297.

It has been seen (*ante*, p. 364) that after administration with the will annexed has been granted, in consequence of an executor renouncing his right to the probate, or neglecting to appear, or being duly cited to accept or refuse the same, the executor cannot retract his refusal during the lifetime of the administrator; but before 20 & 21 Vic. he might have done so after the grant had ceased by the administrator's death. 1 G. & T. 515.

[1] The executor is bound to see that the deceased is decently interred; and the law will imply a promise on his part to satisfy the demand of a person who, upon his neglect, has undertaken the funeral. *Tugwell v. Hayman*, 3 Camp. 298.

The friends of the deceased may, however, relieve the executor from this part of his duty, which any person may do without making himself liable to be charged as an executor *de son tort*. Toll. Ex. 245. *Mr. Justice Blackstone* says he must bury the deceased in a manner suitable to the estate which he leaves behind him.

Necessary funeral expenses are allowed previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of devastavit or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased. 2 Bl. Com. 507; Salk. 196; Godolph. p. 2, c. 26, s. 2.

In strictness, no funeral expenses are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees, but not for pall ornaments. *Per Holt*, 1 Salk. 296.

If there are assets, the allowance shall be according to the estate and degree of the deceased. *Edwards v. Edwards*, 2 C. & M. 612; 4 Tyr. 38. In *Stagg v. Punter*, 3 Atk. 119, the testator having desired to be buried at a church thirty miles distant, and it not being clear that there would be a deficiency, *Lord Hardwicke, C.J.*, allowed 60*l.* for funeral expenses. So in *Offley v. Offley*, Prec. Ch. 26, 600*l.* were allowed, in respect of the testator's quality, and his having been buried in his own country. 70*l.* has been held to be too large a sum, as against creditors, for a captain in the army. *Hancock v. Podmore*, 1 B. & Ad. 260. In the case of a small tradesman, the court have held 10*l.* to be a reasonable allowance to the executrix, as against a creditor. *Reeves v. Ward*, 2 Bing. N. S. 235; 2 Scott, 390. An executor who promises to pay funeral expenses is liable, although the widow gave the order. *Brice v. Wilson*, 3 Nev. & M. 512. And it is a question for the jury whether an administrator who approves a funeral ordered by a third person is liable. *Lacy v. Walrond*, Bing. N. S. 841. He is liable, when he has assets, for suitable funeral expenses, though ordered by a third party. *Rogers v. Price*, 3 Y. & J. 28. *Tugwell v. Hayman*, 3 Camp. 298; 2 Wms. Ex. 701.

A demand for mourning furnished to the widow and family of a deceased person is not a "funeral expense," and cannot be claimed against the estate by the executor. *Johnson v. Baker*, 2 C. & P. 207. In *Pitt v. Pitt*, 2 Ca. Temp. Lee, 508, a widow was allowed for her mourning in her account as administratrix in the spiritual court.

[2] The interest of an executor or administrator in the property of the deceased is, in all respects, the same. So, also, an executor of an executor, in however remote a series, has the same interest in the goods of the first testator as the first and immediate executor. Com. Dig. Administrator, G.; Off. Ex. 259; 11 Vin. Abr. 24; 4 Burn's Ec. Law,

(A) *Property in Possession of Deceased.*

(*a*) *Chattels Real.*[1]

273; Shep. Touch. 464. An administrator *de bonis non* has also the same interest in such of the effects as remain unadministered as was vested in the executor, or antecedent administrator. Toll. Ex. 242.

The property of a deceased person vests in his executors from the time of his death; in an administrator, from the time of the grant of letters of administration. *Wooley v. Clark*, 5 B. & A. 744; 1 D. & R. 409.

[1] Chattels real are such as concern or savour of the realty, as interests for years in houses or lands, advowsons, commons, fairs, corodies, and the like; mortgages; the next presentation to a church; estates by statute-merchant, statute-staple, or *elegit*; and a plantation; for, though it is an estate of inheritance, yet, being in a foreign country, it is called a chattel in the hands of executors to pay debts.

An estate *pur autre vie*, if there is no special occupant, is assets. *Oldham v. Pickering*, 2 Salk. 464; Carth. 376.

A lease for years, determinable on lives, is a chattel interest, and shall vest in the executor or administrator of such lessee. Off. Ex. 54. If an estate be granted to A. for so long a time as B. shall live, but not granted to his heirs, and A. die in the lifetime of B., the heir not being named in the grant, the executor or administrator is entitled to the estate by the statute 29 Car. 2, c. 3. In case of a tenancy from year to year, as long as both parties please, if the tenant die intestate, the same interest shall devolve on his administrator. *Doe d. Shore v. Porter*, 3 T. R. 13. *See* also *Gulliver d. Tasker v. Burr*, 1 Black. Rep. 596. *Rex v. Willet*, 6 T. R. 295. *James v. Dean*, 11 Ves. jun. 383; 13 id. 236. A reversion of a term is vested in the executor immediately on the testator's death, as also in the administrator on the taking out letters of administration, and shall be assets in their hands for its utmost value. 11 Vin. Abr. 240. *Prattle v. King*, 2 Jo. 170. If the testator die in possession of a term of years it shall vest in his executor, and although it be worth nothing, he cannot waive it; for he must renounce the executorship altogether, or not at all. Com. Dig. Administrator, b. 4, 10; 1 Sid. 266. *Fooler v. Cooke*, 1 Salk. 297. *Helier v. Casebert*, 1 Lev. 127. *Bolton v. Cannon*, 1 Vent. 271. But this is to be understood only where the executor has assets, for he may relinquish the lease if the property be insufficient to pay the rent; yet, in case there is enough to bear the loss for some years, though not during the whole term, the executor is bound to continue tenant till the fund is exhausted, when, on giving notice to the landlord, he may waive the possession. Off. Ex. 120. To conclude the executor's interest in chattels real, it may be observed, that where such chattels concern corporeal hereditaments, as leases for years of houses or lands, the executor is not deemed to be in possession of them till he has actually entered; but in regard to such chattels as relate to incorporeal hereditaments, as leases of tithes, the possession of the executor is necessarily constructive, because, on them there can be no entry: at the instant, therefore, that the tithes are set out in a place, however remote, he shall be possessed of them in contemplation of law. Off. Ex. 120.

In order to give a more clear and definite idea of the executor's interest in the property of the deceased, let us take a short view of those cases where the chattel interest shall go to the heir in preference to the executor. The principle which generally pervades the cases in which the heir, as distinguished from the executor, shall be entitled to the chattels is this, that they are so annexed to and consolidated with the inheritance that they shall accompany it wherever it vests. 2 Bl. Com. 427, 428.

If A., seised in fee, grant an estate in tail, or a lease for life or years, reserving rent, such rent as accrues after his death, being incident to the reversion, shall go to his heirs, and not to his executors, although they are expressly named in the covenant. 3 Bac. Abr. 62; Harg. Co. Litt. 47. In case the lease reserve the rent at Michaelmas, or ten days after, if the rent be not paid at Michaelmas, and before the ten days are expired, the landlord die, his heir, and not his executor, shall receive the rent, because it was not legally due before the end of the ten days, and therefore no chattel. Hargrave, Co. Litt. 47, n. 9. *Drake v. Munday*, Cro. Car. 207. So, if the landlord die on the day on which the rent is payable, after sunset and before midnight, the heir, and not the executor, may demand the rent; for it is not, in strictness, due till the last minute of the natural day, and the executor is only entitled to such rent as was actually due to his testator at the time of his death. 3 Bac. Abr. 63; Harg. Co. Litt. 202, n. 1. *Duppa v. Mayo*, 1 Saund. 287. *Lord Rockingham v. Oxenden*, 2 Salk. 578; and *see* 1 P. Wms. 177: but *see* 4 & 5 Wm. 4, c. 22, s. 2, as to apportionment. All rents, &c. coming due at fixed periods after 1834 are to be apportioned. *See* Rents.

A lease which had belonged to a testator will be received as assets, although in the hands of a third person claiming a right of lien. *Vincent v. Sharp*, 2 Stark. 507.

If an estate for another's life be limited to testator, his heirs, executors, administrators, and assigns, and be not devised, it shall descend to the heir, and not to the executor. *Atkinson v. Baker*, 4 T. R. 229. Money covenanted to be laid out in the purchase of land shall descend to the heir. Toll. Ex. 7. If the parson of a church be seised of the advowson in fee, and die, in such case

(*b*) *Chattels Personal.*[1]

the heir, and not the executor, shall present; because, at the same time the avoidance vests in the executor, the inheritance descends to the heir: and where two titles concur in an instant of time, the elder shall be preferred. 11 Vin. Abr. 169; 3 Bac. Abr. 61. *Holt v. Bishop of Winchester*, 3 Lev. 47; 3 Salk. 280.

If the owner of an estate *pur autre vie*, which has been granted to him, his heirs and assigns, bequeath the estate to A. and his assigns, and die intestate in the lifetime of *cestui que vie*, the premises will pass to A.'s personal representative under the statute, and not to his heir-at-law. *Doe v. Lewis*, 9 Mee. & W. 662.

[1] The executor is entitled to all *chattels animate;* these are, all birds, beasts, and fishes, whether they be tame or wild, provided they were in the testator's possession at his decease; that is, so confined that they could not escape. 2 Bl. Com. 390, 391; Com. Dig. Biens, a. 2. An executor shall likewise be entitled to deer in a park, hares or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, fish in a private pond, and bees in a beehive, if the testator were lessee for years of the premises to which they belong. Off. Ex. 53. But the heir has a qualified possessory property in deer in a park, hares or rabbits in a warren, doves in a dove-house, pheasants and partridges in a mew, swans, though unmarked, in a private moat or pond, or kept in water within a manor, or at large, if marked; and in bees in a hive, or (as it has been held by some authorities) though not in a hive, in respect of his ownership in the soil. He is also entitled to fish in a private pond or piscary.

These various animals shall all go with the inheritance, for without them it is incomplete. Harg. Co. Litt. 8; Com. Dig. Biens, b; 1 Roll. Abr. 916; Off. Ex. 53; 11 Vin. Abr. 166; 2 Burn. Inst. 369; 7 Co. 15, b; 3 Bac. Abr. 64; 2 Bl. Com. 427; Harg. Co. Litt. 8, n. 10.

Chattels vegetable are fruit or other parts of a plant or tree when severed from the body of it; or the whole plant or tree itself when severed from the ground, as apples or pears which are gathered or fallen, grass which is cut, and trees or their branches which are felled or lopped (2 Bl. Com. 389; Off. Ex. 59), and all those vegetables and plants that are raised annually by labour and manurance, and styled emblements, which includes corn growing, hops, saffron, hemp, flax, clover, saintfoin, and every other yearly production in which art and industry must combine with nature, whether in the ground or severed at the death of the testator. 2 Bl. Com. 122. *Termes de la Ley*, Embl.; Off. Ex. 59; 4 Burn's Ec. Law, 255; Com. Dig. Biens, G. 1; Harg. Co. Litt. 55, b. *Anon.* 2 Freem. 210. *Cox v. Godslave*, 6 East, 604, n. Manure in a heap, before it is spread on the land, is also a personal chattel. 11 Vin. Abr. 175; Sty. 66. But with regard to chattels personal and vegetable, trees of every description belonging to the soil, unless severed during the life of the testator, and likewise all species of fruits hanging on the tree at the time of the ancestor's death, also grass growing, though ready to be cut for hay, shall descend to the heir, all which, if they had been served, we have just seen, would belong to the executor. Com. Dig. Biens, H. 3; Bac. Abr. 64; Off. Ex. 59; Swinb. 934, p. 7, s. 10.

Chattels inanimate.—Under this head are classed household goods, merchandise, money, stock, pictures, jewels, garments; in short, everything not included in the former classes that can properly be put in motion, and transferred from one place to another. 2 Bl. Com. 387, 389; Off. Ex. 57.

The next advowson, before it becomes void, is a chattel real; but after an avoidance, it is a chattel personal. 11 Vin. Abr. 173; Off. Ex. 54, 73.

The executor has also an interest in the person of a debtor in execution at the testator's suit, and without the executor's assent the party cannot be discharged. This interest is in the nature of a personal chattel, inasmuch as the debtor is merely a pledge to secure the debt. 3 Bac. Abr. 57. Off. Ex. 56. Such deeds and writings as relate to terms of years, or other chattels, or are securities for debts, belong to the executor (3 Bac. Abr. 65; Off. Ex. 63, 73. *Jones v. Jones*, 3 Bro. Ch. Rep. 8; Touchs. 496); and if the testator die after the church becomes void, and before presentation, his executor shall have the benefit of presenting, nor shall it be regarded as assets, as it cannot be sold; but if in that case a stranger present, and procure his clerk to be admitted, damages recovered by the grantee's executor in a *quare impedit* shall be assets. 3 Bac. Abr. 65; Off. Ex. 63, 73. *Jones v. Jones*, 3 Bro. Ch. Rep. 80; Touchs. 496.

Such personal chattels inanimate as go to the heir with the inheritance, and not to the executor, are such things as cannot be taken away without damaging or dismembering the freehold; whatever, therefore, is strongly affixed to the inheritance, and cannot be severed without violence or damage, is a member of the same, and shall pass to the heir, as chimneypieces, pumps, tables, and benches, which have been long fixed. 2 Bl. Com. 427,428. *Lord Petre v. Heneage*, 12 Mod. 520. The law is the same in regard to coppers, leads, pales, posts, rails, window-shutters, windows, whether of glass or otherwise; wainscots, doors, locks, keys, millstones fixed to a mill, anvils, and the like; they are annexed to the freehold, and are held to form part of it (Burn's Ec. Law, 256; 3 Bac. Abr. 63; Off. Ex. 62; 4 Co. Litt. 63, 64; Swinb. p. 6, s. 7); although pictures and looking-glasses generally go to the executor as personal chattels, yet, if put up instead of wainscot, it seems they shall be-

(B) *Property not in Possession of Deceased.*[1]

long to the heir: he has a right to the house entire and undefaced (L. of Test. 380, 381. *Cave v. Cave*, 2 Vern. 508); but where the testator has annexed any chattel to the house for the purposes of his trade or profession, he or his executor may disunite it, during the continuance of his interest, if he can do it without injury to the fabric of the house, or the soil of the freehold. 3 Bac. Abr. 63, n. *Lord Dudley v. Lord Warde*, Ambl. 113. *Harvey v. Harvey*, 2 Stra. 1141. Thus, modern tables, though fastened to the floor, grates, iron ovens, jacks, clock-cases, in whatever mode annexed. 4 Burn's Ec. Law, 257. It has been said that pictures go to the executor, but ancient portraits of former owners of the mansion, though not fastened to the walls, are excepted, as they go with the mansion. 2 Bl. Com. 429; Harg. Co. Litt. 18, b. *See post*, Fixtures.

A devisee of the lands is entitled to all those chattel interests which have been stated to belong to the heir (2 Bl. Com. 428), and, in one respect, he has an advantage to which the executor is not entitled. Such devisee shall have the emblements, and not the executor of the devisor. Toll. Ex. 202. But a devisee of the goods, stocks, and movables, is, it seems, entitled to growing corn, in preference both to the devisee of the land and executor. Winch. 51. *Cox v. Godslave*, Holt's MSS. 157; L. of N. P. 34; Swinb. 933, 934, p. 7, s. 10.

If an executor take a bond from a debtor, it will be considered as assets, although the obligor be extremely poor. *Anon.* 12 Mod. 346. The produce from the sale of a trade and good-will of a public-house is in the hands of an administrator of assets. *Worral v. Hand*, Peake, 74. Where a debtor pays the testator's debt to A., with the consent of the executor, it is assets. *Jenkins v. Plume*, 1 Salk. 207. So, if an administrator recover in trover the goods of the intestate, they are assets, though the action be brought in his own name. *Turner v. Davies*, 1 Mod. 62. But if an executor receive money from a trust bond, it is not assets. *Nicols v. Bridebridge*, 12 Mod. 381. And if an obligee assigns, and covenants not to revoke the assignment, and dies, the bond is not assets in the hands of his executor. *Deering v. Torrington*, 1 Salk. 79. So, if the executor of lessee for years enter no part of the profits but what is above the rent and repairs, it is assets. *Buckley v. Pirk*, 1 Salk. 317; 10 Mod. 12.

In contemplation of law, a complete unity of person subsists between the husband and wife. As long as the relation continues, they are regarded as one individual. On this principle, whatever property belonged to her sole, is vested in the husband by the marriage. 2 Bl. Com. 443; Com. Dig. Baron and Feme, d. 1. If the husband dispose not of the chattels real of his wife in his lifetime, and die before her, they shall not pass by his will, nor shall they go to his executor; for not having altered the property in his lifetime, they were never transferred from the wife, but after his death she shall remain in her former possession. 2 Bl. Com. 434; Plowd. 418. So, if the husband and wife grant a lease to the wife's property, and she assent after the death of her husband, she shall have the arrears incurred in his lifetime (1 Roll. Abr. 350. *Dembyn v. Brown*, Moore, 887); or if the husband be entitled to an advowson in right of his wife, and after an avoidance, but before presentation, die, his wife, and not his executor, shall present. Com. Dig. Baron and Feme, E. 3; Co. Litt. 351. Chattels personal, or choses in action, as debts on bond, simple contracts, and the like, do not vest in the husband until he receives or recovers them at law, and then at his death will go to his executor, and shall not revert to his wife (2 Bl. Com. 434: Harg. Co. Litt. 351); but in equity it is held that a settlement before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband dying in her lifetime to her choses in action.

The wife also is entitled to what is called her paraphernalia (2 Bl. Com. 435; 3 Bac. Abr. 66; Off. Ex. Suppl. 61, 62; 11 Vin. Abr. 178), which term includes her bed and necessary apparel, and also such ornaments of her person as are agreeable to the rank and quality of the husband (Com. Dig. Baron and Feme, F. 3; 1 Roll. Abr. 911; Swinb. p. 6, s. 7), pearls and jewels of all kinds (*Graham v. Lord Londonderry*, 3 Atk. 394), that may be in her possession at the death of husband. The wife is to be preferred as to such ornaments to all legatees; but such ornaments are subject to the husband's debts on a deficiency of assets. 2 P. Wms. 80, n. 1. *Tipping v. Tipping*, 1 id. 729. *Lord Townsend v. Windham*, 2 Ves. 7. *Snelson v. Corbet*, 3 Atk. 369. *Tynt v. Tynt*, 2 P. Wms. 542.

[1] Under this class range things in action, as well those where the cause of action accrued in the testator's lifetime as those where it accrued after his death. The executor is entitled to the testator's debts of every description, either debts of record, as judgment, statutes and recognisances, or debts due on special contract, as for rent; or on bonds, covenants, and the like under seal; or debts on simple contract in notes unsealed, and promises not in writing, either express or implied, and all such debts, when received by the executor, shall be assets. Toll. Ex. 157.

So, where the cause of action accrues after deceased's death, the executor is equally entitled to the debt as damages; therefore, if A. contract to deliver certain goods to B. on a certain day, and they are not delivered in the lifetime of B., but after his death to his executor, he shall be possessed of them in that character, and they shall be assessed in his hands; or, in case

(C) *As to the Interests Vested in him by Condition, Remainder, Limitation, or Election.*[1]

(D) *As to the Transmissible Nature of the Interest.*[2]

the contract had not been performed, damages recovered for the non-performance would have been so considered. Off. Ex. 82. So, if A. covenant with B. to grant him a lease of certain land by a certain day, and B. die before the day, and before the grant of the lease, A. is bound to grant it to the executor of B., and it shall be vested in him as executor, and consequently be assets. Off. Ex. 82; 11 Vin. Abr. 231; B. N. P. 158. Or, if A. refuses to grant the lease, he is liable to make a compensation to the executor of B. in damages, which shall also be assets. Plowd. 286.

So, where a father possessed of a term for years held of the church, renewable every seven years, assigned the lease to his son in trust for himself for life; remainder in trust for the son, his executors, administrators, and assigns; and the father covenanted to renew the lease every seven years as long as he should live. The son died, and the seven years elapsed, when the executors of the son filed a bill to compel the father to renew the lease at his own expense. It was decreed accordingly. *Husband v. Pollard*, 2 P. Wms. 467. *See* 1 Wms. Ex. 633.

Where the cause of action accrues after the testator's death, the debt and damages shall be assets immediately. 1 Salk. 207; Toll. Ex. 159.

[1] An executor may become entitled in such character to chattels, real or personal, by condition. *See* Off. Ex. 76, 81; 3 Bac. Abr. 58; 2 Fonbl. Eq. 404, n. f. So, chattels which were never vested in the testator in possession, may accrue to an executor by remainder (Off. Ex. 83); or by increase, as the wool of sheep produced after the testator's death, which will be assets. (Id.) An executor may also be entitled in respect of limitation. *See* 1 P. Wms. 563; Fearn's Cont. R. 444; 1 Ves. 236; 2 Atk. 616. And an executor may claim by election, as where the testator at the time of his death was entitled, out of several chattels, to take his own choice of one or more to his own use. *See* Com. Dig. Election, B.; Harg. Co. Litt. 144, 145, b; 1 Roll. Abr. 726.

[2] The executor of an executor represents the first testator. *Hurst v. Smith*, 7 T. R. 182. *Anon.* Freem. R. 49; 2 Lev. 72; 3 Keb. 116.

So, the executor of A.'s executor is, to all intents and purposes, the executor and representative of A. himself. 2 Bl. Com. 506; Com. Dig. Admin. B. 6; 11 Vin. Abr. 63, 90, 107; Off. Ex. Suppl. 140; Plow. 525; Shep. Touch. 484. Such executor, therefore, may transmit that power to another in whom he has equal confidence. And so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator, in however numerous succession. Nor is a new probate of the original will, in any of the subsequent stages, requisite. 1 Salk. 309.

By 25 Edw. 3, stat. 5, c. 5, "executors of executors shall have actions of debts and accounts, and of goods carried away of the first testator, and execution of statute-merchants and recognisances, made in courts of record to first testator, in the same manner as the first testator should have had if he were living; and the executors of executors shall answer to others for as much as they have recovered of the goods of the first testator as the first executors should do if they were living."

But if an executor does not prove a will, his executor is not executor to the first testator, as he would have been in case the will had been proved. But, unless the will be proved by the executors, the Probate Court takes no notice of his executorship, but grants administration *cum testamento annexo* to the next of kin to the first testator. *Wankford v. Wankford*, 1 Salk. 299; 11 Mod. 38. *Gradell v. Tyson*, 2 Stra. 716; 2 Ld. Raym. 1441. Where, therefore, an administrator takes a man in execution, and dies, the administrator *de bonis non*, and not the executor, may discharge him. *Drew v. Bayley*, 2 Lev. 100; 1 Vent. 275; 3 Keb. 298.

A limited probate, taken out of the will of a *feme covert*, will not continue the chain of representation under the general probate of the will of the original testator; but the court will make a supplemental grant, limited to the property which the *feme covert* had as executrix. *Re Goods of R. Bayne*, 1 Sw. & Tr. 132.

In these cases, when the course of representation from executor to executors is interrupted by an intestacy, it becomes necessary that a new administration should be granted of the goods of the deceased, not administered by the former executor or administrator, as the case may be. Such administrator, usually termed an administrator *de bonis non*, is necessary in the following cases:—

Where the executor of the deceased, having proved the will, dies intestate.

Note.—If an executor die before probate (21 & 22 Vic. c. 95, s. 16. *Per Holt, C. J.*, Salk. 305), although he should have administered part of the personal estate of the testator, an immediate administration must be granted.

When an executor named in a will, being cited to take probate, does not appear to such citation. 21 & 22 Vic. c. 95, s. 16.

Where there are several executors, and the surviving executor, having proved the will, dies intestate.

VI. Of the Inventory.[1]

Where an administrator dies before he has administered the whole personal estate of the deceased. *See* Administration, vol. i. pp. 173, 174, 175.

[1] By the 21 Hen. 8, c. 5, an executor is indeed bound by its enactments to make an inventory of the deceased's personal estate and effects, in the presence of at least two of his creditors, or legatees, or next of kin, and in their default or absence, of two other honest persons, and the same shall cause to be indented, of which one part shall be delivered to the ordinary upon oath, and the other part shall remain in the possession of such executor or administrator. And the ordinary shall not, under the penalty of 10*l.*, refuse to take such inventory when so presented to him. 3 Bac. Abr. 45; 4 Burn. Ec. Law, 251. Also, by stat. 22 & 23 Car. 2, c. 10, an administrator must enter into a bond with two or more sureties, conditioned, among other things, for his exhibiting into the registry of the court, at or before a day specified, a true and perfect inventory of the goods, chattels, and credits of the deceased come to his possession. 3 Bac. Abr. 46; 11 Vin. Abr. 358.

An inventory is thus required for the benefit of creditors and legatees, or parties in distribution. 3 Bac. Abr. 45; Swinb. p. 6, s. 6. It must be written or engrossed on paper or parchment, duly stamped. It is to contain a full, true, and perfect description and estimate of all the chattels, real and personal, in possession and in action, to which the executor or administrator is entitled in that character, as distinguished from the heir and the widow of the testator or intestate. It must also distinguish such debts as are likely to be recovered, and those which are doubtful or desperate. 4 Burn. Ec. Law, 454; 3 Bac. Abr. 47; L. of N. P. 140; 2 Wms. Ex. 706.

However, it is not necessary, according to the modern practice, that the appraisement and inventory should be pursuant to the letter of the statute. If the effects appear to have been appraised fairly, and by persons of repute, and reduced into an inventory, such inventory shall obtain credence, unless it be falsified by the adverse party. 4 Burn. Ec. Law, 265, 266; Swinb. p. 6, s. 6; 1 Ought. 344. And the judge has authority to cite or summon either the executor or administrator for such a purpose, not only at the suit of a party, but at his own discretion. Com. Dig. Admin. B. 7; 4 Burn. Ec. Law, 250, 265: but *see Pettit v. Smith*, 5 Mod. 247; 2 Wms. Ex. 712.

But, although such be the legal obligation imposed on an executor or administrator in every case to produce an inventory, yet, the practice of the Spiritual Court on this point was gradually relaxed. At one period, it appears to have been usual for the executor or administrator, before probate or administration, to exhibit an inventory, which was considered as authenticated by the general oath he had taken for the execution of the will or administration of the effects, and for exhibiting a true inventory. Toll. Ex. 249.

According to the later practice neither the executor nor administrator, in general cases, exhibited any inventory, unless he was cited for that purpose in the Spiritual Court, at the suit of a creditor or legatee, or party in distribution, executor, relation, or otherwise, at the discretion of the ordinary; and in that case, the inventory thus exhibited was verified by a special oath, either personally or by virtue of a commission. 4 Burn. Ec. Law, 266.

By rule 40 of the rules of the New Probate Court, in contentious business inventories, and not merely declarations of the personal estate and effects of the deceased, are to be used, unless by order of the judge, and the form of inventory is prescribed in the Sched. of Forms, No. 28, and is as follows:—

"A true, full, and particular inventory of all and singular the personal estate and effects of A. B., late of deceased, which have at any time since the death come to the hands, possession, or knowledge of C. D., the sole executor named in the last will and testament of the said A. B. [*or* administrator, *as the case may be*], made and exhibited upon or by virtue of the corporal oath [*or* solemn affirmation] of the said C. D., as follows, to wit:—

	£	s.	d.
First, this exhibitant saith that the said deceased was at the time of his death possessed of [*The details of the deceased's effects must be here inserted, on as many sheets of paper as may be necessary, and the value inserted opposite to each particular*].			

Lastly, this exhibitant saith that no personal estate or effects of or belonging to the said deceased have at any time since his death come to the hands, possession, or knowledge of this exhibitant, save as is hereinbefore set forth.

(Signed) C. D.

On the day of 18 the said C. D. was duly sworn to [*or* solemnly affirmed] the truth of the above inventory before me.

[*Person authorised to administer oaths under the act.*]

It is the part of a prudent person who sustains this office, in every case to see that the effects are carefully appraised and reduced into an inventory, not only because he may be cited hereafter to produce it, but also because a distinct and accurate knowledge of the fund is necessary to direct him in the safe execution of the trust. Toll. Ex. 251; 2 Wms. Ex. 712.

VII. Of Probate of the Will.

(A) *Acts an Executor may do before Probate.*[1]

On the other hand, the judge will, in special cases, at the instance of a party interested, decree an inventory to be exhibited by the executor or administrator before the issuing of the probate, or letters of administration under seal; and such inventory must be substantiated by a special oath. 4 Burn. Ec. Law, 266; 1 Ought. 314.

From what has been said, it may be collected that formerly an inventory on the oath of the executor or administrator was absolutely necessary within a limited time after the granting the probate or the letters of administration, and that on some particular occasions, even before the probate or the letters of administration; that afterwards the inventory was good without a special oath, it having been considered as sufficiently authenticated by the oath which the executor or administrator is obliged to make before they obtain the probate or letters of administration, in which they swear they will deliver into the registry of the Ecclesiastical Court a free, true, and perfect inventory of all the goods and effects of and belonging to the deceased; and that now, owing to the more relaxed practice of the courts, no inventory whatever is necessary, unless the judge, at his own discretion, or any of the creditors, legatees, or parties in distribution, cite the executor or administrator to bring in an inventory; and even then, in the case of a creditor, legatee, or party in distribution requiring it, it remains in the breast of the judge to say whether the circumstances are such as entitle them to it. But, supposing the executor or administrator be not required to bring an inventory, yet it is absolutely necessary that he should acquaint himself with the value of the deceased's personal property, in order to take the necessary oath as to the extent of such property.

By the custom of London, if any man or woman, free of the city, die, leaving an orphan within age, and not married, the mayor and aldermen may compel the executor or administrator to appear at a court of orphanage, and exhibit an inventory. And in case any debt appear to be outstanding, to give security to the chamberlain to render upon oath a true account of the same when received; and on his refusal, may commit him till compliance. Nor shall his giving any security to the Spiritual Court, as above-mentioned, release him from the obligation of the custom. Com. Dig. Guardian, 1 Roll. Abr. 550; and *see* Toll. Ex. b. iii. c. 1.

[1] Although the executor has not proved the will, yet he is a complete executor to all intents, except bringing of actions; and he may bring actions also, so as he get the probate time enough to produce in evidence. *Per Cur.: Wankford v. Wankford*, 1 Salk. 299; 11 Mod. 38. The probate of a will is a mere ceremony. When possessed, the executor does not derive his title under the probate, but under the will. The probate is only evidence of the right, and is necessary to enable him to sue; but he may release, &c. before probate. *Per Cur.: Smith v. Milles*, 1 T. R. 475. See *Duncombe v. Walter*, 3 Lev. 57; 2 Show. 254.

He may enter peaceably into the house of the heir, and take specialties and other securities for the debts due to the deceased, or remove his goods. He may, at his discretion, sell, give away, or otherwise dispose of the goods and chattels of testator; he may assent to or pay legacies; he may enter on testator's term of years (Off. Ex. 35, 92; 11 Vin. Abr. 203, 204); he may commence actions in right of the testator, as for a trespass committed, or goods taken, or on a contract made in the testator's lifetime (he could not formerly declare before probate): since, in order to assert such claims in a court of justice, he must produce the probate; but when produced, it has relation to the time of suing out the writ. 11 Vin. Abr. 202, *et seq.*; Com. Dig. Admin. b. 9; Off. Ex. 36; 3 Bac. Abr. 53; 9 Co. 36; Harg. Co. Litt. 292, b. So, if in the same right he file a bill in Chancery, a subsequent probate shall be equally available. *Humphreys v. Ingledow*, 1 P. Wms. 752. *Humphreys v. Humphreys*, 3 id. 352. And it seems sufficient if it be obtained any time before the hearing. *Patten, Executrix, v. Panton*, cited 3 Bac. Abr. 53.

An executor may also maintain actions on his own possession, as trespass, detinue, or replevin, for goods or cattle of the testator taken after the testator's death. 11 Vin. Abr. 203; Off. Ex. 36. So, if he be entitled as executor to the next presentation to a living, he or his grantee may maintain a *quare impedit* for it before probate. 3 Bac. Abr. 53; Com. Dig. Pleader, O. 14. So he may maintain actions, such as trespass or trover, for such of the effects as never came into his actual possession taken or converted after the testator's decease (3 Bac. Abr. 53. *Frederick v. Hook*, Carth. 154); so he may sue on contracts either actually made with him subsequent to that event, or arising by legal implication. In all such cases the causes of action arise subsequent to the attaching of the plaintiff's rights, and therefore he need not describe himself as executor (*Smith v. Barrow*, 2 T. R. 477); and consequently no production of probate is requisite.

On the other hand, if he has elected to administer, he may also, before probate, be sued at law or in equity by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom as executor he has made himself responsible. Com. Dig. Admin. b. 9; Plowd. Com. 280,

VIII. Duties of the Executor after Probate.

(A) *Collection of Goods.*[1]

b; 11 Vin. Abr. 205. *Dulwich College v. Johnson*, 2 Vern. 49; Off. Ex. 37.

[1] The executor or administrator is to collect all the goods inventoried; and to that end they have very large powers and interests conferred on them by law, being the representatives of the deceased, and having the same property in his goods as the principal had when living, and the same remedies to recover them. 2 Bl. Com. 510; Harg. Co. Litt. 209. And if there be two or more executors or administrators, a sale or release by any one of them shall be good against all the rest (Dyer, 23; Cro. Eliz. 347; Sid. 33; Brownl. 183), unless such release be obtained by fraud. Cro. Eliz. 318; 2 Leon. 209. Whatever is so recovered that is of a saleable nature, and may be converted into ready money, is called assets in the hands of the executors or administrators; that is, sufficient or enough (from the French word *assez*), to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Jac. *Law Dict.* Executor.

Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him. *See* 6 Rep. 47; Co. Litt. 374.

An executor may, in convenient time after the testator's death, enter into a house descended to the heir for removing and carrying away the goods (*see* Harg. Co. Litt. 56, b), so as the door be open, or the key be in the door; and although the door of the entrance into the hall and parlour be open, he cannot, therefore, justify forcing the door of any chamber to take the goods contained in it, but is empowered only to take those for which he shall find the key. He has also a right to take deeds and other writings relating to the personal estate out of a chest in the house if it be unlocked, or the key be in it; but he has no right to break open even a chest. If he cannot take possession of the effects without force he must desist, and resort to his action. Off. Ex. 92, 93; 11 Vin. Abr. 267; Shep. Touch. 40. On the other hand, if the executor or administrator, on his part, be remiss in removing the goods within a reasonable time, the heir may distrain them as damage feasant. Off. Ex. 93; Plowd. 280, 281; see *Strodden v. Harvey*, Cro. Jac. 204; Harg. Co. Litt. 56, b; 2 Wms. Ex. 664.

He may take the goods and chattels himself, or give power to another to seize them for him. 9 Rep. 38. If an executor with his own goods redeem the goods of the testator, or pay the testator's debts, &c., the goods of the testator shall for so much be changed into the proper goods of the executor. Jenk. Cent. 188. Where a man by will devises that his lands shall be sold for the payment of his debts, his executors shall sell the lands, as they are the persons bound to pay the debts. 2 Leon. c. 276. And if lands are devised to executors to be sold for the payment of the testator's debts, those executors that act in the executorship, or will sell, may do it without the others (Co. Litt. 114); for by stat. 21 Hen. 8, c. 4, it is enacted, that bargains and sales of lands, &c. to be sold by the executors, shall be as good if made by such of the executors only as take upon them the execution of the will as if all the executors had joined in the sale. If lands are thus devised to pay debts, a surviving executor may sell them; but if the devise be, that the executors shall sell the land, and not a devise of the land to them to be sold, here being only an authority, and not an interest, if one die the other cannot sell. *Sed quære?* Jac. *Law Dict.* Executors. The executor has also a right on producing the probate at the Bank, and causing so much of it as relates to the testator's interests in the several stocks to be entered in the proper offices, according to the acts of parliament which regulate this species of property, to have the same transferred from the testator's name into his own, or to such person as he shall appoint, and even in the case of specific bequest of stock the executor is entitled to call upon the Bank for a transfer; and on their refusal they are subject to an action at his suit. *See* stat. 5 Wm. & M. c. 20. *The Bank of England v. Moffatt*, 3 Bro. Ch. Rep. 260; *see* also Dougl. 524. The administrator has the same right on producing the letters of administration. Toll. Ex. 255. The executor or administrator has likewise authority to sell or dispose of the deceased's effects, and convert them into ready money, to answer the purposes of the trust. 2 Bl. Com. 510; 11 Vin. Abr. 270. *Humble v. Bill*, 2 Vern. 445; 1 Bro. P. C. 71. *Paget v. Hoskings*, Gill. Rep. Eq. 113. *Nugent v. Gifford*, 1 Atk. 463. *Whale v. Booth*, 4 T. R. 625. He has power to sell (*Ewer v. Corbet*, 2 P. Wms. 148. *Burting v. Stonard*, id. 150. *Elliott v. Merriman*, 2 Atk. 41. *Jacomb v. Harwood*, 2 Ves. 265); or mortgage terms of years, or assign mortgaged terms (*Nugent v. Gifford, supra. Mead v. Lord Orrery*, 3 Atk. 235; but see *Bonny v. Ridgard*, cited 2 Bro. Ch. Rep. 438); and to dispose of any of the effects, although, as it seems, specifically given by the will (*Ewer v. Corbet, supra. See* 2 Bro. Ch. Rep. 431); and even in satisfaction of his own private debt (*Nugent v. Gifford, supra. Mead v. Lord Orrery, supra. Jacomb v. Harwood, supra. Ewer v. Corbet*, 2 P. Wms. 149, n. 2; 2 Bro. Ch. Rep. 431. He is also empowered to redeem such chattels as the deceased may have left in pledge. Toll. Ex. 256; 2 Wms. Ex. 635.

All special and limited administrators may perform all such acts as cannot be de-

(B) *Disposition of Property.*[1]

By 22 & 23 Vic. c. 35, s. 32, "when a trustee, executor, or administrator, shall not, by some instrument creating his trust, be expressly forbidden to invest any trust-fund on real securities, in any part of the United Kingdom, or in the stock of the Bank of England or Ireland, or in East India stock, it shall be lawful for such trustee, executor, or administrator, to invest such trust-fund on such securities or stock, and he shall not be liable as for a breach of trust: Provided that such investment shall in other respects be reasonable and proper." Power of investment.

(*a*) *Order of Payment of Debts.*

By 17 & 18 Vic. c. 113, s. 1, it is enacted, "that where a mortgagor of land dies without providing by his will for the satisfaction and discharge of the mortgage debt out of his personal estate, the heir or devisee to whom the mort- A mortgage debt in the absence of any direction

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layed without prejudice or danger to the estate. They may sell goods that will otherwise perish, cattle which are fattened, grain, fruit, or any other substance which may be the worse for keeping. 3 Bac. Abr. 13; 11 Vin. Abr. 102, 103; 1 Roll. Abr. 910. *Anon.* 3 Leon. 278; 2 And. 132, pl. 78. *Price v. Simpson*, Cro. Eliz. 718; 5 Co. 9; Godb. 104. They may pay debts which were due from the deceased at the time of his death (Com. Dig. Admin. F. See *Briers v. Goddard*, Hob. 250; 5 Co. 29, b); or, for the payment of them, they may dispose of effects not perishable. 5 Co. 29 b; 2 And. 132, pl. 78. They may also, in such respective characters, receive debts due to the deceased (Com. Dig. Admin. F. See *Anon.* 3 Leon. 403), or may maintain actions for the recovery of the same (*Walker v. Woolaston*, 2 P. Wms. 576; Toll. Ex. 404), for in all these and the like instances the urgency of the case requires them immediately to act.

If the administration be granted generally during infancy, the grantee has authority to make leases of any term vested in the infant executor, which shall be good till he comes of age; and, as it has been also held, till he enter. 6 Co. 67, b; Off. Ex. 215. Such administrator has also, it seems, a right in case the administration were granted with the will annexed to assent to a legacy. Off. Ex. 215; 5 Co. 29, b. But if the administration were granted *ad usum et commodum infantis*, for the use and benefit of the infant, such administrator is incapable of making leases (6 Co. 676; Off. Ex. 215), or of assenting to a legacy. Off. Ex. 215. Nor shall the power of an administrator during infancy, although the grant were general, extend to the prejudice of an infant. Therefore he has no authority to transfer the property by sale, except in cases of necessity, nor to sell leases even for the payment of debts, if there be other property which he may dispose of to more advantage (2 And. 132, pl. 73), nor to assent to a legacy, unless there be assets for its payment (5 Co. 29, b); nor to release a debt without actually receiving it. 1 Roll. Abr. 910, 911. Such acts therefore as are performed by such administrator, to the injury of the infant, shall be altogether ineffectual. Toll. Ex. 406. As to limited grants, *see* 30 L. J. Prob. 86.

In conformity with the doctrine relative to trustees, executors are not, in general, allowed any remuneration for their care and trouble. 1 Ves. & B. 170. An executor, however, appointed in India, being considered as an agent, is, according to the practice there, allowed a commission upon his receipts and payments (4 Ves. 72; 1 Sim. R. 23; and *see* 2 Sim. & Stra. 453); but agents in England appointed executors are not entitled to commission upon remittances from India by the testator not received until after his death. 4 Ves. 596.

Payment to a married woman who is executrix is a discharge of the debt, although her husband refuse to allow her to act, and prevent probate of the will from being granted to her. *Pemberton v. Chapman*, E. B. & E. 1056.

Executors ought not, in their representative character, continue the trade of their testator (*Barker v. Parker*, 1 T. R. 295), even for the benefit of infant children; and if they do so they will incur a personal responsibility. *Wightman v. Townroe*, 1 M. & S. 412. *See* 2 Wms. Ex. 1274; 27 L. J. Ch. 689.

If the trade be beneficial, the profits are applicable to the purposes of the will, and the executor derives no personal benefit from the success of the trade. If the trade prove a losing concern, the executor, on a failure of the assets, will be personally liable to the loss. 2 Wms. Ex. 1275.

[1] The power of an executor to dispose of the property is not affected by the mere filing of a bill in equity to administer the estate. *Bryan v. Clay*, 1 E. & B. 38.

An assignment by an executor of his testator's property for the benefit of the creditors of the testator cannot be set aside in a court of law. *Wolverhampton & Staffordshire Banking Co. v. Marston*, 7 Jur. N. S. 1040; 30 L. J. Ex. 402.

on the subject is primarily payable out of the personal estate.[1]

gaged lands descends, or to whom it has devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of the mortgagor, but the mortgaged lands shall, as between the different persons claiming through the deceased mortgagor, be primarily liable to the payment of the mortgage-debt with which the same shall be charged."[2]

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[1] The heir was not, at common law, responsible upon any simple contract entered into by the ancestor, whether he was or was not named therein, or whether he had or had not assets by descent; but the legislature has, by various statutes, made all the real estate of every debtor assets for the payment of simple contract debts, after debts by specialty have been discharged and satisfied. *Fleming v. Buchanan*, 22 L. J. Ch. 886. *Ex-parte Hamer*, 21 id. 832.

[2] *With respect to the order of payment.*— The executor or administrator must, in the first place, pay all funeral charges, and the expenses of proving the will, or taking out letters of administration. He will then pay the debts to which the estate is liable. Debts due to the Crown, if of record, must first be satisfied. *Attorney-General v. Norstedt*, 3 Price, 97. Therefore, an executor whose testator was indebted by matter of record or specialty to the Crown, may plead to an action brought by a judgment-creditor or any other creditor that the testator died thus indebted to the Crown, and has not left assets more than to satisfy the same, and such plea shall be valid. Off. Ex. 134; Com. Dig. Admin. c. 2; *see* 3 Bac. Abr. 79; Off. Ex. 135.

This prerogative of the Crown does not extend to a debt assigned to the Crown. Com. Dig. Admin. c. 2; 11 Vin. Abr. 301; Lane, 65. So also the arrears of rents due to the Crown, whether it be a fee-farm rent, or a rent reserved upon lease, shall, it seems, be regarded in the light of a debt by simple contract. 3 Bac. Abr. 80; Off. Ex. 135.

Debts secured to the Crown by specialty are of the same degree as those of record. Off. Ex. 134; 33 Hen. 8, c. 39. So, fines and amerciaments in the queen's courts of record are debts of record. 1 Went. Off. Ex. c. 12.

By stat. 33 Hen. 8, c. 39, it is enacted, that "all obligations and specialties for any cause concerning the king shall be taken *dominio regi*, and shall be of the same force and effect as a statute staple."

Next in order of payment are debts declared by statute to have precedence, as money due from the overseers of the poor; executors of an overseer being required by stat. 17 Geo. 2, c. 38, to pay out of his assets all monies due, received by virtue of his office, "before any of his other debts are paid and satisfied." A similar provision is contained in 18 & 19 Vic. c. 63, s. 23, respecting executors of persons intrusted with the monies or effects of friendly societies; and by 3 & 4 Wm. 4, c. 14, s. 28, respecting executors of officers of savings' banks. By 58 Geo. 3, c. 73, s. 1, the regimental debts of officers and soldiers dying in actual service are to be paid in preference to any other debts whatsoever.

Judgments take precedence of recognisances. The reason of this superiority in judgments is, that they are recovered on judicial proceedings, and in regular course of justice, and the records of such judgment are entered on public rolls, and thereby become a public proceeding. But recognisances are entered into by the consent of the parties, and are in the private keeping of the creditor himself. This privilege is not confined to judgments in the courts of Westminster Hall, but extends itself to judgments in all courts of record. Off. Ex. 139; Swinb. p. 6, s. 16; 11 Vin. Abr. 297. *Searl v. Lane*, 2 Vern. 89.

If judgments are kept on foot merely to defraud other creditors, or if there be any defeasance of it in force, such judgments shall not prevail to preclude them from their debts. 3 Bac. Abr. 81; Off. Ex. 137. A judgment in a foreign country is regarded in our courts merely as a debt by simple contract. 11 Vin. Abr. 291; 2 Fonbl. 460. *Dupleix v. Raven*, 2 Vern. 540. *Walker v. Wiffen*, Dougl. 1. Nor are judgments against an executor comprehended within the same class as those which are recovered against the testator. Off. Ex. 138.

Nor is an executor bound to take notice of judgments unless they are registered, that is, abstracted and entered, pursuant to the statute of 1 & 2 Vic.; 2 & 3 Vic. c. 11; 23 & 24 Vic. c. 38, s. 4 (*Bearblock v. Read*, Cro. Eliz. 822; L. of N. P. 142; Yelv. 20); otherwise they are put on a level, and rank with simple contract debts (*Hickey v. Hayter*, Administrator, 6 T. R. 384); and the statute extends to decrees in equity and bankruptcy, and other orders having the operation of a judgment. If the executor have notice of the judgment, although not docketed, he may perhaps be warranted in giving it a preference as a judgment; but if he in that case pay other debts first, he is clearly not liable to a *devastavit: per Lord Kenyon, C. J.*, id. But of such judgments, when docketed, an executor shall be presumed to have a cognisance. 3 Bac. Abr. 83, n. *Littleton v. Hibbins*, Cro. Eliz. 793. See *Harman v. Same*, 3 Mod. 115; 11 Vin. Abr. 274, 291; 5 Jur. N. S. 1046.

Before a writ of *scire facias* was sued out, the executor had it in his election, where there were two judgment creditors, to pay which of them he please first; and if each brought a *scire facias* on his judgment, yet the executor might confess either action at his option, and that although the *scire facias* were brought by the one creditor before the

other. Off. Ex. 138; 11 Vin. Abr. 299, 301; 2 Fonbl. 2d edit. 401.

But where the defendant in an action on simple contract, after an interlocutory judgment, died, and on *scire farias* against his administrator, and writ of inquiry issued, and damages assessed, judgment was entered up against the intestate, the court inclined to the opinion that the judgment pursuant to the stat. 8 & 9 Wm. 3, c. 11, ought to have been entered up, not against the intestate himself, but against the representative; and was, therefore, not pleadable by the administrator to an action brought against him on a bond. 11 Vin. Abr. 279. *Weston v. James*, 1 Salk. 42; Com. Dig. Plead. 2 D. 9. *See* 1 Wms. Ex. 640, 643.

Decrees in courts of equity are equivalent to a judgment at law, and shall stand in the same order of payment. 11 Vin. Abr. 301; 3 Bac. Abr. 81. *Shafto v. Powel*, 3 Lev. 355. *Astley v. Powis*, 1 Ves. 496. *Bligh v. Earl of Darnley*, 2 P. Wms. 621; 3 id. 401, n. F. *Morrice v. Bank of England*, Ca. Temp. Talb. 217. *Peploe v. Swinburn*, Banb. 48; 4 Bro. P. C. 287; 2 Fonbl. 412, n. But it must be observed that, to claim a priority, the decree must be for a sum certain, and not for a sum to be ascertained after taking of an account.

By 1 & 2 Vic. c. 118, s. 18, all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or Court of Review in bankruptcy, or of the Lord Chancellor in lunacy, whereby any sum of money, or any costs, &c., are payable to any person, have effect as judgments of the superior courts of common law. It has been held that an order of the court of a court of equity for the payment of money into the bank, in the name of the accountant-general, to the credit of a cause, is not an order within this section. *Gibbs v. Pike*, 8 Mee. & W. 223. *See* 23 & 24 Vic. c. 33, ss. 4, 5.

A judge's order under the 6 & 7 Vic. c. 73, s. 43, on the taxation of an attorney's bill ordering judgment to be entered up for the amount found by the master's *allocatur*, has the same effect as a rule of court within this section. *Griffiths v. Hughes*, 16 Mee. & W. 809. *See* 23 & 24 Vic. *supra*.

Next in rank to judgments are recognisances and statutes. Off. Ex. 140; 2 Bl. Com. 511; Com. Dig. Admin. C. 2. *Phillips v. Echard*, Cro. Jac. 8, 35. A recognisance is an obligation of record; it may be entered into by the party before a court of record or magistrates duly authorised, conditioned for the performance of a particular act, as to appear at the assizes, to keep the peace, to pay a debt, or the like. A recognisance is, in most respects, like another bond, only it is authenticated by the record of the court, and not by the party's seal (2 Bl. Com. 341); but if it be not enrolled it shall be considered as a bond, and payable accordingly. *Bothomly v. Lord Fairfax*, 1 P. Wms. 334; 2 Vern. 750, S. C.

Of securities by statute there are three species: statutes merchant, statutes staple, and recognisances in the nature of statutes staple; but as they are all fallen into disuse, it will suffice merely to mention them, and not enter into any further explanation, which would be more tedious than useful. Nor are other inferior debts of record to be forgotten; as issues forfeited, fines imposed by the judges at Westminster or at the assizes, by the justices at quarter-sessions, by commissioners of sewers or of bankrupts, or by stewards of leets, and the like; for all these are debts of record, and so payable by the executor (11 Vin. Abr. 278; Off. Ex. 118); all of which, as well as of those by recognisance or statute, he is bound to take notice, at his peril. *Bothomly v. Lord Fairfax*, *see* 2 Vern. 750.

Specialty Debts.—The class of debts next in succession are debts by special contracts; as, for rent, and also on bonds, covenants, and other instruments, under the seal of the party. It makes no difference whether the rent be reserved by lease or by parol; for, in the latter case, the rent equally arises from the profits of the land, and is regarded as a debt by specialty: nor is the nature of the debt changed by the determination of the lease. 3 Bac. Abr. 82, 96. *Newport v. Godfrey*, 3 Lev. 267; S. C. 2 Vent. 184. *Gage v. Acton*, Com. Rep. 67. *Stonehouse v. Ilford*, 145. *Godfrey v. Newport*, Comb. 183; 11 Vin. Abr. 289, n.

The profits of the land are to be applied by the executor, in the first place, to the discharge of the rent, and, if the fund should prove insufficient, the residue of the rent is payable out of the general assets, and stands on the same footing with other debts by specialty.

Debts by bond, and other instruments under the seal of the party, are of the same class with debts for rent (Off. Ex. 146); and an executor is bound to pay a debt on specialty before a debt by simple contract, although the bond be not yet due; for the obligation is a present duty, and the condition is but a defeasance of it. 11 Vin. Abr. 304; Leon. 187. So, the executor must reserve assets for the payment of such bond when it becomes due.

By the custom of London, if a citizen of London die indebted to another citizen by simple contract made within the city, such debt is equal to a debt by specialty. 3 Bac. Abr. 82. *Snelling v. Norton*, Cro. Eliz. 409; Noy. 53; Roll. Abr. 557; 5 Co. 82, b. 83. *Scudamore v. Hearne*, Andrews' Rep. 340.

In the administration of assets, a contingent security—as for example, a bond to save harmless—shall not stand in the way of a debt by simple contract. 11 Vin. Abr. 395. *Lancy v. Fairchild*, 2 Vern. 101. *Hawkins v. Day*, Ambl. 160. And if, subsequently to the payment of the simple contract debt, the contingency should happen, it seems reasonable that evidence of such payment should be admitted on the executor's plea of *plene administravit* to an action by the specialty creditor. 11 Vin. Abr. 307; Allen, 40; *see* also Goldsb. 142. But where

the contingency has taken place, although the debt consequent upon it has not yet been paid, it may be pleaded to an action by a simple contract creditor.

If the liability upon a covenant is contingent, and may or may not come into existence, the executor cannot reserve funds to meet the probable liability; but he must pay the simple contract debts which have actually accrued. *Henderson v. Gilchrist*, 22 L. J. Ch. 970. *See* 22 & 23 Vic. c. 35; *post*, 378.

When a will contains a direction to the executor to pay the testator's debts, and then a devise of real estate to that executor, the real estate so devised is charged with the debts. *Harris v. Watkins*, 28 L. J. Ch. 541. *Wrigley v. Sykes*, 25 id. 458.

A demand arising from a covenant, whether it be for a specific sum, or whether it sound merely in damages (*Plumer v. Marchant*, 3 Burr. 1380. *Freemantle v. Dedire*, 1 P. Wms. 429); such as on the breach of a covenant in a marriage settlement for him and his heirs, that the premises are free from incumbrances, shall rank equally with debts on bond. 3 Bac. Abr. 81; 11 Vin. Abr. 292. Of this class also are debts by mortgage; and, although there be neither bond nor covenant for the payment of the mortgage money, yet it is payable out of the personal assets. 11 Vin. Abr. 276. *Perot v. Austin*, Cro. Eliz. 232; *see* Co. Litt. 386.

The executor of a deceased occupant is by custom bound to satisfy and discharge all the debts, both specialty and simple contract debts, of the deceased before he satisfies claims for dilapidations. *Bryan v. Clay*, 1 E. & B. 38; 22 L. J. Q. B. 23.

Simple Contract Debts.—Last in order of payment are debts on simple contract, as on bills and notes not under seal, and verbal promises (2 Bl. Com. 465, 466, 511; Off. Ex. 155), or such as are implied in law on contracts. Of this nature, debts due to the king shall be satisfied before debts which are due to subjects. 3 Bac. Abr. 80. Also, the wages of domestic servants and of labourers appear, with great reason, entitled to the next preference; but, with the exception of these, the executor has a right, in this species of debts, to prefer in payment whoever he pleases. 2 Bl. Com. 511; 1 Roll. Abr. 927; 11 Vin. Abr. 274; Shep. Epit. 986; Shep. Touch. 478.

A judgment arising on a judgment-debt, not docketed according to the statute, ranks in the administration of assets only as a simple contract debt. *Steele v. Rorke*, 1 B. & P. 307. *Hickey v. Hayter*, 1 Esp. 313; 6 T. R. 384.

Interest.—A judgment-debt carries interest. 1 & 2 Vic. c. 110, s. 17. Debts by specialty are payable with interest. Com. Dig. Chan. 3, s. 1. Interest cannot be recovered on a bond beyond its penalty. *Creuze v. Hunter*, 2 Ves. jun. 168. *Sharp v. Earl of Scarborough*, 3 id. 557. *Knight v. McLean*, 3 Bro. Ch. Rep. 496. *Grosvenor v. Cook*, Dick. Rep. 305; and see *Lord Lonsdale v. Church*, 3 T. R. 388. In respect to interest on simple contract debts, the holder of a bill of exchange or of a promissory note is entitled to recover the money payable upon it with interest. Bayley on Bills, 90, 91. *Blaney v. Hendricks*, 2 Bl. Rep. 761; Barn. 119. *Auriol v. Thomas*, 2 T. R. 52. In some cases from the date of the bill or note (Bayley on Bills, 91), but in general from the time at which it ought to have been regularly paid (*Robinson v. Bland*, 2 Burr. Rep. 1077), together with all incidental expenses occasioned by non-acceptance or non-payment. Bayley on Bills, 91. *Auriol v. Thomas*, 2 T. R. 52. And in all cases interest may be due by express contract, or on a contract to be implied from the course of dealing. If the debt is a sum certain, payable by virtue of some writing, interest may be given by a jury from the date at which the debt is stated to be payable, or if no time is stated, then from the date of a formal demand made in writing, and accompanied with notice to the debtor claiming interest on default of payment. 3 & 4 Wm. 4, c. 42, s. 128. And interest is due on debts not arising under any writing, if a written notice is given that interest will be claimed from the date of the notice. 3 & 4 Wm. 4, c. 42, s. 28. *See post*, Interest.

As to the power to prefer Creditors in an equal degree.—Although in general, on a deficiency of assets, it were a more honourable and conscientious discharge of the executor's duty, as far as he hath the power of deciding, to pay debts of equal degree in equal proportions (3 Bl. Com. 19), yet this election may be controlled by legal or equitable proceedings against him, of which he has due notice. Off. Ex. 145. Thus, if an action be properly commenced against an executor for any specific debt, it must be preferred by him in payment to others of the same class. Nor in that case would he be warranted in making any voluntary payment of such other debts, to defeat the party of his remedy. 11 Vin. Abr. 296; 2 Vern. 300; 2 Fonbl. 412; Com. Dig. Admin. C. 2; 3 Bac. Abr. 83; 2 Ch. Ca. 201; 2 Vern. 62; Off. Ex. 1436; 2 Bl. Com. 512. Yet, although one creditor commence an action, if another creditor in equal degree commence a subsequent action, and first recover judgment, he must be first satisfied. Hence, an executor has it in his election to give a preference by confessing judgment in the action of the one, and pleading such judgment to the action of the other. Off. Ex. 145; 11 Vin. Abr. 296, in note, 302; 1 Lev. 200; 1 P. Wms. 295; Cart. 228; 2 Vern. 300; Swinb. p. 6, s. 16; 2 Fonbl. 411, 412; 5 T. R. 238, 239. But if, for the purpose of favouring the claim of one plaintiff in prejudice to that of another, he plead a matter which he knows to be false, the plea shall not be available, as it shall be if the falsity exist not in his own knowledge, as, if he plead *non est factum testatoris*. 11 Vin. Abr. 296; 2 Ch. Ca. 201; 2 Vern. 62. And even after an interlocutory judgment, and before the execution of a writ of inquiry of damages, he may confess a judgment in an

(1) *Retainer of Debt due to Himself.*[1]

action for a debt in equal degree (2 Atk. 386); for he is in no case bound, against his will, to defend a suit, and expend the assets in costs, where the case is clear. Off. Ex. 145.

According to several adjudged cases (2 Fonbl. 412, note S.; Prec. Chan. 79; id. 182; 1 Vern. 369; 3 Bac. Abr. 81), the filing of a bill in equity shall equally prevent the alienation of assets, as the issuing of a writ at law; and, therefore, if a suit in Chancery be instituted by a creditor against an executor, he cannot justify a voluntary payment of another creditor of the same order. But a decision to that effect was reversed in the House of Lords, principally on the ground that a decree cannot be pleaded at law to an action brought against an executor on another debt of equal rank. However, it is now settled, that though a decree in equity cannot be pleaded at law, it is equivalent, in the administration of assets, to a judgment. Nor will equity interpose where, after an action brought by one creditor, an executor confesses judgment to another creditor in equal degree (3 Bac. Abr. 83, in note; 1 P. Wms. 295), even although the judgment be given on a *quantum meruit*, without a writ of inquiry to ascertain damages, if they be so laid in the declaration as not to exceed the debt which is really due. 11 Vin. Abr. 298, in note; 1 P. Wms. 295. Nor, where a creditor sues an executor at law and in equity at the same time for the same demand, will equity compel him to make his election in which of the said courts he will proceed, in case the executors be attempting to prefer other creditors before him, by confessing judgments to them, but will merely restrain him from taking out execution on the judgment without leave of the court. 3 Bac. Abr. 83; Barnard, Ch. Ca. 277. Nor will a mere demand by the creditor divest the executor of his right of giving such preference; that effect can be produced only by the process of a court of justice. Off. Ex. 145. Thus the executor is invested with large discretionary powers of preferring one creditor to another of the same class, and in certain cases he may avail himself of the privilege with great propriety and on solid reason. 11 Vin. Abr. 270; Sid. 81. Nor is an executor warranted merely in the payment of one debt before another of the same order: he may also pay a debt of an inferior nature before one of a superior, of which he has no notice (Bac. Abr. 82), provided a sufficient time has elapsed since the testator's death, for such payment, if precipitate, would be evidence of fraud.

Of debts of record, supposing, in the case of judgments, they are registered (23 & 24 Vic. c. 38, ss. 4, 5), an executor is bound to take cognisance, as well as of a decree in equity. Constructive notice in respect to them is sufficient. Dyer, 32; 3 Bac. Abr. 83; Cro. Eliz. 793; 2 Vern. 88; but *see* 3 Mod. 115. Of other species of debts there must be actual notice. Toll. Ex. b. 3, c. 2. It is not necessary that such notice should be by action. *Harman v. Harman*, 2 Show. 492; 3 Mod. 115. *Scudamore v. Hearn*, And. 340. *Britton v. Batthurst*, 3 Lev. 115. *Contrà*, *Brooking v. Jennings*, 1 Mod. 175. And an executor is not authorised to confess a judgment for a debt of an inferior nature, if he has notice of the existence of a superior. *Sawyer v. Mercer*, 1 T. R. 690. But if he has paid the inferior debt without notice, he may, when sued on the specialty, plead that fact, and the want of assets. *Britton v. Batthurst*, *supra*. An executor cannot confess judgment to one creditor in trust for a number of creditors, so as to exclude the suit of a third. *Tolputt v. Wells*, 1 M. & S. 394. As to priority of English creditors, *see* 29 L.J.Ch. 296.

A judgment must be satisfied, though recovered against one executor only, where there are several (Com Dig. Adm. C. 2), or recovered against an executor by the name of an administrator, or *vice versâ*. Id. 1 Sid. 404.

[1] If a debtor appoint his creditor executor, he may retain his debt in preference to all other creditors of an equal degree. *Plumer v. Marchant*, 3 Burr. 1380; 2 Lev. 73. *Mason v. May*, 3 V. & B. 197. This remedy arises from the mere operation of law, on the ground that it were absurd and incongruous that he should sue himself, or at the same hand should at once pay and receive the same debt; and, therefore, he may appropriate a sufficient part of the assets in satisfaction of his own demand, otherwise he would be exposed to the greatest hardship: for since the creditor who first commences a suit is entitled to a preference in payment, and the executor can commence no suit, he must, in case of an insolvent estate, necessarily lose his debt, unless he has the right of retaining. Toll. Ex. b. 3, c. 3. But where the testator in his individual capacity was indebted to himself and others upon a partnership concern, and executed a deed of assignment as a security for such debt, it was held that his partners, whom he had appointed executors, could not retain as for a specialty debt. *De Tastet v. Shaw*, 1 B. & A. 664; 2 Wms. Ex. 761.

If administration be granted to a creditor, and afterwards repealed at the suit of the next of kin, such creditor may retain against the rightful administrator. *Blackborough v. Davis*, 1 Salk. 38. But where A. & B. were joint obligors in a bond, the former as principal, the latter as surety, A. died; B. took out administration to him, and, on forfeiture of the bond, discharged the debt: it was held that he could not retain; for by joining in the bond the debt became his own. 11 Vin. Abr. 262. Yet, in such case, it seems he might retain for the money paid, as constituting a simple contract debt. Toll. Ex. 296; 2 Wms. Ex. 767; *see* 6 Jur. N.S. 863.

(*b*) *Satisfaction of Covenants in Leases, &c.*

After assigning a lease, or agreement of a lease, and laying apart a sum to meet the lessor's claim, where a fixed sum has been agreed to be laid out on the premises, the executor or administrator may distribute the estate.[1]

22 & 23 Vic. c. 35, s. 27. "Where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate, whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease: but nothing herein contained shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed." *See* 2 De Gex & J. 121; 30 L. J. Ch. 799; 1 Drew & S. 384; 28 L. J. Ch. 593.

So of rents, covenants, or agreements contained in any convey-

By the 28th sect. of 22 & 23 Vic. c. 35, it is enacted, that "in like manner where an executor or administrator, liable as such to the rent, covenants, or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant, or reservation) or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such

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The mere nomination of a creditor to the executorship will not, if he refuses to act, extinguish his legal remedy for the recovery of the debt. *Lowe v. Peskett*, 16 C. B. 511; 24 L. J. C. P. 196. *Rawlinson v. Shaw*, 3 T. R. 557. *See* 3 Bac. Abr. 10 n.

Where there are several executors or administrators who are creditors, they can only retain for their debts rateably, and in proportion to the assets. *Chapman v. Turner*, 9 Mod. 268.

Although if one of two partners to whom a debt is due be made an executor, he may, it seems, retain the debt: yet, if such an executor dies, so that the interest in the debt wholly devolves on his surviving partner, the right of retainer ceases, and cannot be exercised as the representative of the executor. *Burge v. Brutton*, 2 Hare, 373.

The right of retainer exists notwithstanding a decree for an account has been made in a suit by the other creditors for the administration of the assets, and notwithstanding the assets, out of which he seeks to retain his debt, came to his hands after the decree; for the decree does not affect the legal priorities of creditors, and there is no distinction in this respect between assets possessed prior to the decree and subsequent to it. *Nunn v. Barlow*, 1 Sim. & Stu. 588.

Under the common decree against an administrator who has obtained the letters of administration as a creditor, directing the accounts to be taken in the usual way, and the assets to be applied in a due course of administration in payment of the intestate's debts, the master has no authority to disallow the administrator's claim to retain, on proof by affidavits that there has been a waiver of the right on his part by arrangement with the other creditors. In order to justify such a departure from the ordinary course of administering assets in a court of equity, there ought to be a specific instruction to the master to that effect. *Spicer v. James*, 2 Mylne & K. 387. *Thompson v. Cooper*, 1 Coll. 81.

[1] Before the above statute, it was held that the executor of an assignee of a lease, who had covenanted to indemnify the assignor for breaches of the covenants of the lease, was not bound to retain the proceeds of the sale of the lease to form a fund for indemnification in respect of some possible future breach of the covenant of his testator. *Collins v. Crouch*, 13 Q. B. 547.

The case of an assignment of a leasehold to a residuary legatee is not within the meaning of sect. 27 of 22 & 23 Vic. c. 35. *Dodson v. Sammel*, 30 L. J. Chan. 799; 9 W. R. 887.

liabilities under the said conveyance or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or the administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed."

Ance on chief rent or rent-charge entered into with the testator or intestate.

(*c*) *Payment of Legacies.*[1]

(*d*) *Distribution of Residue.*

The Executors are Trustees for the Next of Kin of any Residue not expressly disposed of.

By 1 Wm. 4, c. 40, s. 1, "where any person shall die after 1st September, 1830, having by his will, or any codicil thereto, appointed executors, such executors shall be deemed by courts of equity to be trustees for the persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, that the executors were intended to take such residue beneficially."

The executors are trustees for the next of kin of any residue not expressly disposed of.[2]

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[1] When the debts are all discharged, the legacies claim the next regard, which are to be paid by the executor or administrator, as far as his assets will extend; but he may not give himself the preference herein, as in the case of debts. 2 Vern. 434; 2 P. Wms. 25. On this subject *see post*, Legacy.

[2] This statute has, it seems, made no alteration in the law, except in cases where the deceased has left next of kin. *Taylor v. Haygarth*, 14 Sim. 8. *Russell v. Clowes*, 2 Coll. 648. If, therefore, there are no next of kin, and no intention is disclosed on the face of the will that the executors shall be excluded from taking beneficially, they will be entitled as against the Crown. 2 Coll. 648; 2 Wms. Exors. 1329, n. I.

Parol evidence is in all cases inadmissible to show that the testator intended his executors to take beneficially, for the act requires that the intention should appear by the will. *Love v. Gaye*, 8 Beav. 472. *See* also *Briggs v. Penny*, 3 De Gex & S. 525.

Where a testator appointed A. & B. his executors, and he gave them all his personal estate, "that is to say, for you to pay as follows." He then gave several legacies, and afterwards said, "I wish all this to be paid in six months after my death." It was held (under the statute) that the executors did not take the unexhausted residue beneficially, but in trust for the next of kin, as the intention that they should take beneficially did not appear by the will. *Love v. Gage, supra.* See *Andrew v. Andrew*, 1 Coll. 686. *Briggs v. Penny, supra.*

Previous to the above statute of 1 Wm. 4, c. 40, s. 1, the undisposed of residue went to the executor, unless it could be collected from the will that it was not intended he should be so beneficially entitled. As this doctrine can only be applied to wills of persons who died before the 1st of September, 1830, a very brief reference to it will suffice.

At law, the appointment of an executor was virtually a gift to him of the surplus of the personal estate of the testator, after the payment of his debts and legacies. 2 Ves. 166; 2 Atk. 46, 300; 1 Ves. jun. 67; 7 Ves. 228; 12 id. 308. In equity, however, he was not considered as entitled to all that was not disposed of, but only to such of the property as was not meant to be disposed of. 18 Ves. 284. See *Haynes v. Littlefear*, 1 Sim. & Stu. 496. Hence, under certain circumstances, this court construed a trust to arise for the benefit of the next of kin of the testator (1 P. Wms. 701; 2 Atk. 18; 3 id. 300); or, if none could be ascertained,

By sect. 2, it is not to affect the rights of executors where there is not any person entitled to the residue by the Statute of Distributions.

If before distributing the residuary estate the executor or administrator give notice to creditors and others to send in their claims, he is not afterwards liable to persons of whose claims he had no notice.

By 22 & 23 Vic. c. 35, s. 29, "where an executor or administrator shall have given such or the like notices as in the opinion of the court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, among the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed, to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets, or a part thereof, as the case may be; but nothing in the present act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively."

(e) *Of the Distinction between Legal and Equitable Assets.*[1]

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of the Crown (*Middleton v. Spicer*, 1 Bro. C. C. 201); and the ground of its decisions on this subject being the intention of the testator, that the enjoyment of the residue should not accrue to the executor, it seems proper to notice the manner in which this meaning was to be deduced. And, first, it may be remarked, that although an executor is, from his office, regarded in equity as a trustee, yet any indication of intention, on the part of the testator, to consider him as such, certainly demonstrates a determination merely to impose the duties upon him; and, therefore, if the testator expressly created him a trustee of the whole personalty (*Bagwell v. Dry*, 1 P. Wms. 700; 2 Atk. 18. *Read v. Snell*, 2 Atk. 642. *Dean v. Dalton*, 2 Bro. C. C. 634; 14 Ves. 198; 1 Turn. R. 68), though he did not declare the trust (14 Ves. 370; 15 id. 414; and see *Bishop of Cloyne v. Young*, 2 id. 91. *Milnes v. Slater*, 8 id. 295); or, having declared it, the same was afterwards cancelled (*Mence v. Mence*, 18 Ves. 348), or failed (*Morice v. Bishop of Durham*, 9 id. 399; S. C. 10 id. 522; 14 id. 570. *Vesey v. Jamson*, 1 Sim. & Stu. 69; 1 Turn. R. 68), or was of such an indefinite nature as to be incapable of execution (2 Ves. & B. 297), the court raised a presumption against the legal consequence, and a constructive trust thereupon in favour of the next of kin (*Skrymaker v. Northcote*, 1 Swan. 568; S. C. 111; C. C. 248. *Vesey v. Jamson*, *supra*); and, in the execution thereof, excluded him from the residue. Where, on the one hand, a testator bequeathed the residue, or, on the other, did not dispose thereof, but gave a legacy to the executor for his care and trouble, an inference of the same kind was held to arise. And this was true in cases of the former description, although the residuary legatee should have died in the testator's lifetime. *Nichols v. Crisp*, Ambl. 769. *Bennet v. Batchelor*, 1 Ves. jun. 63; S. C. 3 Bro. C. C. 28. *Bishop of Cloyne v. Young*, *supra*. *Lord North v. Pardon*, 2 Ves. 495. *Lord Cranley v. Hale*, 14 id. 307. And the same construction was made where he had professed to dispose of the residue, but had omitted the name of the legatee (*Noarse v. Finch*, 1 Ves. jun. 344; S. C. under title *Hornsby v. Finch*, 2 id. 78; 18 Ves. 254), or had failed to exhaust it (*Wheeler v. Sheers*, Moss, 288. *Oldham v. Carleton*, 2 Cox, R. 399. *Lord Cranley v. Hale*, 14 Ves. 307; 15 id. 416. *Langham v. Sanford*, 17 id. 435; S. C. 2 Meriv. 6) by his bequests; or had neglected to complete the residuary clause (*Knewell v. Gardener*, Gilb. 184); or, having stated his design to make a disposition thereof, had wholly admitted so to do. *Mordaunt v. Hussey*, 4 Ves. 117. But, where a testator had left a mere blank in his will, without expressing therein any intention as to the residue of his personal estate, no such presumption could be made, and the executor, therefore, was entitled. 3 Ves. & B. 72.

Where there is a devise of a term in trust to an executor, the election as to the character in which he took might be inferred from circumstances. *Doe v. Tatchell*, 3 B. & Adol. 675.

A specific bequest to an executor for care and trouble was held to exclude him from the residue. *Whittaker v. Tatham*, 7 Bing. 628; 5 M. & P. 628.

[1] There are interests which may form part of the estate not recognised as assets at law, and which, therefore, if administered at all, must be administered in a court of equity. This latter portion of the estate in the hands of an executor or administrator is called equitable assets, in contradistinction to such assets as may be reached at law, and which a creditor suing the executor in an action at law, for a debt due from the testator, might bring forward in evidence, on an issue joined on the executor's plea of

plene administravit, and which are called legal assets. An important distinction exists with respect to the administration of these two kinds of assets; if they are legal, they must be administered by the executor or administrator of the deceased in a due course of administration, having regard to the rules of priority among creditors. But if assets in the hands of an executor are equitable, then, although the precedence in payment of debts to legacies must be respected, yet as among creditors the assets must be applied in satisfaction of all the claimants *pari passu*, without any regard to the priority in rank of one debt to another. 2 Wms. Ex. 1519, 5th ed.; 6 Jur. N. S. 1083.

In equity, as well as at law, the simple contract debts of a deceased person, who was not a trader within the meaning of the bankrupt laws at the time of his death, are *primâ facie* payable out of his personal estate only (see *Powell v. Robins*, 7 Ves. jun. 209; 4 Madd. 156); whilst his debts by specialty (3 P. Wms. 367. *Ex-parte Morton*, 5 Ves. 449), or, formerly (*see post*, p. 382), if he were such a trader, his debts by simple contract, also (47 Geo. 3, sess. 2, c. 74. *Keene v. Riley*, 3 Meriv. 436. *Hitcham v. Bennett*, 4 Madd. 180), are, in case that fund should be insufficient for the satisfaction of them (1 Bro. C. C. 526; 2 id. 263; 8 Ves. 125; 4 Madd. 156), likewise payable out of his real estate (see *Kingston v. Clarke*, 2 Atk. 204, and authorities just cited), except such as may be copyhold. *King v. Budd*, Park. 190; 8 Ves. 394; and see *Coombes v. Gibson*, 1 Bro. C. C. 273. So far the rules in both jurisdictions correspond; and it may be noticed, as there are several kinds of specialty debts, that they are paid out of such assets, according to their legal priority. Ca. Temp. Talb. 220; 1 Sim. & Stu. 589.

In Chancery, however, a distinction exists, arising out of its peculiar doctrines, with regard to property; there being, in its contemplation, various interests therein, which are not recognised at law, and which, therefore, if administered at all, must be administered in equity. Hence we derive what are termed equitable assets, as distinguished from those above-mentioned. Legal assets, however, are not entirely confined to property which may be reached at law; for, by the stat. 29 Car. 2, c. 3, s. 10, trust estates in fee-simple, permitted to descend to the heir, are made legal assets, although it may be necessary, in order to obtain the possession, to proceed in a court of equity.

An equity of redemption, whether on a mortgage of lands in fee (*Sawley v. Gower*, 2 Vern. 61. *Plunket v. Penson*, 2 Atk. 290), or on a mortgage for a term, if it be of the whole estate of the mortgagor (*case of the creditors of Sir C. Cox*, 3 P. Wms. 341. *Hartwell v. Chitters*, Ambl. 308. And see *Clay v. Wallis*, 1 B. & C. 364; K. B. R. 372), is equitable assets, and not legal assets (*Clay v. Willis*, 2 D. & R. 539), although, where the mortgage is of a part only of the mortgagor's estate, he having a reversion as well as an equity of redemption, the former interest constitutes legal assets. 2 Atk. 294. *Tyndale v. Warre*, 1 Jac. R. 212. And here it may be remarked, that if a creditor before a decree for administration should obtain a judgment, even a mere equity of redemption, he having power to redeem, would, as to him, be considered legal assets. *Wolestoncroft v. Long*, 1 Ch. Cas. 32. *Sharpe v. Earl of Scarborough*, 4 Ves. 538. If the deceased should have devised his real estate upon trust to pay his debts (*Anon.* 2 Ch. Cas. 54. *Lewin v. Okeley*, 2 Atk. 50; 1 Bro. C. C. 139, n.), or should even have simply devised the same to his heir or executor for that purpose (*Lewin v. Okeley, supra. Silk v. Prime*, Rep. 1 Bro. C. C. 138, n.; S. C. Dick. 384. *Newton v. Bennett*, 1 Bro. C. C. 135), or should have created a charge on a real estate for the payment thereof (1 Bro. C. C. 139, n. *Pope v. Gwyn*, 8 Ves. 28, and note. *Bailey v. Elkins*, 7 id. 319. *Shiphard v. Lutwidge*, 8 id. 26), or it having been previously charged with the same, he should have devised it to a stranger (2 Atk. 293), or to his heir (*Batson v. Lindegreen*, 2 Bro. C. C. 94); such property would constitute equitable assets. And it seems that this doctrine would prevail with regard to copyhold as well as to freehold estates (see *Coombes v. Gibson*, 1 Bro. C. C. 273. *Kentish v. Kentish*, 3 id. 257. *Noel v. Weston*, 2 Ves. & B. 269. *Ronalds v. Felsham*, 1 Turn. & Russ. 418), although it appears that, if there should be property of both descriptions, the freehold would be first applied. *Growcock v. Smith*, 2 Cox, R. 397.

Assets, then, it will be perceived, are not constituted equitable by being recoverable in courts of equity only, for that is the case with trust estates; neither are they by being capable of administration in such courts alone, for that is the case with the real estate formerly of a trader, in satisfaction of his simple contract creditors; but they must consist of mere equitable property. *See* 4 De Gex & J. 539.

In natural justice and conscience, and in the contemplation of this court, all debts are equal, and the debtor is equally bound to satisfy them all (Ca. Temp. Talb. 220); and hence no distinction is made here in the administration of the equitable assets between debts by simple contract and those by specialty (1 Jac. & W. 45); but they are satisfied *pari passu* without regard to priority. 2 Atk. 294; 1 Bro. C. C. 139, 140, n.; and see *Wolestoncroft v. Long, supra. Anon.* 2 Ch. Cas. 54.

It must be observed, however, that estates expressly devised for the payment of debts, whether by trust or otherwise, are applicable before descended estates (3 Ves. 118; and see *Donne v. Lewis*, 2 Bro. C. C. 257. *Manning v. Spooner*, 3 Ves. 114), whilst those upon which they are merely charged by the debtor himself (*Lawson v. Hudson*, 1 Bro. C. C. 58. *Ancaster v. Mayer*, id. 454. *Tweddell v. Tweddell*, 2 id. 101, 152; 3 Ves. 117; *see* 5 id. 534), or being charged by another are adopted as his own

(C) *Suing for Torts, &c. done to the Testator.*

They may maintain an action for a tort to their testator or intestate.

The statute 4 Edw. 3, c. 7, entitled "Executors shall have an action of trespass for a wrong done to their testator," and reciting, that in times past executors have not had actions for a trespass done to their testators *as* of the goods and chattels of the same testators, carried away in their life, and so such trespassers have hitherto remained unpunished, enacts, "that the executors, in such cases, shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be should have had if they were in life."[1]

See 3 & 4 Wm. 4, c. 42, s. 2, and 9 & 10 Vic. c. 93, *post*, p. 383.

(*Earl of Oxford v. Lady Rodney*, 14 Ves. 417), are not payable thereout, until the personalty, the estates so devised for such payment, and the descended estates (1 Bro. C. C. 527; 8 Ves. 124) have been applied. *Bartholomew v. May*, 1 Atk. 487. *Lanoy v. Duke of Athol*, 2 id. 444. *Davies v. Topp*, 2 Bro. C. C. 259, n.; 1 id. 527; 8 Ves. 125. *Barnewall v. Lord Cawdor*, 3 Madd. 453; 2 P. Wms. 644, n.; 2 Atk. 489, n.

The 3 & 4 Wm. 4, c. 104, expressly makes freehold and copyhold estates assets for the payment of simple contract and specialty debts, under the administration of a court of equity. *See* 26 Beav. 465.

As to the subject of fraudulent devises, which fall within the stat. 3 Wm. & M. c. 14, made perpetual by the 6 & 7 Wm. 3, c. 4, s. 2, it is to be observed that the case of a person devising or charging his real estate with the payment of his debts is expressly excepted from its operation, which is virtually like the rule established with regard to traders above-mentioned, a parliamentary approbation of the doctrine of equitable assets. 1 Bro. C. C. 139, n. And although the real estate of one indebted is by that statute rendered liable for the payment of his specialty debts, notwithstanding the alienation of his heir or devisee, yet it is in his power to put all his creditors, except such as have specific liens on any of his realty, who may thereby maintain their priority (3 Atk. 327. *Wolestoncroft v. Long, supra*) upon an equal footing (2 Ves. 590; 1 Bro. C. C. 312; 12 Ves. 154), for it is held that a provision by will, effectual (*Hughes v. Doulben*, 3 Bro. C. C. 614) in law or equity, for the payment of creditors, is not fraudulent (7 Ves. 323) within the intent of stat. 3 Wm. & M. c. 14.

In making the above remarks it has been assumed that the assets of the deceased person are applicable, according to the usual and natural order in which they are administered at law; but this is liable to variation, in some instances, from the disposition of the court to carry into full effect its equitable principles of distribution, and, in others, in consequence of certain doctrines of the same court, termed the doctrines of exoneration, conversion, and election.

The first example of the former kind arises where the assets are partly legal and partly equitable, and a superior creditor has been partially paid out of the legal assets; in which case the court, in applying the equitable assets, will postpone him until an equality in satisfaction has been made thereout to the inferior creditors. Ca. Temp. Talb. 220; and *see* 2 P. Wms. 228. The other example of the former kind arises where a superior creditor has two funds liable to his claim, and an inferior creditor has but one, and the superior creditor obtains satisfaction out of the primary fund; for in such a case this court, in administering the assets, if the last-mentioned fund be not of sufficient value for the payment thereout of both the debts, will, upon its equitable principles, satisfy the inferior creditor out of the superior fund, to the extent to which the superior creditor might have come upon it, for otherwise the inferior creditor would, by the means alluded to, be defeated of his right to satisfaction. *Sagitary v. Hyde*, 1 Vern. 455. *Wilson v. Fielding*, 2 id. 763; Ca. Temp. Talb. 54; 2 Atk. 436, 466. *Lacum v. Mertins*, 2 Ves. 312; Ambl. 615. *Feuhontet v. Passavant*, Dick. 253. *Aldrich v. Cooper*, 8 Ves. 282. *Trimmer v. Bayne*, 9 id. 209.

[1] An administrator is within the equity of the above statute. *Smith v. Colgay*, Cro. Eliz. 384; and *see* 31 Edw. 3, stat. 1, c. 11. And by stat. 25 Edw. 3, stat. 5, c. 5, the like remedy is extended to the executors of executors.

The stat. 4 Edw. 3 being remedial, receives a liberal construction. See *Emerson v. Emerson*, 1 Vent. 187. *Williams v. Breedon*, 1 B. & P. 329; 1 Wms. Saund. 217.

In *Wilson v. Knubley*, 7 East, 128, it was said in argument that the *taking of goods and chattels* was not put in the statute merely as an instance, but as restrictive to such injuries only. *Sed per Lord Ellenborough, C. J.:* "It must be remembered that this act is a very ancient statute, passed at a period when no great precision of language prevailed; and the body of the act does not speak of actions, but it speaks of actions for a trespass done to the testator's goods; and it enacts that executors, in such cases, shall have an action against trespassers; apparently using the word trespass as meaning a wrong done generally, and the trespassers as wrongdoers."

Trover or replevin will lie at suit of executors where the conversion or taking has been in the lifetime of the testator. See *Rutland v. Rutland*, Cro. Eliz. 377. *Le Mason v. Dixon*, Sir W. Jones, 174. *Doe d.*

Shore v. Porter, 3 T. R. 13; Bro. Abr. Executors, 45; Com. Dig. Admin. b. 13. Case lies by an executor against the sheriff for a false return to a *fi. fa.* made in the lifetime of the testator (*Williams v. Grey*, 1 Ld. Raym. 40); for an escape on final process (*Berwick v. Andrews*, 2 id. 973. *Le Mason v. Dixon*, Sir W. Jones, 173); or for removing goods from the premises under a *fi. fa.* before the landlord has been paid a year's rent. *Palgrave v. Windham*, 1 Stra. 212. And an action is maintainable by the executors of a deceased incumbent against the executors of his predecessor for dilapidations which occurred during his incumbency. *Bunbury v. Hewson*, 18 L. J. Ex. 258.

Further, an executor or administrator may maintain trespass or trover for goods of the intestate taken between the death and the grant of probate or of letters of administration; for, in the case of an executor, his interest in the estate vests the moment of the testator's death; and letters of administration relate back to the time of the death of the intestate. *Tharpe v. Stallwood*, 6 Scott, N. R. 715; 1 D. & L. 24. See *Foster v. Bates*, 12 Mee. & W. 226. *Welchman v. Sturgis*, 18 L. J. Q. B. 211.

"A man cannot sue out a writ as administrator until he has obtained his letters of administration; although, when he has obtained them, all tortious acts done to the deceased's property relate back to the time of his death, so as to enable the administrator to sue for them:" *per Parke, B., Yorston v. Fether*, 14 Mee. & W. 854.

The stat. 9 & 10 Vic. c. 93, has also enabled executors and administrators of a person whose death has been occasioned by the act, neglect, or default of another, of such a character as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. *See* Lord Campbell's Act; Negligence; Torts.

Previously to the 3 & 4 Wm. 4, c. 42, no remedy was provided for injuries to the real estate of any person deceased committed in his lifetime (1 Wms. S. 217, b); but the 2d section of that statute enacts, "that an action of trespass or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person, and the damages when recovered shall be part of the personal estate of such person." If an action be brought by a termor upon the stat. 7 & 8 Geo. 4, c. 31, for an injury done to his house within three calendar months from the offence committed, and that offence abates by the death of the termor after the three months have expired, his executor cannot, it seems, bring a fresh action (*Adam v. Inhabitants of Bristol*, 2 Ad. & E. 389); and it is a matter of doubt whether the executor of a termor can in any case bring an action upon that statute for an injury to the premises under lease sustained in the lifetime of his testator. *See* 2 Ad. & E. 402, Judgment; 1 Wms. Ex. 673.

The personal estate of the deceased vests in the executor at the testator's death, and the title of the administrator relates back to the same date when the letters of administration are taken out; and therefore they may maintain trespass or trover for his goods taken between the death and the grant of probate, or of letters of administration. This rule applies also to injuries done to leasehold property; but in that case the administrator must first enter. *Barnet v. the Earl of Guildford*, 11 Ex. 19. The doctrine of relation by which the letters of administration are held to relate back to acts done before taking out the letters, exist only in those cases where the act done is for the benefit of the estate (*Morgan v. Thomas*, 8 Ex. 302); but detinue cannot be maintained by an administrator against a person who has had possession of the goods of the intestate, but has ceased to hold them prior to the grant of administration. *Crossfield v. Such*, 8 id. 825. Where, however, goods of an intestate were sold by a stranger to pay the debts of the former, the title of the administrator afterwards appointed was held to relate back so as to enable him to sue the stranger for money had and received. *Welchman v. Sturgis*, 13 Q. B. 900. Where an executor has allowed legacy duty to be unpaid, and the legatee to have possession of the subject-matter of bequests for years, the executor, when called to pay increased duty, may recover the whole from the legatee as monies paid to his use. *Bate v. Payne*, 13 Q. B. 900.

In an action by an executor or administrator for a tort to the deceased in his lifetime, the action must be brought in the representative character; but in an action for goods, the right to which vested in him by virtue of his representative character, and which right draws after it a constructive possession, the executor or administrator may either sue as such or in his individual capacity (*Gallant v. Bouteflower*, 3 Dougl. 35. *Bollard v. Spencer*, 7 T. R. 358. *Hollis v. Smith*, 10 East, 292. *Bonafons v. Walker*, 2 T. R. 126); that is, he may lay the possession either as that of the deceased or his own. *Adams v. Cheverel*, Cro. Jac. 113.

With respect to breaches of real contracts not in the nature of continuing breaches, where the covenant having been broken is broken once for all, and the entire and ultimate damage has accrued, such damage, if it results in the time of the ancestor, survives to his personal representative, who in such case is the only party entitled to sue upon the covenant. *Ricketts v. Weaver*, 12 Mee. & W. 718.

IX. Liabilities of Executors and Administrators.

(A) *Liability for Contracts of Testator.*[1]

3 & 4 Wm. 4, c. 4, s. 14, enacts, "that an action of debt on simple contract shall be maintainable in any court of common law against an executor or administrator."

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[1] The general rule is, that personal representatives, though not expressly named (*Williams v. Burrell*, 1 C. B. 402. *Ward v. Andland*, 16 Mee. & W. 862), are liable to the extent of assets on all the covenants and contracts of the deceased broken in his lifetime, and on such as are broken after his death, provided that his skill or taste was not required for their performance (*Siboni v. Kirkman*, 1 id. 423. *Wentworth v. Cock*, 10 Ad. & E. 42; Bacon's Abr. Exs. & Admins. p. 1); and that they were not to be performed by him in person, or limited expressly to his lifetime. *Cooke v. Colcraft*, 2 W. Black. 856. *Marshall v. Broadhurst*, 1 C. & J. 406. *Hyde v. Dean and Canons of Windsor*, Cro. Eliz. 552. "Where the cause of action," said *Lord Mansfield*, "is money due, or a contract to be performed, gain or acquisition of the testator by the work and labour or property of another, or a promise of the testator expressed or implied — where these are the causes of action, the action survives against the executor." *Hambly v. Trott*, 1 Cowp. 375.

An executor is liable in his representative character on a covenant by his testator for performance of a particular act, as payment of a sum of money. *Ex-parte Tindal*, 8 Bing. 404. *Powell v. Graham*, 7 Taunt. 580. An administrator was held liable upon an agreement entered into by the intestate to receive from plaintiffs a certain quantity of slate monthly for a certain period, a portion of which, when tendered after his death, but before the expiration of the stipulated period, his administrator refused to accept. *Wentworth v. Cock*, 10 Ad. & E. 42. So an executor has been held liable on his testator's contract for the performance of work by another party, before the completion of which he died, but which was subsequently completed. *Corner v. Shew*, 3 Mee. & W. 350. And the same liability has been held to apply in the case of a covenant to build a house, which was commenced but left unfinished by the testator. *Quick v. Ludborrow*, 3 Bulst. 20. See *Marshall v. Broadharst*, 1 C. & J. 405.

An action is maintainable against the executors of an innkeeper on his implied promise to keep safely and without diminution the goods of his guests. *Morgan v. Ravey*, 6 H. & N. 265.

If several persons jointly contract for the building of a ship, or in furnishing a house for the common benefit of all for a certain sum, and it is expressly agreed that if any of the parties should die before the completion of the work his executors should stand in his place: there, although the legal remedy of the person employed would be wholly against the survivors, yet the law would imply a contract on the part of the deceased, that his executors should pay their proportion of the contract-price. *Prior v. Hembrow*, 8 Mee. & W. 889.

Where an intestate had authorised the plaintiff to sell a picture, his property, and had promised him 100*l.* for his trouble in effecting the sale, but before the plaintiff was able to sell the picture the intestate died, and after his death the plaintiff sold the picture, and claimed the 100*l.*; the court held, that the authority to sell was revoked by the death of the intestate, and that his administrator was not bound to pay the 100*l.* *Campanari v. Woodburn*, 24 L. J. C. P. 15.

A bond by an executor binding himself and his heirs, &c., makes him personally responsible. Thus, in *Barry v. Rush*, 1 T. R. 691, the defendant, as administrator, bound himself, his heirs, &c., to the plaintiff, with a condition to perform an award to be made concerning certain matters in dispute. To an action of debt for the non-performance thereof he pleaded *plene administravit*, and that at the time of entering into the bond he had no assets. Demurrer.

The court said that the plea was bad; for the entering into the bond amounted to an admission of assets, and that he could not afterwards be allowed to dispute it; besides, the bond was an express undertaking, without any regard to assets.

An executor may make himself personally liable by his promise to pay a debt, or answer damages out of his own estate; but the Statute of Frauds must in such cases be complied with, and there must be sufficient consideration to support the promise. It must be alleged and proved that assets had come to his hands (*Hawkes v. Saunders*, Cowp. 289), unless an admission of assets can be implied from the nature of the promise itself. Forbearance to be an executor (having assets) for a certain time is a good consideration for a promise by the executor. Cro. Jac. 47; Yelv. 55; Cro. Jac. 273. *Grindall v. Davies*, Freem. 532. So is forbearance to sue for a reasonable time, although the executor have no assets. 1 Roll. Abr. 24, pl. 33. *Porter v. Bille*, Freem. R. 124. *Davis v. Reyner*, 2 Lev. 3. *Davis v. Wright*, 1 Vent. 120. *Johnson v. Gardiner*, 10 Mod. 254. But in case there be no assets, a promise by an executor to pay a debt *out of testator's estate* is *nudum pactum*. *Pearson v. Henry*, 5 T. R. 6. *Rann v. Hughes*, 7 id. 350, n, a. *Day v. Gareby*, Freem. 434; 3 Keb. 710. *Browne's case*, 3 id. 514; Freem. 409.

(B) *Liability for Torts.*

An Action may be Maintained against the Personal Representative for a Wrong done by the Deceased to the Property of another, provided it were done within Six Months of his Death.[1]

An action may be maintained against the personal representative

3 & 4 Wm. 4, c. 42, s. 2, recites, that there was no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal, and enacts, "that an action of trespass, or trespass on the case, as the case may be, may be maintained against the

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It is a general rule, that if an action is brought against an executor on an account stated of monies due from him, as such, he is personally liable; but he is not so on an account stated by him as executor of money due from the testator. *Powell v. Graham*, 7 Taunt. 580; 1 Moore, 305. *Secar v. Atkinson*, 1 H. Black. 102. *Rann v. Hughes*, 7 T. R. 350. *Ellis v. Brown*, Forrest, 98. *Jennings v. Newman*, 4 T. R. 347. *Powdick v. Lyon*, 11 East, 565. *Juden v. Samuel*, 1 N. R. 43. *Powley v. Newton*, 2 Marsh, 147. *Ord v. Fenwick*, 3 East, 104. *Rose v. Bowler*, 1 H. Black. 108. *Lee v. Muggeridge*, 5 Taunt. 36. *Atkins v. Hill*, Cowp. 284. *Hawkes v. Saunders*, id. 289. *Deeks v. Strutt*, 5 T. R. 690. *Coryton v. Letheby*, 2 Wms. Saund. 117.

A promise by A. to B. that, in consideration of his procuring at his own expense administration to the estate of C. to be granted to A., he would pay over to him dividends due since the death, upon stock which C. held in trust for B., is not binding. *Parker v. Baylis*, 2 B. & P. 73.

A promise by an executor to pay on receipt of sufficient assets, means effects received after demands entitled to priority are satisfied. *Bowerbank v. Monteiro*, 4 Taunt. 844.

A. as administrator of B., the lessee of certain premises, took possession of them on B.'s death, but paid no rent. The premises proved to be unproductive, and after eight months A. made an offer to surrender them. A. was held not personally liable for rent due after B.'s decease. *Remnant v. Bremridge*, 8 Taunt. 191; 2 Moore, 94; *see* 1 Vent. 271; Yelv. 103; 1 Salk. 297; 1 Wils. 4.

A power of attorney given by an executrix to act for her as executrix, does not authorise the accepting of bills of exchange to charge her in her own right, though for debts due from the testator. 6 T. R. 591.

A promissory note, by which the makers, as executors, jointly and severally promise to pay on demand, with interest, renders them personally liable. *Childs v. Monies*, 2 B. & B. 460.

If A., empowered by an executor to settle the concerns of the estate, accept in name of the executor a bill drawn by a creditor, which the executor afterwards admits is for a just demand and ought to be paid, a previous authority to accept may be presumed, without reference to the power. *Howard v. Baillie*, 2 H. Black. 618.

The action of debt on simple contract did not formerly lie against a personal representative for a debt contracted by the deceased, unless the undertaking to pay originated with the representative. *Barry v. Robinson*, 1 B. & P. (N. R.) 293; 3 Bl. Com. 347. The reason was, that the representatives when so charged could not wage their law, and were consequently deprived of a defence which would have been open to their testator. But wager of law is now abolished (3 & 4 Wm. 4, c. 42, s. 13); and by the 13th sect. of the same statute (*supra* in text), it is expressly enacted that the action shall lie. But debt does not lie on a penal statute against an executor or administrator. 2 Wms. Exors. 1471.

An executor cannot be sued for things done by an agent of the testator after the death, for the authority was revoked by that event. *Campanari v. Woodburn*, 15 C. B. 400; 24 L. J. 13. *Smout v. Ilbery*, 10 Mee. & W. 1. 22 & 23 Vic. c. 35, *post*, p. 390.

[1] For a tort to the property of another, whether real or personal, an action may now be maintained against the personal representatives of the person originally liable. *Ward v. Audland*, 16 Mee. & W. 682. *Bacon v. Smith*, 1 Q. B. 348. Add. *Torts*, 713, 714. Detinue will lie to recover specific chattels in the hands of the executor which were wrongfully retained by his testator. *Le Mason v. Dixon*, Sir W. Jones, 173; Bro. Abr. Detinue, pl. 19. *See* 2 F. & F. 351.

Where, under the above statute (3 & 4 Wm. 4, c. 42), damages had been recovered in trespass against an administrator for the tortious raising and taking of coal from the plaintiff's land by the intestate during the six months previous to his death, it was held that an action for money had and received would also lie for the proceeds of so much coal as had been, previously to such six months, sold by the intestate, and in respect of which the remedy in tort was consequently barred by the statute. *Powell v. Rees*, 7 Ad. & E. 426. *Bishop of Winchester v. Knight*, 1 P. Wms. 406. And where, besides the tortious act of the testator, property is accrued by him as a consequence thereof, an action in form *ex contractu*, for the value of such property, would, independently of the 3 & 4 Wm. 4, c. 42, survive against the executor; as where the testator has wrongfully cut down trees, or has wrongfully acquired the possession of property. *Hambly v. Trott*, 1 Cowp. 373. *See* 7 Ad. & E. 429. Add. *Torts*, 733.

And although, at common law, an action

for a wrong done by the deceased to the property of another, provided it were done within six months of his death.

executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death,[1] so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

(C) *Liability for Acts of Co-Executor.*[2]

on the case would not lie against the executor of a common carrier, on the custom of the realm, nor would an action of trespass lie if the testator took the horse of another and brought him back again, yet if, in either case, the declaration were framed in *assumpsit*, the action was maintainable. *Hambly v. Trott*, 1 Cowp. 375. *Powell v. Layton*, 2 N. R. 370.

At common law, no executor was answerable for a *devastavit* by his testator (*Browne v. Collins*, 2 Lev. 110; 1 Vent. 292; 3 Keb. 462; Com. Dig. Administration, b. 15); but by the stat. 30 Car. 2, c. 7 (explained and made perpetual by 4 & 5 Wm. & Mary, c. 24, s. 12), "the executors or administrators of any executor or administrator, whether rightful or of his own wrong, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate would have been, if they had been living." So that since these statutes, if a judgment be obtained against an executor, who afterwards dies, an action may now be brought against his executor or administrator upon the judgment, suggesting a *devastavit* by the first executor. 1 Wils. 258; 1 Saund. 219, c. a. But it has been considered that an executor *de son tort* of an executor *de son tort* cannot be sued as such by virtue of these statutes. Andr. 252, 254; 2 Vent. 360; *quære*, 10 East, 315?

An action was not, however, maintainable at common law against an executor for a tort to the person of the plaintiff committed by his testator. 3 Bl. Com. 302. *Ireland v. Champneys*, 4 Taunt. 884. *Per Lord Lyndhurst, C.: Viscount Canterbury v. the Attorney-General*, 1 Phil. 322. *See* Actio Personalis moritur cum Persona, vol. i. p. 132. 3 & 4 Wm. 4, *supra*, p. 385.

An attachment does not lie against an administrator for not paying money pursuant to rule of court entered into by the intestate. *Newton v. Walker*, Willes, 315.

[1] See *Richmond v. Nicholson*, 8 Scott, 134.

[2] An executor has been held liable for the amount of a debt of the testator, in conjunction with his co-executor, to whom he had paid over the money, but who, instead of paying it to the creditor, misapplied it. *Crosse v. Smith*, 7 East, 246; 3 Smith's Rep. 203.

But joint-administrators have been considered in a different light. Their power arises not from the act of the deceased, but from that of the court; and administration is in nature of an office. Hence it has been held that, if granted to several persons, they must all join in the execution of it; nor shall the act of one only be binding on the rest; and that, therefore, one of several administrators cannot, like one of several co-executors, convey an interest, or release a debt, without the others. 4 Burn's Ec. L. 272; Lord Bacon's Tracts, 162; 1 Atk. 460. But this distinction has been said to be overruled; and it seems to be now settled that a joint-administrator stands on the same footing, and is invested with the same powers, as a co-executor. 2 Ves. 267; Toll. Ex. 407; 2 Wms. Ex. 686.

A warrant of attorney, however, given by one of several executors, does not bind his co-executors. *Elwell v. Quash*, 1 Stra. 20. See *Barrow v. Mashiter*, 4 East, 430; 1 Roll. Abr. 929; 1 Chitt. Rep. 708; 2 V. & B. 54; Holt's N. P. C. 141; 2 Wms. Ex. 1380.

If an executrix marry, and the husband claim the goods, or is guilty of any other species of *devastavit*, it will be a *devastavit* also by the wife, and they will be both answerable accordingly. Com. Dig. Admin. D.; Cro. Car. 510; Dyer, 210, in marg.; 2 Bro. Ch. Rep. 323; 1 Sch. & Lef. 257. On the other hand, if an executrix commit a *devastavit*, and then marry, the husband, as well as the wife, is chargeable for it during the coverture. Cro. Car. 603; Moore, 761. And where an executrix marries, and her husband and she admit assets in answer to a bill filed against them, the assets become a debt of the husband in respect of such admission, and may be proved under a commission of bankruptcy issued against him. 1 Sch. & Lef. 173.

In the courts of equity, Mr. Jeremy, in his Treatise on Equity Jurisdiction, p. 160, has the following remarks:—If one of several executors should concur with the rest in any act by which property should get into their possession, and a breach of trust should result therefrom, he would, in most cases, be responsible equally with them (2 Bro. C. C. 114; Prec. Ch. 173; 3 Atk. 584; 7 Ves. 198; 11 id. 324; 1 Sch. & Lef. 341; 1 Meriv. 712; 3 Swanst. 64), to creditors (1 P. Wms. 243), or even to legatees (2 Bro. C. C. 117). This is true, notwithstanding his concurrence might have arisen from an innocent motive (*Langford v. Gascoyne*, 11 Ves. 333), or even from a false representation, if he did not use due diligence to obtain better information. 11 id. 252; S. C. 16 id. 477;

(D) *What is an Admission of Assets.*[1]

1 Meriv. 712; 3 Swanst. 58. A difference has been stated to exist in the case of an executor signing a receipt, where the relief, in consequence of a breach of trust, is sought by creditors, and where it is sought by legatees (1 P. Wms. 241; S. C. 2 Salk. 243); for in the latter case, it has been said, the addition of his name is a mere matter of form, the act of receiving being the substantial part of the transaction. 1 P. Wms. 243. But this distinction, though necessary to be noticed, does not seem to have been approved (2 Bro. C. C. 117); and the disposition which appears to have prevailed to decide the cases of executors concurring, according to the particular circumstances of each (1 Eden. R. 357; S. C. Dick. 329: 1 P. Wms. Cox's ed. 82, n.; 2 Ves. jun. 678; 3 Ves. 596; 5 id. 331), has been strongly condemned by the highest authorities. 7 id. 198; 11 id. 325; 16 id. 479; 1 Sch. & Lef. 341. If, however, one executor should actually receive the property, and should pay it over to another (1 Dick. 356), unless from necessity (3 Ves. 596), and for the purpose of transmitting it to the proper hands for its administration (2 Ves. jun. 678; 5 Ves. 331); or if he should unnecessarily contribute to enable another to obtain the possession (11 id. 333), and the latter should commit a breach of trust, the former would be equally responsible. Indeed, it now seems that, generally, the liability of one executor for the conduct of others depends upon his acting. 3 Swanst. 64. But the distinction which we have noticed between the cases of trustees and executors, in this respect, if thoroughly and irrevocably established as a general maxim, could not, it seems, be inflexible; for acts which it is ordinarily the duty of trustees to perform might be dispensed with, whilst others, which do not usually attach to executors, might be rendered necessary by the trust, or the nature of the property. Thus, for the sake of example, if it should not be required according thereto that a trustee should join in a receipt, and he should, nevertheless, think fit to do so, he would make himself answerable thereby (3 Bro. C. C. 90; 7 Ves. 186); and if persons should have died possessed of funded property, it being necessary in such a case that all should concur in the transfer (id. 197), the signature of one of them, if he did not otherwise interfere, would be a mere act of conformity. 11 id. 252; 16 id. 477. And it may be observed, that an executor, by merely proving the will, does not render himself liable to the consequences of a breach of trust by his co-executors. 2 Ves. jun. 671; 4 Ves. 596; 11 id. 333; 1 Jac. Rep. 198; *see* 2 Wms. Ex. 1294.

If an executor has improperly allowed his co-executor to have possession of large sums of money, and the latter fails, he may be compelled to make good the loss. *Candler v. Tillett*, 25 L. J. Ch. 505. *Clough v. Bond*, 3 M. & Cr. 496. *Stafford v. Fidden*, 23 Beav. 386.

[1] It is an admission of assets if an executor suffer judgment by default. *Treil v. Edwards*, 6 Mod. 308. See *Erving v. Peters*, 3 T. R. 685. *Skelton v. Hawling*, 1 Wils. 258; 2 Stra. 1075; Cro. Eliz. 102. Therefore, where an executor allowed judgment to go by default in an action against him as executor, it was held that the judgment creditor was entitled to priority over a subsequent judgment obtained against the executor for a personal debt of his own. *In Re Higgins*, 2 Griff. 562; 30 L. J. Ch. 405. And if a party do not avail himself of pleading matter in bar to the original action, he cannot afterwards plead it, or in a *scire facias*. *Rock v. Leighton*, 3 T. R. 690; 1 Ld. Raym. 589; 1 Salk. 310. *Parker v. Atfield*, 1 Ld. Raym. 678; 12 Mod. 496.

If, therefore, an executor plead a plea which admits that he has assets, which is found against him, he is concluded by the admission from afterwards disputing that he has assets sufficient to satisfy the demand. *Erving v. Peters*, 3 T. R. 685. So, the insertion of separate debts in an inventory given into the Ecclesiastical Court was held to be admission of assets. *Young v. Cordery*, 3 Moore, 66; 8 Taunt. 734. But an executor's saying that a debt is just, and should be paid as soon as he could, is not an acknowledgment of assets. *Hindsley v. Russell*, 12 East, 232.

Nor shall an executor's merely submitting to an award amount to an admission of assets. 5 T. R. 6. But if the executor bind himself by a personal engagement to perform the award, or if his submission to arbitration be a reference, not only as to the cause of action, but also of the question whether he has or has not assets, and the arbitrator award the executor to pay the amount of the plaintiff's demand, it is equivalent to a determination, as between the parties, that the executor had assets to pay the debt. The defendant, therefore, is concluded by the award, although it will not operate as an admission of assets in any other litigation, and he may be attached for non-payment. 1 T. R. 691; 5 id. 7; 7 id. 453, abridged. *Pearson v. Henry*, 5 id. 6. *Worthington v. Barlow*, id. 403. *See* vol. i. p. 436. A *cognovit actionem* is not an admission of assets. Hob. 178.

So, paying interest on a bond due from a testator is not conclusive evidence of assets. *Cleverly v. Brett*, 5 T. R. 8. But although an executor is in general personally bound by an admission of assets, express or implied, as by the payment of interest, yet in either case he may be let in to show why it should not charge him; as, that the money was deposited in the hands of bankers who have failed, or that his admission was grounded on a mistake. 2 Ves. 85. Such admission is also waived by the plaintiff's proceeding to an account of assets, and procuring a receiver to be appointed. 1 Bro. Ch. C. 484.

A settlement of account by one executor, in the absence of fraud, binds the other. 5 Jur. N. S. 1332.

Where, to prove assets, an account rendered by the defendants to the plaintiff was given in evidence, in which they stated that 1000*l.* had been awarded as due to the testator's estate, *Lord Ellenborough* held that this was not sufficient proof of assets, as it did not show that any part of the sum awarded had been received by the executors. *Williams v. Innes*, 1 Camp. 364; 2 Wms. Ex. 1187.

Where a defendant pleads *non est factum testatoris*, or a release to the testator, or payment by him, or *non assumpsit*, assets are admitted. Wentw. Ex. 185, 186; 1 Atk. 292, 294; Robinson's Ent. 64, 65. So, where he pleads *plene administravit*, and it is found against him (1 Roll. Abr. D. 931, pl. 3; Wentw. Ex. 186; Towns. Judgments, 69, pl. 31; in *Norton v. Harvey*, cited in 2 Saund. 50), which was adjudged in K. B., and affirmed in the Exchequer Chamber, where the defendant pleaded several judgments against the testator, and amongst others, a judgment against the testator and one A. B., but did not aver that A. B. died before the testator; so that it did not appear that the defendant was liable to that judgment, although he averred that he had assets to a small sum, yet, for this defect, the plea was adjudged insufficient and bad in the whole, and judgment given against the defendant *de bonis testatoris* generally, and all the judgments which were well pleaded set aside. S. P. 1 Salk. 312; Cowp. 133. *Rex v. Dickenson*, Arg. Sir Thomas Parker's Rep. 263, 264; 1 Saund. 337, n. 1.

But, notwithstanding these cases, it seems to be contrary to common sense and justice that there should be a judgment against an executor who has no assets to satisfy the debt in demand, merely because his debt is mispleaded, or one of the judgments is false. It is certain that the executor must ultimately pay out of his own pocket the debt and costs so recovered; because the judgment is, in law, a proof that he has assets to satisfy it, and, therefore, to a *scire facias* on the judgment, or action of debt suggesting a *devastavit*, the defendant cannot plead *plene administravit*, but only controvert the *devastavit*, of which fact the judgment and the sheriff's return of *nulla bona testatoris* are almost conclusive evidence; and judgment will be against the defendant *de bonis propriis*. This idea is strongly fortified by the opinion of *Lord Vaughan*, who, in delivering the judgment of the Common Pleas, finds fault with this rule, and says that the entirety of the plea, which is the only foundation of it, is a *spungy* reason, and not sense; for if the falsehood or badness of the plea be neither hurtful to the plaintiff nor beneficial to the defendant, why should the plaintiff have what he ought, or the defendant pay what he ought not? Vaugh. 104, 105. Where, indeed, the executor pleads several judgments, and that he has only assets sufficient to satisfy them, if the plaintiff can falsify any one of the judgments, as by showing it satisfied, or the like, he will be entitled to judgment for the plea of false, and the falsehood detrimental to the plaintiff, and beneficial to the defendant; for, as one of the judgments was falsified, the executor has confessed he has more assets than will satisfy the other judgments by as much as the judgments so satisfied amounts to. Id. 103. Besides, the usual pleading is that the plaintiff must avoid all payments pleaded in bar, until some assets appear remaining in the executor's hands, and then the plaintiff is to have judgment. Id. 105. The second judgment pleaded in the case cited by Vaugh. 105, from the Year Book, 9 Edw. 4, c. 12; S. C. Bro. Double Plea, 69; seems to have been a judgment of assets *in futuro*, and not a general judgment *de bonis testatoris*. So, *Lord Holt* is reported to have said, that if there are three judgments against the testator of 20*l.* each, and the executor has only assets to the value of 20*l.*, if he pleads these three judgments, and one of them is ill-pleaded, or, upon issue joined, is found against the executor by pleading the three judgments, it is implicit confession of assets more than two judgments, and, therefore, judgment shall be given against him for the value of the judgments; to which *Gould J.*, agreed. 1 Ld. Raym. 678, 679. There seems, however, to be a mistake in the report of that case. For a judgment obtained against the testator is no admission of assets by the executor, unless the executor has admitted assets by neglecting to plead a want of assets in bar to a *scire facias* previously sued out against him upon the judgment; but that is not the case put by *Lord Holt*. The executor is bound to plead the judgments against the testator in bar of the action, otherwise it will be an admission of assets to satisfy the judgments (*Earle v. Hinton*, 2 Stra. 732); therefore it does not seem correct to say that the pleading of judgments obtained against the testator is an implied confession of assets by the executor, or that there should be a general judgment against him for the whole, when, by the terms of the proposition, he has no more assets than will satisfy one judgment, because one of the three judgments is ill pleaded, or found to be false. It is true that, if one, or twenty, judgments be obtained against the executor himself, whether by default or by verdict, finding them on *plene administravit*, it is an admission of assets to satisfy them all. *Rock v. Leighton*, 1 Salk. 310. Therefore, if the executor pleads these judgments, and one of them is found to be false, it seems the plaintiff is entitled to judgment, though the plea alleges that the defendant has but a small sum, not sufficient to satisfy them, for the allegation is not material. 1 Salk. 312. As the judgments pleaded are an admission of assets to satisfy them all, if any of them be falsified, the executor does, of course, admit by his plea, that he has more assets than will satisfy the other judgments, by as much as the judgment so falsified amounts to. Perhaps, therefore,

X. Of Devastavit by an Executor.[1]

(A) *What is.*

the rule may be understood thus: that if the executor plead judgments obtained against his testator, and that he has not sufficient to satisfy them, or any of them, if any one or more of the judgments be avoided, still there ought not to be a general judgment against the executor, or, at least, not until so many are avoided as to leave assets in the executor's hand. But if he plead judgments obtained against himself, and any or more of them be avoided, in that case there ought to be a general judgment for the plaintiff. 1 Wms. Saunders, 337, n.

If an executor plead *plene administravit*, he is only liable to the amount of assets in his hands. *Harrison v. Beccles*, 3 T. R. 688.

Where an administrator being sued, pleaded no assets. Issue thereon and judgment for the plaintiff. Execution issued, and *nulla bona* returned. The plaintiff then declared in debt, setting forth the above proceedings, and alleging that the defendant had assets, but had eloigned and wasted them. *Plea*, that the defendant had fully administered, and had not wasted, &c., and issue thereon. It was held that the defendant could not on the trial of this issue prove that all assets that had come to his hands at the time of the former recovery had been duly administered, and that the plaintiff might take the objection without having replied to former recovery as an estoppel. *Dawson v. Gregory*, 7 Q. B. 756.

[1] An executor may incur this charge in a variety of modes, not only by plain and palpable acts of abuse, as giving away, embezzling, or consuming the property, without regard to debts or legacies; but also by misapplying it in extravagant expenses in the funeral; in the payment of debts out of their legal order, to the prejudice of such as are superior; or by an assent to, or payment of, a legacy, when there is not a fund sufficient for creditors. Off. Ex. 158. So, if the executor release or cancel a bond due to the testator, or deliver it to the obligor, this shall charge him to the amount of the debt, whether, in point of fact, he received it or not. Off. Ex. 159; 1 Nels. Abr. 262. If he release a cause of action accrued in right of the testator, whether before or subsequently to the testator's death, this will also be a *devastavit*. Off. Ex. 71, 159. *Chandler v. Thompson*, Hob. 266; And. 138. *Brightman v. Keightly*, Cro. Eliz. 43. If he submit to arbitration a debt or any other demand he may be entitled to in right of the testator, and the arbitrator do not award him a recompense to the full value, this, as being his own voluntary act, shall bind him to answer the difference. Off. Ex. 71, 159, 160; *Anon.* 3 Leon. 51; but *see* vol. i. p. 430.

An executor may, as against creditors, commit a *devastavit* by making disbursement in the schooling, &c., of the testator's children. *Giles v. Dyson*, 1 Stark. N. P. 32.

Executors will be responsible for money lost by the failure of bankers if the money is paid in to their own private account, and used as their own money, but not if it is placed to their separate account as executors, and the deposit has been made in the ordinary course of business. *Wilks v. Groom*, 25 L. J. Ch. 724; *see* 2 Wms. Ex. 1311.

If an executor appoint an agent to collect the testator's effects, and the agent embezzle them, it shall be a *devastavit* by the executor. 6 Mod. 93. If a term be assigned by an executor, in trust to attend an inheritance, it shall in equity follow all the estates created out of such inheritance, and all the incumbrances subsisting upon it; but as, by such assignment, the term ceases to be assets at law, the executor shall be responsible to the creditors for a *devastavit*. 3 P. Wms. 330; 1 T. R. 763. If an executor retain money in his hands for any length of time, which by application to the Court of Chancery, or by investing in the funds, he might have made productive, he shall be charged with interest upon it. 2 Fonbl. 2nd edit. 184. *Bird v. Lockey*, 2 Vern. 744. *Perkins v. Baynton*, 1 Bro. Ch. Rep. 375; *see ante*, p. 373. If he sell the testator's goods at an undervalue, although it be an appraised value (Off. Ex. 158), or if he delay disposing of them, by which they are injured, he is personally bound to make a compensation. 6 Mod. 181, 182. If he omit to sell the goods at their full price, and afterwards they are taken out of his hands, he shall be liable to the extent of the value of the goods, and not merely to what he recovers in damages, for there was a default on his part. (Id.) But if, without any imputation on him, the goods are taken out of his possession, although he recover not such damages as the goods were really worth, he shall be responsible for no more than he recovers. (Id.) If the goods be perishable, and on his part there has been neither neglect in keeping them nor delay in selling them, in case they are impaired, he shall not answer for their first value, but for only what they were worth at the time of the sale. Yet, if the goods be taken out of his possession, he must sue the party taking them, that he may exempt himself from any greater claim than the damages he shall recover, &c. In case of an executor's investing money in the funds, and appropriating the same, he shall not be answerable for the loss by a fall of stocks. 2 Fonbl. 2d edit. 184; 3 Bro. Ch. Rep. 147, 433. Nor, as it seems, shall he be so liable, although without the indemnity of a decree he lend money on a real security, which at the time there was no reason to suspect. 1 P. Wms. 141. An executor has also an honest discretion to call in a debt bearing interest, if he conceive it to be in hazard. 2 Fonbl. 2d edit. 186. *Newton v. Bennett*, 1 Bro. Ch. Rep. 361.

An executor is personally liable as for a *devastavit*, if by delaying to commence an action he has enabled a creditor of the testator to avail himself of the Statute of Limitations. *Hayward v. Kinsey*, 12 Mod. 573. But it is no error to pay legacies before debts when the estate is sufficient for all. *Brooking v. Jennings*, 1 id. 174; *Anon.* 1 Show. 492. And an executor is not guilty of a *devastavit* by lending out money of the testator not wanted for the immediate purposes of the will. *Webster v. Spencer*, 3 B. & A. 360. Neither is a conversion of the goods of the testator to his own use a *devastavit*, if he pay debts of the testator to the value with his own money. *Merchant v. Driver*, 1 Saund. 308; 1 Vent. 20; 1 Sid. 412. Nor is he so liable if he pay a debt out of his own purse to the amount of the testator's effects in his hands. *Wheatley v. Lane*, 1 Saund. 216.

If an executor merely gives a receipt for so much due on a bond as he in fact receives, he shall not be charged with a *devastavit* for the residue. Com. Dig. Admin. 12; Off. Ex. 159. Nor, if the executor compound an action of trover for the goods of the testator, and take a bond for the money payable at a future day, does that act necessarily amount to a *devastavit*, as the money for which the bond is taken is assets immediately. 2 Lev. 189. But he shall be charged in case there be a failure in the payment of it. If there be arrears of rent on a lease, and on the tenant's becoming insolvent the executor release the arrears, and give him a sum of money to quit possession, in case he appear thus to have acted for the benefit of the estate he shall be allowed both. 3 P. Wms. 381; Toll. Ex. c. ix.

An executor may traverse a *devastavit* found by inquisition, but not if returned by the sheriff without inquisition. *Whitrong v. Blaney*, Freem. R. 110; 2 Mod. 10; 3 Keb. 170. It seems that if an executor *durante minore ætate* commit a *devastavit*, and obtain a release from the executor when of full age, yet he remains liable to creditors. *Brooking v. Jennings*, Freem. R. 149; 1 Mod. 174.

If an executor suffer judgment by default, or judgment be given against him on a demurrer to the declaration, or if he plead payment of a bond, and omit to plead *plene administravit*, or *plene administravit præter*, it will operate as an admission of assets in an action against him on the judgment, suggesting a *devastavit* (3 T. R. 685; 1 Atk. 292; Salk. 310; 1 Ld. Raym. 589; Hob. 199); for it is a universal principle of law that, if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it in another action founded upon it, or in a *scire facias: per Buller, J.*, 3 T. R. 689; and, therefore, in an action against an executor, on a judgment suggesting a *devastavit*, on issue taken on a plea of *non devastavit*, it is sufficient to prove the judgment and the return of *nulla bona* to the *fieri facias*. 3 T. R. 685; 1 Wils. 259. Whether the defendant plead *non devastavit* to a *scire fieri* inquiry, or *nil debet*, or not guilty, or *non devastavit*, to an action of debt against him suggesting a *devastavit*, he cannot give in evidence the want of assets (3 T. R. 693; 1 Wms. Saund. 219, c.); nor can he do so upon a writ of inquiry, after judgment by default in the original action (6 Mod. 308; 2 Stra. 1075); nor would a previous judgment be evidence for him (1 Ld. Raym. 591); for although, under the issue of *non devastavit*, the defendant may give in evidence any matter which would have been a discharge to him under the plea of *plene administravit* (*per Gould, J.*, 1 Ld. Raym. 591), yet, under the latter plea, the former judgment would not be evidence. On issue taken on the plea of *non detinet* to an action of debt suggesting a *devastavit* the issue is on the defendant, the judgment being conclusive as to assets. 1 East, 2; 2 Stark. Ev. 561.

If an executor pay over the residue before the six months, he is personally liable for breaches of covenant committed by the testator. *Davis v. Blackwell*, 9 Bing. 5; 2 M. & Scott, 7. *See ante*, p. 378, as to covenants.

An executor is not in general liable for assets received by a co-executor. *Stearn v. Mills*, 1 Nev. & M. 436.

Two executors had jointly handed in an inventory to the ordinary, but it was proved that one of them had never interfered with the testator's effects, and personally had received no assets. Upon *plene administravit*, the court held he was entitled to a verdict. The inventory of the goods and chattels of the deceased, made out by the executor for the purpose of taking out probate of the testator, is not conclusive evidence of assets in the hands of the executor to the amount specified in that inventory.

An executor who receives dividends and does not invest them will be charged with interest. *Goodchild v. Fenton*, 3 Y. & J. 481; *see* 1 J. & W. 39.

An executor may make a fair and reasonable compromise for a debt without being guilty of a *devastavit*. *Pennington v. Healey*, 1 C. & M. 402; *see* 3 P. Wms. 381.

If executors have effected a policy of insurance to secure the estate against loss, they will be responsible if they allow the policy to drop without consulting the parties beneficially interested, or resorting to the Court of Chancery. *Garner v. Moore*, 24 L. J. Ch. 687.

By the 26th section of 22 & 23 Vic. c. 35, "no trustee, executor, or administrator, making any payment, or doing any act *bonâ fide* under or in pursuance of any power of attorney, shall be liable for the monies so paid or the act so done, by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power: provided that the fact of the death or of the doing of such act as last aforesaid at the time of such payment or act *bonâ fide* done as aforesaid by such trustee, executor, or administrator, was not known to him: Provided always, that nothing herein contained shall in any manner affect or prejudice the

(B) *Responsibility of Co-Executor, of Executor of Executor, &c.*[1]

(C) *Proceedings upon Sheriff's Return of* Nulla Bona.[2]

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right of any person entitled to the money against any person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made, as he would have had against the trustee, executor, or administrator, if the money had not been paid away under such power of attorney." *See ante*, p. 385, n.

[1] It is clearly settled, that one executor shall not be charged with the *devastavit* of his companion, and shall be liable only to the extent of the assets which came to his hands (2 Bac. Abr. 31; Off. Ex. 161, 162; Godolph. 134; Ambl. 162; Shep. Touch. 496; 3 Bro. Ch. Rep. 74), if he has not in any manner contributed to the loss. The testator's having misplaced his confidence in one executor shall not operate to the prejudice of the others. Cro. Eliz. 318. Nor shall one executor be affected by notice to the other, who conceals it from him, of the existence of a superior demand. Ambl. 162. But if there be notice to one executor, and nothing more appears, he shall, it seems, be presumed to have communicated it to the other. Id.; Toll. Ex. *See* also 22 & 23 Vic. c. 35, s. 31, *ante*, p. 390.

Formerly the executor of an executor could not be charged with a *devastavit* committed by the first, although to the prejudice of the king; for it was held to be a tort (3 Leon. 241; 2 Bro. Ch. Rep. 324), and, therefore, to die with the party. But by stat. 4 & 5 Wm. & M. c. 24, s. 12, an executor of an executor shall be liable to a *devastavit* committed by his testator, in the same manner as he would have been if living. So that since these statutes, if a judgment be had against an executor, who afterwards dies, an action may now be brought against his executor or administrator upon the judgment suggesting a *devastavit* by the first executor; and the judgment is as conclusive upon the representative of the executor, that he (the executor) had assets to satisfy the judgment obtained against him, as it is upon the executor himself. Therefore, if an action of debt, suggesting a *devastavit* by the first executor in his lifetime, be brought against his executor or administrator, he cannot plead that the first executor fully administered the goods of the first testator, or any other plea purporting that he (that is, the first executor) had no assets to satisfy the judgment any more than the executor himself could have done. 1 Wils. 258. For whatever act of the executor would have made him personally liable and chargeable with the payment of the demand *de bonis propriis*, will now, by virtue of the statute, make his personal estates liable in the hands of his executor or administrator. 1 Wms. Saund. 219, d.

The following distinction may be worthy of note between an action against the executor himself, upon a judgment suggesting a *devastavit* by him, and one against the executor of such executor, suggesting a *devastavit* by the former executor. First. In the former case, the action is in the *debet* and *detinet*, and the judgment is *de bonis propriis;* but in the other, the action is in the *detinet* only, and the judgment is *de bonis testatoris.* Secondly. The former action can only be brought upon a judgment previously obtained against the executor *de bonis testatoris*, or where he is made a party to a judgment against a testator by *scire facias;* but in the other, an action may be brought in every case where the executor in his lifetime was in any way guilty of any act which amounts in law to a *devastavit*, such as exhausting the assets by payment of debts of an inferior degree before those of a superior, and the like. And, lastly, in the former case the executor cannot plead *plene administravit;* but in the latter case such plea is proper. 1 Wms. Saund. 219, e.

If an executrix marry, and the husband claim the goods, or is guilty of any other species of *devastavit*, it will be a *devastavit* also by the wife, and they will be both answerable accordingly. Off. Ex. 207, 208, 225; 1 Fonbl. 84, 86; 5 Co. 27. On the other hand, if an executrix commit a *devastavit*, and then marry, the husband as well as the wife is chargeable for it during the coverture. Com. Dig. Baron & Feme, N.; Cro. Car. 603; Moore, 761. And where an executrix marries, and her husband and she admit assets in answer to bill filed against them, the assets become a debt of the husband, in respect of such admission, and may be proved under a commission of bankruptcy issued against him. *In re McWilliams*, 1 Sch. & Lef. 173; 2 Wms. Ex. 1305.

If the husband were indebted to the testator, the making of the wife executrix is equally a release of the debt as if she had been the debtor; although if an executrix, after the death of the testator, marry such debtor, it will be a *devastavit.* Toll. Ex. c. 5.

[2] Upon a return by the sheriff of *nulla bona* and a *devastavit* execution may be immediately issued against defendant *de bonis propriis.* Upon a general return of *nulla bona*, an action may be brought on the judgment suggesting a *devastavit.* *Berwick v. Andrews*, 2 Ld. Raym. 971. But as the judgment is the foundation of the action, no action of debt suggesting a *devastavit* by executor lies against him upon a judgment obtained against his testator. *Crosby v. Gearing*, 2 Ld. Raym. 971. *Ent v. Withers*, 1 Vent. 315; 2 Lev. 209. Still less will such action lie against an executor on his testator's bond suggesting a *devastavit* in the executor. *Horsey v. Daniel*, 2 Lev. 145. But if a man obtains judgment against an executor, and dies, his executor may, without first suing out a *scire facias*, bring an

action of debt upon the judgment against the executor suggesting a *devastavit*, for the action is brought against the same person against whom judgment was had, and by that judgment assets were admitted. 2 Ld. Raym. 971. *Berwick v. Andrews*, 6 Mod. 125.

The action may be brought upon a bare suggestion of a *devastavit*. *Wheatley v. Lane*, 1 Saund. 216; 1 Sid. 397; 2 Keb. 431. Although such course is not usually adopted. 1 Wils. 259.

Anciently, if the sheriff returned *nulla bona*, and also a *devastavit* to a *fieri facias de bonis testatoris* sued out on a judgment obtained against an executor, it was sometimes the practice to sue out a *capias ad satisfaciendum* against the executor. 2 Hen. 6, 12; Bro. Ex.; 8 Dougl. 210, a, in marg. Or, a *fieri facias de bonis propriis* (Doc. Plac. 169; Bro. Ex. 18); and an entry was made on the roll of the sheriff's return, and of the *fieri facias* thereon, to levy the debt and costs *de bonis propriis* (Rast. Ent. 323, b; 326, a, pl. 6); and in the case of *Read v. Bingham* (C. B. Mich. 8 Ann. Vin. Abr. Ex. 397, pl. 17), a MS. case, it is said to have been decided by the court, that the plaintiff may still sue out a *fieri facias de bonis propriis* upon the return of a *devastavit* by the sheriff to a writ of *fieri facias de bonis testatoris*, without any previous inquisition finding a *devastavit* and a *scire facias*. However, the better and more frequent method undoubtedly was, to sue out a *scire facias*, and obtain an award of execution before the issuing of the *fieri facias de bonis propriis*. Hetl. 11. *Thompson v. Thompson*, Dougl. 210, a. But the most usual practice upon the sheriff's return of *nulla bona* to a *fieri facias de bonis testatoris* was to sue out a special writ of *fieri facias de bonis testatoris*, with a clause therein, "*et si tibi constare poterit*," that the executor had wasted the goods, then to levy *de bonis propriis* (9 H. 6, 9; Bro. Ex.; 11 Hetl. 110); and this continued to be the practice of the King's Bench until the time of Charles the First; but in the Common Pleas a practice had prevailed in early times, upon a suggestion in the special writ of *fieri facias* of a *devastavit* by the executors, to direct the sheriff to inquire by a jury whether the executrix had wasted the goods; and if the jury found he had, then a *scire facias* was sued out against him; and, unless he made a good defence thereto, execution was awarded *de bonis propriis*. The practice of two courts thus differing, a judgment given in the Common Pleas against an executor on a *scire facias* awarded upon the return of a *devastavit* found by the inquisition, according to the practice of that court, was reversed in the King's Bench, in *Pettifer's case* (5 Rep. 32), and the principal reason assigned was, because no action would lie against the sheriff if the return found by the inquisition was false; whereas, according to the practice of the King's Bench, an action would lie against him for a false return. The same point, however, came again before the Court of King's Bench in the case of *Mounson v. Bourn*, hereafter cited, in error from the Common Pleas; and though *Pettifer's case* was cited and relied upon, yet the judgment was affirmed, and the court recommended the practice of the Common Pleas to be adopted in the King's Bench in future. Sir W. Jones, 417; Cro. Car. 518, 527. *Mounson v. Bourn*. It afterwards became the practice of both courts, for the sake of expedition, to incorporate the *fieri facias*, inquiry, and *scire facias* into one writ, thence called a *scire fieri* inquiry, a name compounded of the first words of the two writs of *scire facias*, *fieri facias*, and that of inquiry, of which it consists. This writ recites the *fieri facias de bonis testatoris* sued out on the judgment against the executor; the return of *nulla bona* by the sheriff; and then, suggesting that the executor had sold and converted the goods of the testator to the value of the debt and damages recovered, commands the sheriff to levy the said debt and damages of the goods of the testator in the hands of the executor, if they could be levied thereof; but if it should appear to him by the inquisition of a jury, that the executor had wasted the goods of the testator, then the sheriff is to warn the executor to appear, &c. If the judgment had been either by or against the testator or intestate, or both, the writ of *fieri facias* recites that fact, and also that the court had adjudged (upon a writ of *scire facias* to revive the judgment) that the executor or administrator should have execution for the debt, &c. (*see* the form of this writ, Clift's Entries, 659, 671; Lilly's Entries, 664, 666; 2 Rich. Pract. K. B. 523); and this practice is still frequently adopted. But the usual mode of proceeding is by action of debt on the judgment suggesting a *devastavit;* because, in the proceeding by *scire fieri* inquiry, the plaintiff is not entitled to costs, unless the executor appear and plead to the *scire facias*. For the statute of 8 & 9 Wm. 3, c. 11, s. 3, which gives costs to the plaintiffs in suits upon *scire facias*, limits them to those cases only where the plaintiff obtains judgment, or award of execution, upon a plea pleaded, or demurrer joined thereon. *See* 15 & 16 Vic. c. 76, s. 132, as to teste, &c. of *scire facias*.

There are certain rules equally applicable to the proceeding by *scire fieri* inquiry, and to that by action of debt on a *devastavit*. 1. The return of a *devastavit* is not conclusive, and therefore the executor may traverse the *devastavit*, whether it be found by the inquisition or returned by the sheriff (Cro. Eliz. 859. *Gibson v. Brook*, S. C., cited in 3 T. R. 687; Sir W. Jones, 418. *Monson v. Bourne*); as, if the sheriff should return that there were no goods, the plaintiff may prove that there were, and that he showed them to the sheriff. The form of the traverse is indeed different. In the *scire fieri* inquiry, the executor precisely and expressly denies the *devastavit* found by the inquisition, and takes issue upon it. *See* the form, Lib. Plac. 289, pl. 21, 290; pl. 26; Clift, 659, pl. 1, 663; Lilly, 666, 667; 2 Saund. 402. *Blackmore v. Mercer*. But in

XI. Of an Executor de son Tort.[1]

an action of debt the whole may be given in evidence on *nil debet* (*see* 2 Ld. Raym. 1502. *Warren v. Consett*), or on not guilty, *Coppin v. Carter*, 1 T. R. 462. 2. The executor cannot, in either case, plead *plene administravit*, or any other plea of the same nature, which puts his defence upon want of assets; for such plea would be contrary to what is admitted by the judgment. And if the truth were that he had no assets, he should have set it up as a defence to the original action; and having neglected to do so, he shall not be permitted to say so afterwards. For it is a general rule, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it, either in another action founded on it, or in a *scire facias*. 1 Salk. 310. *Rock v. Leighton*, 1 Atk. 292. *Ramsden v. Jackson*, 2 Stra. 732. *Earle v. Hinton*, 1 Wils. 258. *Skelton v. Hawling*, 3 T. R. 689. And if he has pleaded *plene administravit* to the original action, and the judgment was had upon a verdict, finding that he had assets, he is of course equally concluded from saying that he had no assets. 3 T. R. 693. And for the same reason he cannot give in evidence the want of assets on the trial of the *devastavit* (1 Salk. 310); nor upon a writ of inquiry, after judgment by default in the original action. *Treil v. Edwards*, 6 Mod. 308. *See* also *Wharton v. Richardson*, 2 Stra. 1075, and cited in 1 Wils. 258. 3. No proceeding can be had either by action of debt on a *devastavit*, or by a *scire fieri* inquiry against the husband of an executrix, if she dies after judgment had against her and her husband *de bonis testatoris*. But if a general judgment be had against husband and wife, executrix, either upon the *scire fieri* inquiry, or in the action of debt, and afterwards the wife dies, the husband shall be charged. *Mounson v. Bourn*, Cro. Car. 519. *Baron v. Berkley*, 1 Lutw. 25. And it should seem that the husband shall be charged, if the wife does not die till after a *fieri facias de bonis testatoris*, and return of *nulla bona* thereon. 1 Wms. Saund. 219, 5th edit.

Formerly no costs were recoverable in the *scire fieri* inquiry, unless the executor appeared and pleaded to it; but now, by the 3 & 4 Wm. 4, c. 42, s. 34, such costs are recoverable whether the executor appear and plead to the *scire facias* or not.

[1] An executor *de son tort* is a person who, without any authority derived from the deceased or the Court of Probate, does such acts as belong to the office of an executor or administrator. The question, whether a person is executor *de son tort*, is a question of law, and not of fact. *Paget v. Priest*, 2 T. R. 97.

Paying the deceased's mortgages, or other debts or legacies out of the assets; suing for, receiving, or releasing the debts due to the estate (Swinb. 6, s. 22, No. 2; Dyer, 105; Roll. Abr. 918); seizing a specific legacy without the assent of the lawful executor (3 Bac. Abr. 21; Godolph. 91); entering on a lease or term for years (Swinb. s. 22, No. 2; 3 Bac. Abr. 22); or an estate *pur autre vie* (Carth. 166) (which is made assets by stat. 29 Car. 2, c. 3) especially if he enter in right of the deceased, and do acts on the land which belong to the office of an executor, as turning the cattle upon it; delivering to the widow more apparel than is suitable to her rank (Off. Ex. 175); answering in the character of an executor to any action brought against him, or pleading any other plea than *ne unques executor*. 3 Bac. Abr. 21; Godolph. 92. And all other acts of a similar nature, however slight (2 T. R. 100; Dyer, 166, b.; 11 Vin. Abr. 212) may have the same consequence, as in one case merely taking a Bible, and in another a bedstead (3 Bac. Abr. 24; Noy. 69) were held sufficient, inasmuch as they are the *indicia* of the person so interfering being the representative of the deceased. So, if J. S. be appointed by the ordinary to collect the effects, and he exceed his authority and sell any of them, even such as are perishable (Off. Ex. 174); or if he had the express direction of the ordinary for such sale, the same being illegal, he becomes an executor *de son tort*. Off. Ex. 175; 11 Vin. Abr. 209. So, where A., the servant of B., sold goods to C., an intestate, both before and after C.'s death, in consequence of orders given by him in his lifetime, and paid the money arising from such sale into the hands of B.; and D. had also in the capacity of a servant sold other goods of the intestate, on an action brought against B. and D. as executors, for a debt due from the deceased, they not having discharged themselves by payment of the money which they had respectively received to the rightful administrator, at the time when the action was commenced, or even when they pleaded, were both adjudged liable as executors of their own wrong. 2 T. R. 97; Toller's Ex. 37, 38.

A person may become an executor *de son tort* by taking the intestate's goods before administration. "If he obtained the goods of an intestate," said *Holt, C.J.*, "after administration is actually granted, it does not make him executor of his own wrong; but if he gets possession of the goods before, though administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he delivers the goods over to the administrator before the action is brought, and then he may plead that he has fully administered (5 Co. 33, b. F. N. B. 44); but if he takes on him to act as executor, he is chargeable with the event." *Anon.* 1 Salk. 313; 7 Mod. 31. *See* Dougl. 166, b.; 1 Show. 242; 1 Roll. Abr. 918; 3 Salk. 10; Cro. Eliz. 565; 2 T. R. 97; 3 id. 587; 2 Stra. 1106; 2 H. Black, 18.

So if a person live in the house of the deceased, and carry on his business in the

same manner as it was conducted in his lifetime, that constitutes a sufficient intermeddling to charge him as executor *de son tort* (*Hooper v. Summerset*, Wight. 16); but where the testator's widow continued to live in the house, and opened the shop of the testator, but no sale of goods was proved, nor any interference beyond having an inventory taken, it was held not sufficient to make her an executrix *de son tort*. *Serle v. Waterworth*, 4 Mee. & W. 795; 6 Dowl. 684. If a debtor sell goods for a valuable consideration, but remain in possession till death, the vendee, by taking the property, then becomes executor *de son tort* if the possession were inconsistent with the contract of sale. *Edwards v. Harben*, 2 T. R. 587. So, by stat. 43 Eliz. c. 18, if administration by fraud be granted to an insolvent person, who gives any of the effects to A., or releases a debt due from him to the intestate A., for so much, shall be executor *de son tort*. Vin. Off. Ex. 182, 183. So where A. appoints B. C. and D. his creditors, and D. alone proves the will, and appoints E. his executrix, who administers the estate of A. under the direction of B., she is liable as an executrix *de son tort* of A. *Cottle v. Aldrich*, 1 Stark. N. P. C. 37.

But a person who takes possession of the goods of the deceased under a fair claim of right is not liable as executor *de son tort*. *Fennings v. Jarratt*, 1 Esp. 335.

A deed of trust conveyed the lease of a farm, and all the grantor's effects, and all debts due to him, to trustees, in consideration of a certain sum to be paid to him by one of the trustees in trust to dispose of all the property, and out of the produce to reimburse the trustee the sum advanced by him to the grantor, and all other the trustees' demands upon him, and then to pay all such debts as were justly due from the grantor as the trustees in their discretion should think proper, the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was) as a separate maintenance for her in consequence of a separation between them on account of her husband's ill-usage. It was held that such deed was not fraudulent or void as against creditors, it appearing to have been made *bonâ fide* at the time, and that all the creditors of the grantor known at the time had, upon application to the trustees, received payment of their debts; and it was further held, that the wife was not liable as executrix *de son tort* after the death of her husband intestate on account of her possession of this property under the deed of trust. 8 T. R. 521.

The mere ordering the funeral, and appropriating a reasonable sum for that purpose, does not make the party an executor *de son tort*. *Camden v. Fletcher*, 4 Mee. & W. 378. And if a party intermeddle as the agent of an executor, he cannot be charged as an executor *de son tort*. *Cottle v. Aldrich*, 4 M. & S. 175; but *see* 15 L. J. Ch. 434.

A person knowingly taking goods of the testator from an executor *de son tort*, and dealing with them as his own, does not thereby make himself executor *de son tort*. *Paull v. Simpson*, 9 Q. B. 365. So, locking up the goods; making an inventory of his property (Swinb. 6, s. 22); advancing money to pay his debts or legacies (3 Bac. Abr. 22; Godolph. 92); feeding his cattle, repairing his houses, providing necessaries for his children (Swinb. 6, s. 22); do not make a party an executor *de son tort*, for these are offices merely of kindness and charity.

And although a party may be executor *de son tort* of a term actually existing, and in that case cannot enlarge his estate by claiming in fee, yet if he enter generally on lands of which there is no term in being, he cannot qualify his wrong by expressly claiming only a particular estate, but must be a disseisor in fee, and not an executor *de son tort*. 3 Bac. Abr. 23, 24. *Mayor of Norwich v. Johnson*, 3 Lev. 35; S. C. 3 Mod. 90; 2 Show. 457; Toll. Ex. 39.

Taking property under an executor *de son tort* does not make the person an executor *de son tort*. Thus, where a lessee died intestate during the term, and his widow entered and paid rent, and afterwards the defendant, her son-in-law, took the premises with the assent of the landlord, and paid rent, and continued to occupy during the remainder of the term, it was held that there being no assignment in writing, he could not be considered an assignee, for though the widow may have been chargeable as executrix *de son tort*, the defendant had not made himself executor *de son tort* by taking the premises after her. *Paull v. Simpson*, 15 L. J. Q. B. 382.

In *Lewis v. Rogers* (1 C., M. & R. 48), a list of creditors had been made out by the direction of a trader who had made an assignment for the benefit of creditors to a trustee, for the purpose of informing them of the assignment. In an action against the trustee after the death of the assignor as executor *de son tort*, the document was produced in order to prove the *bona fides* of the assignment.

Per Cur. "The plaintiff made out a *primâ facie* case by showing that on the death of Mrs. Rogers the defendant intermeddled with the goods, and he sought to charge the defendant as executor *de son tort*. The defendant, in order to explain the acts of intermeddling, proposes to show an assignment of the goods to him; and if he can show the intermeddling referable to a *bonâ fide* assignment, he has an answer to the *primâ facie* case. The person who prepared the assignment, and by whose advice she acted, having taken down a list of the names of those who were represented by her to be creditors, and in whose favour the assignment purports to be executed, that list is tendered in evidence. We think it was admissible as a part of the transaction, and to show the circumstances under which the assignment was made, all of which were for the jury."

In *Oxenham v. Clapp* (2 B. & Adol. 309), the question was, whether an executor sued

upon a simple contract debt of the deceased may, between declaration and plea, pay a bond debt, and plead that payment in answer to the action for the simple contract debt?

Per Cur. "The defendant pleaded, in answer to the plaintiff's claim, that after action brought she had disposed of the assets of the deceased in that course of administration which the law allows, viz. by discharging a debt of higher degree; and if any time before plea pleaded, an executor comes to the knowledge of such a debt, he is bound to pay it before a simple contract debt, whether he be a rightful or wrongful executor. We do not say that if the payment had been voluntary the defendant could have justified paying a debt of equal degree with that of the plaintiff, because that might have been taking an undue advantage of her own wrong. It is sufficient in this case that the debt paid was a superior debt, and that that sued for by the plaintiff was one by simple contract.

In *Doe d. Hornby v. Glen* (1 A. & E. 49; 3 Nev. & M. 837), lessee of premises, under a covenant of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances, and his brother administered *de son tort*. B., the brother, agreed with the landlord to give him possession and suffer the lease to be cancelled, on his abandoning the rent, which was twenty-eight days in arrear. B. afterwards took out letters of administration.

The court held that the agreement of B., as administrator *de son tort*, did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made any formal claim in respect of the forfeiture, nor taken a regular surrender of the lease.

In *Dickenton v. Naule* (1 Nev. & M. 721), A. having proved the will of B., in which she supposed herself to be appointed executrix, employed an auctioneer, C., to sell the goods of B. They were sold to D., who, as an inducement to C. to let him remove them without payment, expressly promised to pay C. as soon as the bill should be made out. Probate was afterwards granted to E., the real executrix, who gave D. notice not to pay the price to C. notwithstanding the express promise.

The court held that C. could not sue D. for the price.

After the grant of administration there cannot be an executor *de son tort*. *Anon.* 7 Mod. 37; *see* 1 Salk. 113; 3 id. 161; 1 Show. 242; Ld. Raym. 661; 2 Stra. 1106; 3 Lev. 34.

An executor *de son tort* of a rightful executor is liable in the same manner as a rightful executor for the debt of the original testator. *Meyrick v. Anderson*, 14 Q. B. 719.

An executor *de son tort* has no interest whatever in the property, and therefore can maintain no action in right of the deceased. 11 Vin. Abr. 215; 12 Mod. 471; 2 Bl. Com. 507.

An executor *de son tort* cannot, with the exception hereinafter mentioned, retain in satisfaction of his own debt; and it has been even decided that an assent to a retainer of his own debt, given by the rightful representative to an executor *de son tort* sued by a creditor, is of no avail if given after action brought. *Curtis v. Vernon*, 3 T. R. 587; 2 H. Black. 26. *Prince v. Rowson*, 1 Mod. 208; 2 id. 52. There is, however, one exception to this rule. A party who, by stat. 43 Eliz. c. 8, becomes an executor *de son tort*, in consequence of a gift to him of the intestate's effects by an administrator, who has obtained the grant fraudulently, is by the express provision of that act allowed to retain; but in all other instances an executor *de son tort* is excluded from this advantage.

An executor *de son tort* may perform a variety of acts which shall be as binding as those of a rightful executor. As against creditors, he is justified in paying the debts of the deceased *Parker v. Kett*, 12 Mod. 472; 1 Ld. Raym. 661.

But when it is laid down generally that payments made in the due course of administration by one who is executor *de son tort* are good, that must be understood of cases where such payments were made by one who is proved to have been acting at the time in the character of executor, and not of a mere solitary act of wrong in the very instance complained of, by one taking upon himself to hand over the goods of an intestate to a creditor. An act, therefore, may be well sufficient to charge the party himself as executor *de son tort*, which would not be sufficient to justify a wrong-doer claiming title under it. *Mountford v. Gibson*, 4 East, 441; 1 Smith's R. 129.

The grant of letters of administration to an executor *de son tort* legalises his previous acts. If, therefore, an executor *de son tort* take out administration after suit and before plea, he may plead a retainer to satisfy his own debt. *Whitehead v. Sampson*, Freem. R. 265. *Watson v. Harrison*, id. 533. *Vaughan v. Browne*, 2 Stra. 1106. *Curtis v. Vernon*, 3 T. R. 587; 2 B. & B. 10. And this rule holds, although the administration is committed to him *pendente lite*. *Pyne v. Woolland*, 2 Vent. 180. *Williamson v. Norwich*, 1 Sty. 337. *Vaughan v. Browne*, 2 id. 1106; And. 328.

So, if A. be ordered by B. to sell the effects of the intestate, and B. afterwards take administration, A., to an action brought against him by a creditor, may plead *plene administravit*, and shall be discharged on this evidence. Cro. Car. 88.

By the stat. 30 Car. 2, c. 7, made perpetual by the stat. 4 & 5 Wm. & M. c. 24, the executor of an executor in his own wrong is chargeable on a *devastavit* by his testator, in the same manner as such testator would have been if living. *See* Com. Dig. Admin. 1, 3. But it seems that an executor *de son tort* of an executor *de son tort* is not liable for a *devastavit* committed by such first executor, either at common law

XII. Proceedings in Suits by and against Executors and Administrators.

(A) *Actions by Executors or Administrators.*

(*a*) *Within what Time they may Sue.*[1]

(*b*) *Joinder of Parties.*[2]

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or by either of the two last-mentioned statutes. Com. Dig. Admin. 1, 3; Andr. 252; 3 Bac. Abr. 100, n.

If A. dispose of an intestate's goods to B. for the payment of the funeral, and afterwards take administration, it has been held he shall not have an action of trover against B. for the goods. *Whitehall v. Squire*, 1 Salk. 295.

A rightful executor may maintain trespass against an executor *de son tort*. *Anon.* 12 Mod. 441; *see* 3 T. R. 590; 2 id. 100. So an executor *de son tort* of a term may be sued for waste committed by him on the demised premises. *Mayor of Norwich v. Johnson*, 3 Mod. 90; 3 Lev. 35; 1 Show. 242.

If a creditor take out administration, he may recover his debt against him who, before the grant, was executor *de son tort*, as well as the goods of the intestate taken or converted previously to the same (Com. Dig. Admin. 3 Stra. 384); and if a person act under a power of attorney from one of several executors who has proved the will, although he cannot be charged as executor *de son tort* during the life of such executor, yet if he continue to act after the death of such executor he may be charged as executor *de son tort*, though he act under the advice of another of the executors who has not proved the will. *Cottle v. Aldrich*, *ante*, p. 394.

And, if an executor be guilty of waste, or any other species of *devastavit*, or plead *ne unques executor*, and it be found against him, he shall be charged as another executor *de bonis propriis*. Off. Ex. 157. But to charge an executor *de son tort*, he must have money or effects of the deceased at the time of action brought. *Padget v. Priest*, 2 T. R. 97.

An executor *de son tort* cannot plead in abatement that he is administrator and not executor. *Loveday v. Young*, 2 Show. 372.

Where the executor *de son tort* is really acting as executor, and the party with whom he deals has any reason for supposing that he has authority to act as such (which is a question for the jury), his acts done in due course of administration will bind the rightful executor. *Buckley v. Barber*, 6 Ex. 164. *Thompson v. Harding*, 2 E. & B. 630.

[1] The executors or administrators of a party may bring an action of *assumpsit* within the same period of limitation as the party himself could have done if alive, provided the right of action is one which survives; or where the period of limitation did not expire in the lifetime of the party within a year after the death, then the action may be brought any time within one year from the death. 2 Wms. Ex. 1601, 4th edit. Where, however, the cause of action accrues after the death of an intestate, but before the administration, the period of limitation is counted from the date of administration, the statute not beginning to run till there is a party capable of suing. *Murray v. East India Co.* 5 B. & A. 204. *Rhodes v. Smethurst*, 4 Mee. & W. 42.

Where the party died abroad, and the cause of action had accrued to him there, but he had never come to this country afterwards, the executor may sue any time during six years after the death. *Townsend v. Deacon*, 3 Ex. 706. Executors or administrators may also sue for trespass to their testator's goods, done in his lifetime, within the same period as he could have sued if alive. 4 Edw. 3, c. 7. *Wilson v. Knubley*, 7 East, 134. *Doe d. Shore v. Porter*, 3 T. R. 13.

An executor has a right of action against the Bank for not permitting the transfer of stock by him, although such stock may have been specifically bequeathed. *Franklin v. the Bank of England*, 9 B. & C. 156. An executor may, after refusal, maintain trover for papers, &c. in the hands of a third person, though delivered to the latter with express directions not to deliver them up without having a receipt from the executor for them. *Cobbett v. Clutton*, 2 C. & P. 471.

If the husband die without taking out administration to his wife of choses in action, his administrator cannot sue without obtaining administration to the wife. *Betts v. Kimpton*, 2 B. & Adol. 273.

If one executor lend part of the assets to another, the former may sue on the securities given for the payment of the loan. *Gleadow v. Atkin*, 2 Tyr. 593; 2 C. & J. 548.

[2] Where there are several executors or administrators all must join in suing (*Brassington v. Ault*, 2 Bing. 178; Com. Dig. Admin. B. 12. *Smith v. Smith*, Yelv. 130), though one executor only has proved the will. *Webster v. Spencer*, 3 B. & Ald. 363. Formerly it was necessary to join an executor, notwithstanding he had renounced probate. *Venables v. East India Co.* 2 Ex. 633. *Bensloe's case*, 9 Coke, 27, a. But by 20 & 21 Vic. c. 77, s. 79, "where any person, after the commencement of this act, renounces probate of the will, of which he is appointed executor, or one of the executors, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his estate shall and may, without any further renunciation, go, devolve, and be

(*c*) *Of the Writ of Summons.*[1]
(*d*) „ *Declaration.*[2]

committed, in like manner as if such person had not been appointed executor."

And where a contract has been made by one or some of the executors, not as representing the whole, but in their personal character, then those who made the contract must alone sue. *Heath v. Chilton*, 12 Mee. & W. 632. *Brassington v. Ault, infra. Turner v. Hardy*, 9 Mee. & W. 770. Two of three executors may recover in ejectment on a demise in the names of both. *Doe d. Stace v. Wheeler*, 15 id. 623. Where one of the co-executors or co-administrators dies, his representatives need not be joined. *Hudson v. Hudson*, Ca. Temp. Talb. 127. *Jacob v. Harwood*, 2 Ves. 268.

Where B., the sole executor of A., dies after having proved A.'s will, B.'s executor then may sue as representing A.; but if B. died intestate, or if B. was A.'s administrator, then, on B.'s death, an administrator *de bonis non* must be appointed to A. 2 Bl. Com. 506. *Elliott v. Kemp*, 7 Mee. & W. 306.

The non-joinder of co-executors or co-administrators must be taken advantage of by plea in abatement. 1 Wms. Saund. 291. *Tuckey v. Hawkins*, 4 C. B. 655.

It is no answer to an action by several co-executors that one of them has renounced the executorship, or never taken part in the administration. *Creswick v. Woodhead*, 4 Man. & G. 811; 5 Scott, W. R. 778.

If the executor has been appointed by a Scotch or Irish court, he must also take out probate or letters of administration in the court here, or the probate or letters of administration must be confirmed in the English Probate Court (20 & 21 Vic. c. 89, s. 95; 21 & 22 id. c. 56, s. 9), before he can bring an action here. But where he has taken out probate here, the defendant cannot plead that the deed on which the action is brought was part of the goods to be administered in the foreign country, or in Ireland or Scotland. See *Whyte v. Rose*, 3 Q. B. 493.

Where a guarantee was given to executors and their attorney it was held that the executors might sue alone, they having a separate interest. *Place v. Delegal*, 4 Bing. N. S. 426.

In *Brassington v. Ault*, 2 Bing. 177; 9 Moore, 340; 1 Car. & P. 302, three executors ordered goods to be sold as the goods of their testator. They afterwards sued for the amount without styling themselves executors, and without joining a fourth executor who was named in the will.

Per Cur. In an action by executors, all the executors ought to be joined, because the law has been so from the earliest time; and it has been laid down that even an infant executor must be named. But in the present case, the order to sell was given by three persons; nothing passed to show that they were acting in a representative character, and those three persons having sued on their contract, the defendant could not have set off any debt from the testator to him. The decision of the King's Bench, therefore, which has been cited, does not apply, for in that case the parties *expressly* sued as executors. *Webster v. Spencer*, 2 B. & A. 360.

If a debtor is sued by a party assuming to be an executor, but who has not taken out probate of the will, the court, in the exercise of its known jurisdiction, and to prevent its process from being abused by persons calling themselves executors, who are not so in point of law, will stay the proceedings until probate is taken out and produced for inspection, and it is shown that the plaintiff is clothed with a legal title to the character in which he sues. *Webb v. Atkins*, 14 C. B. 407.

[1] The writ of summons need not describe the plaintiff as "executor or administrator of," but if it does so, he cannot, without first amending, declare in his own right. *Douglas v. Irlam*, 8 T. R. 410. *Anon.* 1 Dowl. 97. See *Free v. White*, id. N. S. 586. It seems also a writ of *capias* need not describe the plaintiff in his representative character, nor need the affidavit of debt. *Ilsley v. Ilsley*, 2 C. & J. 330; 1 Dowl. 310. Moreover, the affidavit in such cases need only swear to the executor's belief of the debt, for in the circumstances he cannot do more. *Sheldon v. Baker*, 1 T. R. 87. *Roche v. Carey*, 2 W. Black. 850.

Though the executor may commence the action before taking out probate, and it is enough that he have probate before trial, still the court will, on application by the defendant, stay the proceedings until probate should be taken out, and reasonable notice thereof given to the defendant. *Webb v. Adkins*, 14 C. B. 401.

The administrator, however, cannot commence an action before he has obtained letters, which are his sole authority. *See* 1 Wms. Ex. 332, 4th edit. *See* also *Holland v. King*, 6 C. B. 727.

[2] The plaintiff must in the declaration state his representative character (1 Wms. Saund. 112, n. 1), unless the contract was made with him subsequent to the death, or completed by him. *Edwards v. Grace*, 2 Mee. & W. 190. In an action for goods, the right to which vested in him by virtue of his representative character, he may either declare as such, or in his individual capacity, whether he was ever actually possessed of the goods or not. *Hollis v. Smith*, 10 East, 293. To an action by an administrator, who sues in his representative character for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime. *Watts v. Rees*, 9 Ex. 696.

The plaintiff need not in the declaration

(1) *Form of Declaration.*[1]

(*e*) *Pleas.*

The plaintiff's representative character is not in issue unless traversed.

By Reg. Gen. (Pl.) T. T. 1853, r. 5, "in all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorised by act of parliament, to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied."

(*f*) *Replications.*

(1) *Replication to Plea of Statute of Limitations.*[2]

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make profert of the probate of the will or letters of administration (15 & 16 Vic. c. 76, s. 55); but if probate has not been taken out, the defendant may apply for a stay of proceedings until he should do so, and give notice to the defendant thereof. *Webb v. Adkins*, 14 C. B. 401. The plaintiff cannot join causes of action accruing in his own right with causes accruing in right of the deceased, for it is only where the money on each count will be assets that the counts can be joined. *Piper v. Chappel*, 14 Mee. & W. 624. *Webb v. Cowdell*, id. 820.

If part of the work has been done by the executors after the death of the testator, in finishing that which the testator commenced they may declare in their representative capacity, and recover for the whole.

Suppose a party to have engaged to build a house, and to have procured all the necessary materials, in the event of his death may not the executors complete the work, or must they dispose of the materials at a loss to the estate? Or, if a man build half a house, and die, if the executors complete the work, are there to be two actions in respect of the same job? Such a rule would, in many cases, operate much to the deterioration of property. It is otherwise where the testator enters into a personal engagement to be performed by himself only. *Marshall v. Broadhurst*, 1 C. & J. 403; 1 Tyr. 348.

Under a declaration that the causes of action accrued in the deceased's lifetime, facts after the death cannot be shown. *M'Lachlan v. Evans*, 1 Y. & J. 380. But the declaration may contain counts for work done by the intestate and the plaintiff as administrator. *Edwards v. Grace*, 5 Dowl. 302. And executors selling goods of the testator after the death may sue for them in an action containing counts on promises to the testator. *Aspinall v. Wake*, 10 Bing. 51; 3 M. & Scott, 423.

[1] *Form of Declaration by an Executor or Administrator.*

—— } A. B., executor of the last will
to wit, } and testament of E. F. deceased, [*or* administrator of all and singular the goods, chattels, and credits, which were of E. F. deceased, at the time of his death, who died intestate] [*or* administrator of all and singular the goods, chattels, and credits, which were of E. F. deceased, at the time of his death, in the last will and testament of the said E. F. annexed], [*or* of G. H. deceased, which said G. H. in his lifetime, and at the time of his death, was executor of the last will and testament of E. F. deceased], [*or* administrator with the last will and testament of G. H. deceased, annexed, of all and singular the goods, chattels, and credits, which were of the said G. H. at the time of his death left unadministered by G. H. deceased, who in his lifetime, and at the time of his death, was executor of the last will and testament of the said E. F.

By J. M., his attorney, sues C. D.

[2] Where the Statute of Limitations is pleaded to an action brought by an executor on a promise made to his testator, a replication that the original writ of the plaintiff was sued out within six years before obtaining the letters testamentary is bad, because the time of limitation must be computed from the time when the action first commenced to the testator, and not from the time of proving the will, for that gave no new cause of action; and, therefore, the time of proving the will is perfectly immaterial. *Hickman v. Walker*, Willes, 27. But where such a replication was pleaded to a claim for money received, debt after the testator's decease was held otherwise. Accordingly, where H. was indebted to A. who died, B. received the money, and afterwards the plaintiff's wife took out letters of administration to A., and within six years after the letters of administration, but not within six years after the receipt of the money, brought an *indebitatus assumpsit* against B., as for money had and received to the use of him and his wife; the defendant pleaded that he did not promise within six years; the plaintiff replied the special matter; and, on demurrer, the court were of opinion that the statute could be no bar, because the plaintiff's title commenced by taking out letters of administration, and this was not a cause of action in the intestate. *Cary v. Stephenson*, 2 Salk. 421: Carth. 335; 4 Mod. 372.

To a plea of the Statute of Limitations the plaintiff may also reply that the testator died before judgment, and that he commenced a new action within a reasonable time. *Matthews v. Phillips*, 2 Salk. 425. *Kinsey v. Hayward*, 1 Lutw. 97.

No precise time is fixed as to what shall be deemed a reasonable time; but it should seem that the statute is the best guide upon the subject; and as that provides that a

(*g*) *Evidence.*[1]

(*h*) *Costs.*

By 3 & 4 Wm. 4, c. 42, s. 31, "in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall (unless the court in which such action is brought, or a judge of any of the superior courts, shall otherwise order) be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recoverable in like manner."

Plaintiff is liable for costs if he fail, unless the court or a judge otherwise order.[2]

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new action in the cases enumerated in it must be commenced within a year, so an executor ought also to bring a new action within that period. In *Kinsey v. Hayward*, 1 Ld. Raym. 434, a year is said to be a reasonable time; and the Court of King's Bench appears to be of this opinion in *Wilcocks v. Huggins*, 2 Stra. 907; Fitzg. 170, 289, where it is said, "that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute, which gives the plaintiff a year to commence a new action where the judgment is arrested or reversed, and that they would not go a moment further, for it would let in all the inconveniences which the statute was made to avoid. Indeed, if the executor had been retarded by suits about the will or administration, and had shown that in pleading, it would have been otherwise, because the neglect would then have been accounted for;" and *Lee, J.*, said, "I think what is or is not a recent prosecution in a case of this nature is to be determined by the discretion of the court, from the circumstances of the case; but, generally, the year in the statute is a good direction." However, in *Lethbridge v. Chapman*, 15 Vin. 103, the action was allowed to be brought within fourteen months after the testator's death, though no reason is assigned for it. Upon the whole, therefore, it seems prudent for the executor to bring a new action as soon as he possibly can after the death of his testator; and, at all events, not to delay it beyond a year. 2 Wms. Ex. 1338.

[1] To establish his title as executor or administrator, where it is put in issue, he should produce the probate or letters of administration. *Rex v. Barnes*, 1 Stark. N. P. 243.

The original book of acts in the Ecclesiastical Court, directing letters of administration to be granted, with the surrogate's fiat for the same, was held sufficient evidence of title. *Elden v. Keddell*, 8 East, 187.

Where a bill of exchange was indorsed generally, but delivered to S. C., as administratrix of J. C., for a debt due to the intestate, and S. C. died intestate after the bill became due, and before it was paid: — *Held*, that the administrators *de bonis non* of J. C. might sue upon the bill; and that their title was sufficiently proved by the letters of administration *de bonis non*, without producing those granted to S. C., the administratrix. *Catherwood v. Chabaud*, 1 B. & C. 150; S. C. 2 D. & R. 271.

As to the evidence against the defendant. — The probate of a will is conclusive evidence till it be repealed, and no court of common law can admit evidence to impeach it. *Allen v. Dundas*, 3 T. R. 125. Where, to prove that the probate of a will had been revoked, an entry of the revocation in a book called the Assignation Book of the Prerogative Court was produced, from which it appeared that all causes were entered by the registrar, and which was kept as the only record of such proceedings, and of the decrees of the court. On an objection as to its admissibility the court overruled it, and held it to be good evidence. *Ramsbottom's case*, 1 Leach, C. L. 25, n.

[2] As a general rule, the above act intended to put executors on the same footing as other parties; and the general rule, therefore, now is, that an executor or administrator who has been nonsuited, or who has lost a verdict, is liable to costs, and it is cast on him to make out that there are particular circumstances in his case which would justify the court in exempting him by an exercise of their discretionary authority. *Wilkinson v. Edwards*, 1 Bing. N. C. 302.

The plaintiff must make out special grounds to satisfy the court that he ought to be exempted from paying costs, such as that he not only acted *bonâ fide* himself, but that the defendant has been guilty of misconduct likely to mislead the plaintiff, though mere silence on the defendant's part is not enough. *Birkhead v. North*, 4 D. & L. 732. *Southgate v. Crowley*, 1 Bing. N. C. 518. It is not a sufficient ground of exemption that the plaintiff was advised by counsel to bring the action, that defendant's pleas were prolix, and that the defendant omitted to give the plaintiff information which the plaintiff did not ask for, but which might have prevented him from bringing the action. *Farley v. Briant*, 3 Ad. & E. 839. One occasion for the exercise of the discretion of the court in favour of the executor is, where, having proceeded with due caution, he has been led on to incur the expense of a trial by misrepresentation or deception. The question to be

XIII. Actions against Executors and Administrators.[1]

(A) *Within what Time they may be sued.*[2]

(B) *Joinder of Defendants.*[3]

(C) *Writ of Summons.*[4]

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considered is not so much whether the plaintiff has *bonâ fide* brought his action, as whether the defendant has been guilty of such misconduct as to put him out of the benefit of the statute, which makes executors, like other parties, liable for the costs of issues on which they do not succeed, unless the court shall otherwise order. *Redmayne v. Moore*, 2 Jur. N. S. 691. *Southgate v. Crowley*, *supra*, p. 399.

The application for exemption must be made to a judge at chambers, or the court, on affidavit; but where the same judge is applied to who tried the cause, no affidavit seems necessary. *Maddock v. Phillips*, 3 Ad. & E. 198. It seems the court may review the decision of the judge. Id. *Laken v. Massie*, 4 Dowl. 239.

The plaintiff is, independently of the above acts, always liable to costs, where suing on a contract made with himself (23 Hen. 8, c. 16. *Spence v. Albert*, 2 Ad. & E. 785), or where he has made default, as by not proceeding to trial, or by suffering judgment of *non pros.*; and an action cannot be discontinued until the costs are paid (Id. *Harris v. Jones*, 1 W. Black. 451); and the court will not suspend payment of the costs till assets come to hand. *Andrews v. Sealey*, 8 Price, 212.

An executor or administrator will not be allowed to sue *in formâ pauperis*. *Paradice v. Sheppard*, 1 Dick. 136. *Oldfield v. Cobbett*, 1 Phil. 613. He may be called upon to give security for costs, like other plaintiffs. *Chamberlain v. Chamberlain*, 1 Dowl. 366.

[1] An executor cannot, we have seen, be sued until he has in some way acted as such by intermeddling with the deceased's estate, or proving the will. *Venables v. East India Co.* 2 Ex. 633.

In an action for use and occupation against two executors of a tenant from year to year, upon the question whether both were liable upon the entry of one only, the court held, that the other never having occupied at all, he was not liable in that form of action; although, *semble*, he *might* have been liable for rent. *Nation v. Tozer*, 1 C. & M. 172; 4 Tyr. 561; *see* 1 C., M. & R. 834.

In *assumpsit*, it appeared that the defendant, as administrator, had received monies for the purpose of being divided amongst the children of the intestate, of whom the plaintiff had married one. At the time of such receipt, it was agreed by all parties that the dividend then due should be paid to the plaintiff for the funeral expenses which had been disbursed by him. The court held, that the plaintiff was entitled to recover that sum even on the account stated. *Meert v. Mossard*, 1 M. & P. 8.

[2] Where the party lived abroad and never returned to England after the cause of action accrued against him, his executor in England may be sued within the period of limitation, counted from the time when he obtained probate. *Douglas v. Forrest*, 4 Bing. 486. But if the Statute of Limitations had once begun to run, it would be no answer to a plea of the statute that the party to be sued had gone abroad or died, and his executor did not prove the will within the period of limitation. *Rhodes v. Smethurst*, 4 Mee. & W. 42; 6 M. & M. 351. It seems payment by one executor will not take the case out of the Statute of Limitations as against a co-executor: *per Parke, B., Scholey v. Walton*, 12 Mee. & W. 510.

Where any wrong has been committed by a person within six months previous to his death, towards another in respect of the latter's property, real or personal, the party wronged may bring an action of trespass or case within six calendar months after the executors or administrators of the wrongdoer's shall have taken upon themselves the administration of the estate and effects, and the damages to be recovered in such action are payable as the simple contract debts of the deceased. 3 & 4 Wm. 4, c. 42, s. 2, *ante*, p. 385.

The remedy given by this statute being merely for torts during six months, if damage has accrued in respect of the tort during prior time, the tort may be waived and *assumpsit* brought. *Powell v. Rees*, 7 Ad. & E. 426. *Powell v. Layton*, 2 N. R. 370.

[3] In general all the co-executors, or co-administrators must be joined as defendants. *Nation v. Tozer*, *supra*; Com. Dig. Admin. B. 12. But if any one of them has died, his representative must not be joined. *Hall v. Huffam*, 2 Lev. 228), unless where they all joined in an executory contract, in which case the representatives of the deceased are held impliedly to contract to pay a share. *Prior v. Hembrow*, 8 Mee. & W. 889.

It is not, it appears, necessary to join as co-defendant an executor who has renounced probate, and never intermeddled (20 & 21 Vic. c. 77, s. 79. *Cumming v. Cummings*, 3 J. & L. 92. *Venables v. East India Co.* 2 Ex. 633. *Ryalls v. Bramall*, 1 id. 734); nor an executor *de son tort*, where there is a rightful executor. Com. Dig. Admin. C. 3.

[4] The writ of summons need not describe the executors or administrators as such. *Watson v. Pilling*, 3 B. & B. 4. It must be served on all the co-executors or co-administrators. *Rous v. Etherington*, 2 Ld. Raym. 870; 1 Salk. 312.

(D) *Declaration.*[1]

(E) *Pleas.*[2]

[1] An executor cannot be charged personally, and in his representative character, in the same declaration (*Ashby v. Ashby*, 7 B. & C. 444. *Kitchenman v. Skeel*, 3 Ex. 49. *Waite v. Gale*, 2 D. & L. 925. *Corner v. Shew*, 3 Mee. & W. 350), or on the same count. 3 Ex. 69. So, a count against an executor for goods sold to himself cannot be joined with counts for money due from his testator. *Corner v. Shew*, *supra*. *See* 3 B. & Adol. 101.

In covenant against an executor for breach of covenant for quiet enjoyment against all having lawful title under him, the declaration must show that the party claimed under the testator. *Fox v. Waters*, 4 Per. & D. 1.

Where the declaration is against the executor or administrator personally for a debt of the deceased, the former must have signed a memorandum in writing within the Statute of Frauds (29 Car. 2, c. 3, s. 4), and there must have been some new and sufficient consideration for such promise. *Forth v. Stanton*, 1 Wms. Saund. 210. *Rann v. Hughes*, 7 T. R. 350.

Where there is a misjoinder of counts, the defendant may demur, or move in arrest of judgment, or bring error; and the plaintiff may cure the error by assessing the damage separately on each count, and entering a *nolle prosequi* as to the bad counts. *Hayter v. Moat*, 2 Mee. & W. 56. *Corner v. Shew*, 4 id. 163. *Kitchenman v. Skeel*, *supra*.

[2] If the defendant takes advantage of a non-joinder, he must plead in abatement, alleging that the co-executor not joined is alive (*Hilbert v. Lewis*, 1 Freem. 268; 2 Wms. Saund. 291, N. C.), and has administered. The plaintiff in such case may amend. *See* Abatement, vol. i. p. 20.

If the defendant denies his representative character, he must do so by a special plea (Reg. Gen. (Pl.) T. T. 1853, r. 5), and must allege therein that he never administered. 2 Wms. Ex. 1656, 4th ed. It is a personal plea, and one executor cannot plead that his co-defendant was never executor. *Atkins v. Humphreys*, 2 C. B. 654; 2 Wms. Ex. 1710.

If each of several defendants pleads *ne unques executor*, the plaintiff may enter a *nolle prosequi* as to the rest, and proceed against one. *Griffiths v. Franklin*, M. & M. 146. The court has, in special circumstances, allowed the defendant to plead *ne unques executor* and *plene administravit*. *Tyson v. Kendall*, 19 L. J. Q. B. 434.

The judgment, when an issue of *ne unques executor* is found for the defendant, is that the plaintiff take nothing by his writ, and that the defendant go thereof without day. *Scott v. Wedlake*, 7 Q. B. 766. *Wood v. Kerry*, 2 C. B. 515.

Where the defendant pleads *plene administravit*, or *plene administravit præter*, he thereby admits that he is executor, and, in the event of judgment against him, will be liable to the extent of assets in hand. *Yardley v. Arnold*, Car. & M. 434. *Cousins v. Paddon*, 2 C., M. & R. 558. And if a *fi. fa.* issue *de bonis testatoris*, and no goods be found, that will be evidence of a *devastavit*. *Leonard v. Simpson*, 2 Bing. N. C. 176; 1 Wms. Saund. 219, b; 2 Wms. Ex. 1792.

The defendant may either plead a retainer of a debt to him (which must be a debt of an equal or higher degree than the debt for which the action is brought, in order to entitle the defendant to retain it), or may give it in evidence on the *plene administravit*. 1 Saund. 333. Thus, he may show that the intestate, before marriage with the defendant, gave a bond to J. S., conditioned to leave the defendant 500*l.*; and that he retained to satisfy the obligation (Bull. N. P. 140, 141; 3 Burr. 1380); that he has paid debts out of his money to the amount of the assets (Bull. N. P. 140; Co. Litt. 123); that he has redeemed part of the testator's goods, which had been pawned to their full value, with his own money, and has paid the value of the residue in discharge of his debts. (Id.) So, he may show that he has retained money to pay the expenses of administration, to which he has made himself liable, although the money has not been actually paid. 2 Starkie's C. 528; Cor. Abbot, L. C. J.

In answer to such evidence of retainer the plaintiff may show the will, and who are the rightful executors. Bull. N. P. 143.

The executor may pay away all the assets to satisfy simple contract debts; and when an action on a covenant in a lease to indemnify against a future breach is brought, may plead *plene administravit*. *Collins v. Crouch*, 13 Q. B. 542.

If each of several defendants pleads *plene administravit*, the plaintiff may succeed as to that one defendant only who is found by the jury to have assets. *Parsons v. Hancock*, M. & M. 330. *Cousins v. Paddon*, 2 C., M. & R. 558.

Where certain parts of the residue of the testator's estate remained in the hands of the executors, after payment of all the debts of which they had notice, and they invested the same in the funds in their own names, and received the dividends, and paid them over to the legatees in satisfaction of their legacies under the will; the court held that, under these circumstances, the executors could not support a plea of *plene administraverunt* to an action against them upon a specialty debt of the testator, of which they had no notice until 15 years after testator's death. *Smith v. Day*, 2 Mee. & W. 684.

To an action against an executor—plea, *plene administravit*—it being shown that the payments proved on the part of the defendant had been made within a day or two of the day on which money had been raised by mortgage, it was left to the jury whether those payments had been made out of the money raised by the mortgage, or out of the

assets proved, and that, if they believed them to have been made out of money raised by mortgage, they should find a verdict for the plaintiff. A verdict was found for the plaintiff. On a motion for a new trial, the court refused the rule. *Marston v. Downes*, 1 Ad. & E. 31; 6 C. & P. 381.

If an administrator give a bond in satisfaction of a bond of the intestate's, it may be pleaded in bar to an action on the intestate's bond. *Blythe v. Hill*, 1 Mod. 225. *Peck v. Hill*, 2 id. 136.

The plea of judgment recovered against the testator must show in what term and year, and in what court, the judgment was obtained. *Jordan v. Fawcett*, 1 Mod. 50; 1 Sid. 449. And where the judgment was against the testator and another, the plea should state that the latter died first. *Norton v. Harvey*, 2 Saund. 50. In pleading a judgment against the executor himself, the debt which is the consideration of the judgment need not be set out in the plea. *Robinson v. Corbett*, 1 Lutw. 246. It need not state that the debt was a just and true one (*Palmer v. Lawson*, 1 Lev. 200; 1 Sid. 333. *Lake v. Raw*, Carth. 8. *Robinson v. Corbett*, *supra*. *Williams v. Fowler*, 1 Stra. 410), or that it remains in force. *Bell v. Bolton*, 1 Lutw. 158.

The present form of pleading a judgment recovered against an executor to an action on simple contract is merely to state the nature of the action on which the judg- was recovered, with a *taliter processum est;* but where the action is on a specialty, it is necessary to show either that the judgment pleaded was recovered on a specialty, or that it was obtained before the executor had notice of the specialty debt on which the action is brought; for, in *Sawyer v. Mercer*, 1 T. R. 690, it was held, in an action on a bond, that a plea of judgment confessed by the executor to a simple contract creditor was bad, without averring that the executor had no notice of the bond.

An administrator cannot plead retainer of a debt without showing that administration was committed to him. *Caverly v. Ellison*, T. Jones, 23. It is sufficient for the plea to show that there is a subsisting debt in respect of which he claims to retain, without specifying the particular legal requisites to the instrument by which it may have been created, or setting out the consideration. *Harry v. Jones*, 4 Price, 89. And it need not aver that the debt is a just one, for that is presumed. *Picard v. Brown*, 6 T. R. 550.

Plene administravit may be pleaded whenever an executor has done what he ought to do, and has no assets in hand, but when judgments are due, and bonds sued, they cannot give that in evidence under *plene administravit*, and must plead it because the goods are in their hands, and so not administered, though liable to the judgment. *Brooking v. Jennings*, Freem. Rep. 149; 1 Mod. 174.

If an administrator commit *devastavit*, and die intestate pending an action of debt on bond, and a *scire facias* be brought on the statute 17 Car. 2, c. 8, against his administrator, the administrator may plead *plene administravit*. *Britton v. Buckworth*, 2 Show. 485. *See* 2 Ld. Raym. 808; 1 Mod. 188. To debt against an administrator for rent incurred in his own time, the plea of *plene administravit* is bad. *Sackvill v. Evans*, Freem. Rep. 171. A plea of *plene administravit* by an executor of an executor must go as well to the administration by his immediate testator as by himself, or must show that he has no assets of his immediate testator. *Wells v. Fydell*, 10 East, 315.

A plea of *plene administravit præter* must show that the defendant had administered before the commencement of the plaintiff's action. *Ingram v. Foot*, 12 Mod. 611; 1 Ld. Raym. 708. But where an executor pleaded *plene administravit præter* a certain sum, and afterwards to another action brought the same term pleaded also *plene administravit præter* the same sum, and as to that sum that he had confessed it in the other action, such plea was considered good. *Waters v. Ogden*, 2 Dougl. 452.

An executor is bound to plead a debt of a higher nature in bar of an action brought against him for a debt of an inferior nature, *riens ultra*, if he has not assets for both, though the debt was not payable until after the death of the testator, as in case of a bond conditioned to pay a sum of money on a day which did not happen until after his death (*Britton v. Bathurst*, 3 Lev. 114. *Lemen v. Fooke*, id. 57); otherwise it will be an admission of assets to satisfy both debts. *Rock v. Leighton*, 1 Salk. 310. When the days of payment in the condition of a bond have not arrived at the death of the testator, the executor can only plead the sum in the condition, because he may free himself from the penalty by performing it; and if he neglect or refuse to do so, it will be a *devastavit*. But where the day of payment is past, though the executor set it out in his plea, yet he shall aver assets to the amount of the penalty. *Bank of England v. Morice*, 2 Stra. 1028; Ca. Temp. Hard. 219. An executor may plead, as an outstanding debt, the penalty of a bond of indemnity given by the testator to the obligee, who is surety for him in another bond, both of which were forfeited in his lifetime, and still unpaid, though the surety has not yet been damnified. *Cox v. Joseph*, 5 T. R. 307. And he may plead an outstanding obligation, in which he was jointly and severally bound with the testator. *Rogers v. Danvers*, 1 Mod. 165; Freem. Rep. 127.

When an executor pleads a recognisance he must set it forth, so that the court may judge whether it ought to be performed. Though, if it be on an action of debt brought against him, he need only say that a judgment was obtained in such a court, if in any of the courts at Westminster; but if brought in an inferior court, he must allege their jurisdiction. *Ingram v. Foot*, 12 Mod. 613.

In pleading a judgment confessed to a simple contract creditor in an action on a bond, he must aver that he had no notice of the bond debt. *Sawyer v. Mercer*, *supra*.

(*a*) *Form of Plea of* Ne unques Executor.[1]

(*b*) „ Plene Administravit.[2]

(F) *Replication.*

(*a*) *Replication to Plea of* Plene Administravit.[3]

(*b*) „ *Judgments, &c. Outstanding.*[4]

In covenant on a lease, a plea to exonerate an executor must show that the premises were of no value at all. *Rubery v. Stevens*, 4 B. & Adol. 241; 1 Nev. & M. 182. But a plea to an action for rent against an executor, that he has derived no profit from the premises, is bad. The general rule is that an executor is to be charged as an assignee. The exception is that he is not liable for rent which the premises do not produce. This is the exception to the general rule, and it is not an authority to show that, when the executor is charged on a covenant for not repairing, he can plead that the premises did not produce profit. *Tremeere v. Morison*, 1 Bing. N. S. 89. And in covenant on a lease, a plea that the profits were less than the rent, and that the executor paid away these profits, is insufficient, unless it be shown that the executor had no other assets. *Reed v. Lord Tenterden*, 4 Tyrw. 111.

If an executor give a bill or note in respect of a debt from the testator, and only in consideration of such debt, a plea stating the facts must allege the absence of all assets. *Serle v. Waterworth*, 4 Mee. & W. 9; 6 Dowl. 684.

As against executors, an acknowledgment merely is not sufficient to take the case out of the Statute of Limitations, but there must be an express written promise, and where more than one executor, a promise by both to affect the other. *Tullock v. Dunn*, 1 Ry. & M. 416. See *Atkins v. Tredgold*, 2 B. & C. 23. *See* 9 Geo. 4, c. 14, s. 1; *post*, Statute of Limitations.

[1] *Plea of* Ne unques Executor.

The defendant, by D. A., his attorney, says that he is not executor [*or* administrator] as alleged.

[2] *Plea of* Plene Administravit.

The defendant, by D. A., his attorney, says that he has fully administered all and singular the goods and chattels which were of the said E. F., deceased, at the time of his death, and which have ever come to the hands of the defendant as executor [*or* administrator], as aforesaid, to be administered [*in a plea of* plene administravit præter, *add*, "except goods and chattels of the value, to wit, of the sum of £ "], and that he, the defendant, hath not, nor at the time of the commencement of this suit, nor at any time since, had any goods or chattels which were of the said E. F. deceased, at the time of his death, in the hands of the defendant as executor [*or* administrator] as aforesaid, to be administered [*in* plene administravit præter, *add*, "except the said goods and chattels of the value aforesaid."]

[3] When the plea of *plene administravit* is pleaded, the plaintiff may take issue on that plea, or take at once, without going to trial, a judgment of assets *quando acciderint*. If he take issue, he must be prepared to prove assets in the defendant's hands; and if he prove some, and not sufficient assets, he may have judgment for that amount (*Jackson v. Bowley*, Car. & M. 97); and as to the remainder, he may have judgment of *quando acciderint* and for costs. If he prove no assets, he cannot have judgment of *quando acciderint* (2 Wms. Saund. 216, a 1), and must pay costs. 2 Wms. Exors. 1690. Where one executor pleaded that a co-executor had assets in hand, whereby the debt sued for was extinguished, this was held to put in issue only legal and not equitable assets. *Lowe v. Peskett*, 16 C. B. 500.

[4] If an executor plead to an action on an outstanding judgment, the plaintiff may reply that it was not duly registered pursuant to the statutes 1 & 2 Vic. c. 110, ss. 10, 11; 2 & 3 Vic. c. 11, s. 4; 18 & 19 Vic. c. 15. *Steel v. Rorke*, 1 B. & P. 307; *see* 2 Wms. Ex. 927, 1187.

When the judgments or debts pleaded by the executor are upon penalties, it seems the right way of replying is to say that the creditor would have accepted the less sums, but the defendant either would not pay or had paid them, but kept the judgments or bonds on foot by fraud and covin; and the plaintiff, on issue joined thereon, may give in evidence such matter as will serve to avoid the penalties: for if he replies generally that the judgments were for less sums, and the defendant has assets above what will satisfy them, on the issue that he has not the defendant has a right to insist on the penalties as the debts (*Thompson v. Hunt*, 3 Lev. 368. *Bell v. Bolton*, 1 Lutw. 158, which recognises the case in Levinz. Lill. Ent. 59, in the margin. *See* the form of the replication, Co. Ent. 152; Winch. 179, 245; Lill. Ent. 120, 121, 159; 3 Dowl. P. C. 797; 3 B. & C. 317; 1 E. & B. 38; 1 Ld. Raym. 263; 1 Wms. Saund. 334, n.

To a plea of unsatisfied judgments by an executor, the plaintiff may reply fraud as to one without answering the rest. *East v. Withers*, Freem. Rep. 467. *Gilbert v. Dee*, id. 537. *Ex-parte Randall*, 2 Mod. 308. But in *assumpsit* against an executor, who pleaded several judgments and assets insufficient to satisfy any one of them, the plaintiff, it was said in his replication, was obliged to answer all. *Chamberlaine v. Pickering*, Freem. Rep. 28. See *Jones v. Roberts*, 2 Car. & M. 219.

An executor may protect himself from judgment of a debt by means of a judgment recovered by another creditor in equal degree, *puis darrein continuance*. *Prince v. Nicholson*, 5 Taunt. 665; 1 Marsh. 280. *See* 3 B. & C. 317; 5 Dowl. P. C. 16.

(G) *Evidence.*[1]

[1] Upon a plea *ne unques executor* (which, we have seen, must be pleaded, if the defendant mean to deny that he is such (R. 5, T. T. 1853), the plaintiff must prove the affirmative. Direct evidence is by the probate or letters of administration; but as these can seldom be in the power of the plaintiff, notice should be given by him to produce them. It must be presumed that the document, if it exist, is in the defendant's possession, and, therefore, it seems that the ordinary proof of possession, as preparatory to the admission of parol evidence, is here unnecessary.

An examined copy of the Act-Book, stating that letters of administration were granted to the defendant, is proof that he is administrator, although no notice has been given to produce the letters of administration. 13 East, 231; 8 id. 187; 1 Starkie's C. 243; and 1 B. & B. 219. So, it seems that the original will, produced by an officer of the Ecclesiastical Court, bearing the seal of the court, and indorsed as the instrument on which probate was granted, with the value of the effects sworn to, and on which probate was obtained, is original evidence to prove the probate. The most usual proof that a party is executor arises from his acts of intermeddling with the property of the deceased, which, in law, constitutes him executor *de son tort*. 2 Starkie's Evid. 552, 553.

Upon issue on the plea of *plene administravit*, it lies on the plaintiff to prove affirmatively that defendant had assets. *Mara v. Quin*, 6 T. R. 10.

The inventory exhibited in the Probate Court is evidence of assets (*Hickey v. Hayter*, 1 Esp. 313. *Giles v. Dyson*, 1 Stark. 32), unless exhibited before probate and without deductions. *Stearn v. Mills*, 6 B. & Adol. 657. On this issue, no evidence can be given of assets after the writ sued out. *Per Lord Kenyon, C. J.: Mara v. Quin, supra.* And if assets have in fact accrued since the issuing the writ, the plaintiff may prove without reply of the fact (B. & L. P. C. 337. *Per Ashurst, J.: Mara v. Quin, supra*), although in proof of assets, the plaintiff may give in evidence the inventory of the personal estate of the deceased delivered by the defendant in the Probate Court; but a copy of the inventory is not admissible, unless it be signed by the defendant, although it has been signed by the appraisers (Bull. N. P, 140); and he may show that the goods have been incorrectly valued. (Id.) A leasehold estate is assets to the value of the term. 1 Starkie's C. 507; and Barnes, 240. Evidence of such an inventory is sufficient to throw it on the executor to show how he has disposed of the goods and money specified in the inventory. Bull. N. P. 142; 1 Starkie's C. 32; 2 Starkie's Evid. 554, 555.

Although the plea of *plene administravit* admits a cause of action, yet it does not admit the amount, which must be proved by the plaintiff. *Shelly's case*, 1 Salk. 296; Bull. N. P. 140. And an executor pleading payment of a debt, and no assets *ultra*, is bound to show the nature of the debt. *Read v. Dawson*, Freem. Rep. 215. Payment of the residuary effects to the legatee after the year from the testator's death, without notice of the plaintiff's demand, will support a plea of *plene administravit*. *Chelsea Waterworks' Co. v. Cowper*, 1 Esp. 277. So will payment of rent due on a parol lease against a bond creditor. *Phillips v. Lee*, Freem. Rep. 262. *Cage v. Acton*, id. 512; 12 Mod. 288. *Newport v. Godfrey*, 4 Mod. 44; 12 id. 7. So an executor may, under the plea of *plene administravit*, give in evidence that he was administrator *durante minoritate*, and that he had paid debts to such an amount, and delivered over the residue of the effects to the executor. *Brooking v. Jennings*, 1 Mod. 174. But payment since suit commenced cannot be shown under a plea of *plene administravit*. *Nightingale v. Lee*, Freem. Rep. 110.

The admission of one executor as to the legal effect of a deed does not bind a co-executor, but it is otherwise as to assets. In order to make an admission of one of two defendants evidence against both, a community of interest in the subject-matter of the admission must be previously shown. In the case of executors, therefore, a statement by one will not bind the other, unless it be made upon a subject-matter properly within that relation as to assets. *Fox v. Waters*, 4 Per. & D. 1; *see* 1 Bro. C. C. 484; 4 Sim. 1.

In covenant by assignees of lessor against the executors of lessee: — *Held*, that payment of a certain probate duty was *primâ facie* evidence of their having assets to the smallest amount that duty would cover. *Curtis v. Hunt*, 1 C. & P. 180. The Probate Act-Book, containing an entry that the will was proved, and probate granted: — *Held* to be the original, and, therefore, the primary evidence: — *Held*, therefore, to be sufficient proof that the parties were executors, although the probate was not produced, nor any excuse for its non-production. *Cox v. Allingham*, 1 Jac. Ch. 535. Letters of administration are not *primâ facie* evidence of the death of the alleged intestate. *Moore v. De Bernales*, 1 Russ. 307. In an action against executors for rent of premises held by the testator under an agreement, and one had suffered judgment by default: — *Held*, that, after notice to produce given to each, secondary evidence of the receipts given to the latter was admissible, and that the clerk of the attorney might be asked if they did not employ the attorney to act for them as executors. *Beckwith v. Benner*, 6 C. & P. 681.

Where, during absence, a special administrator was appointed: — *Held*, that, although the acts of the executor were admissible against the latter, *semble* the mere declarations were not. *Rush v. Peacock*, 2 M. & Rob. 162.

Evidence that furniture was purchased by the testator, and seen in his house shortly before his death, is *primâ facie*

(H) *Confession of Action.*[1]

(I) *Judgment.*[2]

evidence of assets. *Britton v. Jones*, 3 Bing. N. C. 676; 4 Scott, 393. And proof of the amount of stamp upon the probate is presumptive evidence of assets to that amount. *Foster v. Blakelock*, 5 B. & C. 328; 8 D. & R. 48. In *Mann v. Lang*, 5 Nev. & M. 202, this was questioned, and, *per Lord Denman, C. J.*, "this rule was moved for on the ground that, on the issue taken on the plea of *plene administravit*, the stamp on the probate was improperly received in evidence; and the question is, whether this being put in amongst other evidence was admissible. Now, if it is to be considered on the principle of its being a declaration by the party, I must say that I think this evidence was admissible. It was admissible as confirmatory evidence to what extent the other evidence went to prove assets. It is very difficult to draw a line and say after what time the stamp upon the probate becomes evidence. Acquiescence by the executors is strong evidence that what they expected to receive had come to their hands, and the stamp upon the probate must be admissible as confirmatory of other evidence." *See* 1 C. & P. 180; 5 B. & C. 398; 4 B. & Adol. 657; S. C. 1 Nev. & M. 436. 1 C. & K. 445.

A submission to reference is an admission of assets. In *Riddle v. Sutton*, 5 Bing. 200, 2 M. & P. 345, by an agreement between the plaintiff and the defendant as executrix, reciting that disputes and differences had arisen and were depending between them respecting certain unsettled accounts, it was agreed that for the finally settling such disputes the said matters in dispute should be referred to the final award and determination of two arbitrators. There was no reservation by the executrix as to assets, and the arbitrators awarded that she should pay the plaintiff a certain sum. In an action of debt on the award, the court held that a plea of *plene administravit* was no answer to the action. *See* vol. i. p. 436.

Where an executor had a policy deposited with him as a security, it was held, that after paying himself the surplus was assets. *Glaholm v. Rowntree*, 6 Ad. & E. 710.

In an action by administrator on a note given by defendant to the intestate, it was held that an agreement between plaintiff and defendant that the defendant should retain the interest on the note, in consideration of his maintaining the child of intestate, was equivalent to payment of interest so as to bar the Statute of Limitations. *Bodger v. Arch*, 24 L. J. Ex. 19; 10 Ex. 333.

[1] An executor or administrator having the election of paying any one debt before another of the same degree, if two creditors bring actions at the same time, he may confess the action of one and suffer judgment by default, and then plead the judgment recovered against the other plaintiff. *Lyttleton v. Cross*, 3 B. & C. 317. *Prince v. Nicholson*, 5 Taunt. 665. But if an action be brought by one creditor, the executor cannot voluntarily pay other creditors of the same class who have not brought an action in order to defeat the remedy of the former. Com. Dig. Admin. c. 2. If one of several executors give a warrant of attorney against all the executors, the court will order it to be delivered up. *Elwell v. Quash*, 1 Stra. 20.

[2] If the defendant has pleaded *plene administravit*, or *plene administravit præter*, and the plaintiff think it safer not to take issue, but to confess the plea, he is then entitled to sign judgment of assets *in futuro* or of *quando acciderint*, without the costs of a trial. *Mara v. Quin*, 6 T. R. 1. A writ of inquiry or reference to the master may then be had as in other cases, and a *scire facias* must be sued out in order to reach any assets that come to the hands of an executor or administrator. *Smith v. Tateham*, 2 Ex. 205; 17 & 18 Vic. c. 125, s. 91. This judgment of *quando acciderint* embraces not only the assets received by the executor after it is signed, but also such assets as come into, or ought to be in his hands between the issuing of the writ or the plea and the judgment, in the due course of administration. *Smith v. Tateham, supra.*

"Proceedings against executors upon a judgment of assets *in futuro* may be had and taken in the manner provided by the Common-Law Procedure Act, 1852, as to writs of revivor." 17 & 18 Vic. c. 125, s. 91. *See post*, Revivor.

Where the executor pleads several judgments outstanding, and the plaintiff takes judgment of assets *in futuro*, the future assets shall be in the first place applied to those judgments. *Parker v. Attfield*, 1 Salk. 312. Hence there is a difference as to the future assets between a plea of *plene administravit* generally and special plea of *plene administravit præter* judgments.

But where the defendant pleads "*ne unques* executor or administrator," or a release to himself, and it is found against him, the judgment is that the plaintiff do recover both the debt and costs in the first place, *de bonis testatoris, si, &c., et si non, &c., de bonis propriis.* Bro. Ex. 34; 1 Roll. Abr. 930, C, pl. 2, 8; id. 933, pl. 15; Co. Ent. 145, b; Cro. Jac. 648. *Bull v. Wheeler*, id. 672. *Bridgman v. Lightfoot*, Wentw. Ex. 184, 186; Towns. 2d Judgments, 69, pl. 33. The reason alleged is, because the executor cannot but know these to be false pleas; but the same reason seems equally to apply to other pleas, where the judgment is different. The form of the plea of *ne unques executor*, and the replication thereto, may be seen Rast. Ent. 322, a; 329, b. pl. 10; 335, a; Co. Ent. 144, b; Lib. Plac. 427, pl. 27; 1 Wm. Saund. 336, b; and *see ante*, p. 403.

In *assumpsit* against several defendants as executors, with plea of *ne unques executor*,

(*a*) *Form of Judgment for Assets* Quando Acciderint.[1]

(K) *Costs.*[2]

(L) *Execution.*[3]

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the plaintiff may have a verdict against the real executor, on the counts laying the promises by the testator, and the other defendants must be discharged. *Griffiths v. Franklin*, 1 M. & M. 146.

[1] *Form of Judgment for Assets* Quando Acciderint *on a plea of* Plene Administravit.

And hereupon on [*day of signing judgment*], the plaintiff, inasmuch as the defendant doth not deny the action of the plaintiff, and inasmuch as the plaintiff cannot deny but that the defendant had not any goods and chattels which were of the said E. F. at the time of his death, in his hands to be administered, as the defendant hath above in his said plea alleged, and admits the said plea to be true, prays judgment for the said debt, together with his costs of suit, to be adjudged to him, to be levied of the goods and chattels which were of the said E. F. at the time of his death, and which shall hereafter come to the hands of the defendant to be administered: Therefore it is considered that the plaintiff do recover against the defendant the said £ and £ for his costs of suit, to be levied of the goods and chattels which were of the said E. F. at the time of his death, which shall hereafter come to the hands of the defendant as executor [*or* administrator] as aforesaid, to be administered [*if the plea is* plene administravit præter *add*, after satisfying the monies due and owing on, &c., *stating the ground mentioned in the plea*], &c.

Form of Judgment of Quando Acciderint *where part is for Assets* in futuro.

—— To be levied as to £ part thereof of the said goods and chattels so as aforesaid acknowledged to be in the hands of the defendant, to be administered, and as to the residue thereof to be levied of other goods and chattels which were of the said E. F. at the time of his death, and which shall hereafter come to the hands of the defendant as executor [*or* administrator], as aforesaid to be administered, &c.

Judgment for Costs de Bonis Testatoris si, &c., et si non, &c., de Bonis Propriis.

—— To be levied of the goods and chattels which were of the said E. F. at the time of his death, in the hands of the defendant as executor [*or* administrator] as aforesaid, to be administered, if he hath so much thereof in his hands to be administered; and if he hath not so much thereof in his hands to be administered, then £ being for the costs aforesaid, to be levied of the proper goods and chattels of the said defendant, &c.

[2] The executor or administrator defendant will be entitled to the general costs if he succeed in the action. If he plead *non assumpsit* and *plene administravit*, and the plaintiff, instead of taking judgment of assets *quando* on the latter, traverse both the pleas, and issues are joined thereon, and that on *plene administravit* is found for the defendant, he will be entitled to a general judgment and the general costs of the action, although the general issue is found against him. *Marshall v. Wilder*, 9 B. & C. 657. *Hogg v. Graham*, 4 Taunt. 135. *Cockton v. Drinkwater*, 3 Dougl. 239. *Iggulden v. Terson*, 2 Dowl. 277. But see *Hindsley v. Russell*, 12 East, 232.

If he fail in the action he has no privilege as to costs, but is liable to pay them *de bonis propriis* if there are no assets. 2 Wms. Exors. 1690.

Where the defendant admits his representative character, and fails upon some other issue than *plene administravit*, the judgment is that the debt, damages, and costs, be levied out of the goods of the deceased, if there are such; and if not, the costs be levied out of the executor's own goods, *i. e. de bonis propriis. Howard v. Jemmet*, 1 W. Black. 400. *Mounsen v. Bourn*, Cro. Car. 518; 1 Wms. Saund. 335. So on judgment by default, the defendant is liable to costs *de bonis propriis. Smith v. Tatcham*, 2 Ex. 207.

If the defendant plead a plea false to his own knowledge, and fail at the trial, he is liable to pay not only the costs but damages also, *de bonis propriis*; but if he plead a plea, although not false to his own knowledge, and the plaintiff obtains a verdict, the latter is entitled to judgment for the whole: in the first instance *de bonis testatoris*, and if there are not assets, then to the costs *de bonis propriis* of the executor. *Marshall v. Wilder*, 9 B. & C. 658: *per Bayley, J.* The defendant, therefore, in pleading any general plea, runs the risk of paying the costs, whereas if he only pleads *plene administravit*, or having some assets in hand plead *plene administravit præter*, the costs of the judgment on *quando acciderint* will be *de bonis testatoris* only. *De Tastet v. Andrade*, 1 Chit. R. 629, n. *Cox v. Peacock*, 4 Dowl. 134. *Erving v. Peters*, 3 T. R. 685.

The defendant, if likely to fail on the general plea, should apply to a judge for leave to withdraw it on payment of costs. *Dearne v. Grimp*, 2 W. Black. 1275.

If the defendant is liable as assignee, as for rent, repairs, &c. the judgment is *de bonis propriis. Tilney v. Norris*, 1 Salk. 309. *Tremeere v. Morrison*, 1 Bing. N. C. 19. *Rubery v. Stevens*, 4 B. & Adol. 241.

[3] When the judgment is that the debt be levied out of the goods of the deceased, and failing those, that the costs be levied out of the goods of the executor or administrator, the writ of execution issues in the first in-

(*a*) *Forms of Writs of Execution.*[1]

stance *de bonis testatoris*, and then, if the sheriff return *nulla bona testatoris nec propria*, and a *devastavit*, the usual writs of *fi. fa.*, *ca. sa.*, or *elegit*, may issue for the costs against the goods, person, or property of the executor or administrator himself. A *devastavit* must, however, always be returned in such cases before these latter writs can issue. *Ward v. Thomas*, 1 G. & M. 532; 2 Dowl. 87.

If the judgment is that both debt and costs be levied out of the goods of the deceased, if any, and failing these out of those of the executor or administrator, which is the judgment in case of a plea being pleaded false to the knowledge of the defendant, then no previous return of the *devastavit* is necessary, but a *fi. fa.* issues *de bonis testatoris, et si non*, &c., *de bonis propriis;* and if the sheriff returns *nulla bona testatoris nec propria*, a *ca. sa.* may issue directly against the executor.

Where the judgment was *de bonis testatoris*, and a *fi. fa.* has issued accordingly, if the sheriff has returned *nulla bona* only, this will be evidence of a *devastavit*. *Cooper v. Taylor*, 7 Scott, N. R. 950. *Leonard v. Simpson*, 1 Hodg. 251. *Dawson v. Gregory*, 7 Q. B. 756. The plaintiff may then bring an action of debt on the judgment, stating in the declaration the judgment, the writ, and the return, and if successful he may then sue out execution directly against the goods or person of the defendant as in ordinary cases; or, instead of bringing an action on the judgment, the plaintiff may, after giving the same notice as in case of a writ of inquiry (*Biron v. Phillip*, 1 Stra. 235; id. 613), sue out a *scire fieri* inquiry, which is a writ setting forth the *fi. fa.* and *nulla bona*, and suggesting that the executor has wasted the goods, and commanding the sheriff to inquire by a jury if this is so, and thereupon to warn the defendant to show cause why execution should not issue against his own goods. *See post.* The defendant cannot plead either to the action on the judgment *de bonis testatoris*, or to the *scire fieri* inquiry *plene administravit* (*Dawson v. Gregory*, 7 Q. B. 756), and he is liable to pay costs of the *scire facias*. 3 & 4 Wm. 4, c. 42, s. 34.

Where judgment is recovered against an executor, a debt due from a third person to the testator's estate may be attached; and it is no answer that a decree has been made in a suit in Chancery for the administration of the estate. *Burton v. Roberts*, 6 H. & N. 93; 29 L. J. Ex. 484.

[1] *Form of* Fi. Fa. *on a Judgment for Costs* de Bonis Testatoris si, et si non de Bonis propriis.

[For formal commencement *see ante*, Fieri Facias.]

—— You enter the same, and of the goods and chattels in your bailiwick, which were of E. F., deceased, at the time of his death, in the hands of C. D., executor, &c. [*or* administrator, &c.] to be administered, you cause to be made £ which A. B., lately, &c. . . . on which day the judgment aforesaid was entered up, if the said C. D. hath so much thereof in his hands to be administered, and if he hath not so much thereof in his hands to be administered, then that you omit not, by reason of any liberty of your county, but that you enter the same, and cause to be levied of the proper goods and chattels of the said C. D. in your bailiwick the sum of 60*l.*, parcel of the 300*l.*, and which 60*l.* was by the said court adjudged to the said A. B. for his costs of suit in that behalf: and have you these monies with, &c.

Return of Sheriff of a Devastavit.

—— But divers goods and chattels which were of the said E. F. at the time of his death, to the value of 40*l.*, after the death, of the said E. F. came into the hands of the said C. D. to be administered, which said goods and chattels the said C. D. hath, before the coming of this writ to me directed, eloigned, wasted, and converted to his own use.

The Answer of S. S., Sheriff.

Scire Facias *on a Judgment of Assets* Quando Acciderint.

[*Commence as usual, and recite Judgment.*]

And although judgment be thereupon given, yet execution of the said £ still remains to be made to him, the said A. B. And after the judgment aforesaid, in form aforesaid, given divers goods and chattels which were of the said E. F. at the time of his death, to the value of the said £ and more, came and are now in the hands and possession of you the said C. D. as executor [*or* administrator] as aforesaid, to be administered, whereof you may satisfy the said A. B. for the said £ as by the information of the said A. B. in our said court we have been given to understand.

Wherefore the said A. B., having humbly besought us to provide him a proper remedy in this behalf, we command you that within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our said Court of Queen's Bench [Common Pleas, *or* Exchequer of Pleas] at Westminster, to show cause why the said A. B. should not have execution against you of the said £ together with interest upon the same, from the day of , on which day the judgment aforesaid was entered up, to be levied of the goods and chattels which were of the said E. F. at the time of his death, and which so as aforesaid came to and are now in the hands of you the said C. D., to be administered, if it shall seem expedient for him; and further to do and receive what our said court shall then and there consider of you, the said C. D., in this behalf.

And take notice, that in default of your

EXEMPLARY Damages. *See* Damages, vol. iii. p. 549, n.[5].

EXEMPLIFICATION. A process under the Great Seal for removing into one court the record of another court, in order to its being proved. *See ante*, Evidence, p. 289.

EXHIBIT. A document attached to an affidavit or deposition, and referred to therein.

EXIGEAT, or Exigi Facias. *See post*, Outlawry.

EXONERETUR. *See* Bail, vol. ii. p. 93.

EXPLOSIVE Substances, Injuries to Buildings by. 24 & 25 Vic. c. 97, ss. 9, 10. *See ante*, p. 65, and *post*, Malicious Injuries.

EXPOSING CHILD. 24 & 25 Vic. c. 100, s. 27. *See ante*, vol. iii. p. 95.

EXPOSURE, Indecent. *See* Indecent Exposure.

EXPRESSIO eorum quæ tacitè insunt nihil operatur. 2 Inst. 365. *Words expressing that which is implied are inoperative.*[1]

EXPRESSIO unius est exclusio ulterius. Co. Litt. 210. *The express mention of one thing implies the exclusion of another.*[2]

EXPRESSUM facit cessare tacitum. Co. Litt. 210, a. *An expressed stipulation prevents those inferences which otherwise might have been made. See* the preceding maxim, *Expressio unius est exclusio ulterius.*

EXTENTS.[3]

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appearing as aforesaid, the said A. B. may proceed to execution.

Witness at Westminster, the day of 18

[1] "The expression of a clause which the law implies works nothing" (4 Rep. 73); *e. g.* if land be let to two persons for the term of their lives, this creates a joint-tenancy; and if the words, "and the survivor of them" are added, they will be mere surplusage, because by law the term would go to the survivor. Co. Litt. 191, a. See *Seifferth v. Badham*, 9 Beav. 374. If a limitation be made to the use of A. for life, and if A. shall die in the lifetime of B., to the use of B. for life, this limitation gives to B. a vested estate, because the words expressive of a contingency are necessarily implied by the law as being in a limitation to A. for life, and then to B.; and without those words a vested interest would clearly be given. 1 Pest. Abst. Tit. 108; 3 Atk. 138. Finch's Law, b. 1, c. 3.

[2] The above is a general rule of construction; for example, if a lease contain an express covenant on the part of the tenant to repair, there can be no implied contract to repair arising from the relation of landlord and tenant. *Standen v. Christmas*, 16 L. J. Q. B. 264. So if it contain an express covenant for quiet enjoyment, it excludes that which would be implied from the use of the word "demise." *Merrill v. Frame*, 4 Taunt. 329. *Line v. Stephenson*, 5 Bing. N. C. 183. *See*, for other examples of the application of the above maxim, *Cook v. Jennings*, 7 T. R. 381. *Hare v. Horton*, 5 B. & Adol. 715. *Spry v. Flood*, 2 Curt. 365. *Doe d. Spilsbury v. Burdett*, 7 Scott, N. R. 66; 9 Ad. & E. 936. *Aspdin v. Austin*, 5 Q. B. 683. *Dunn v. Sayles*, id. 685. *Tanner v. Smart*, 6 B. & C. 609. *Campbell v. Webster*, 2 C. B. 258. *See* 4 B. & Al. 306.

[3] The writ of extent, or *extendi facias*, is an execution against the body, lands, and goods, or the lands and goods, or the lands only, of the debtor; and it is either for the queen or the subject. For the former it is an ancient prerogative writ for obtaining satisfaction of debts originally due or assigned to the king, or found on an inquisition taken on a writ of extent, or *diem clausit extremum*. For the latter, called an extent in aid, it is a writ issued at the instance and for the benefit of the Crown debtor, for the recovery of his own debt; or it may be had against a principal debtor to the Crown at the instance and for the benefit of his surety, who has paid the Crown debt. *See* West on Extents, and Chitty, jun. Treat. Prerog. of Crown, 264; Manning on Extents. As to registering Crown debts after 31st Dec. 1859, *see* 18 & 19 Vic. c. 15; 22 & 23 Vic. c. 35, s. 22.

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I. Relative to the Different Species of.[1]

(A) *Extents in Chief.*[2]

(B) „ *Aid.*[3]

(C) *Distinction between them.*[4]

II. Relative to an Extent in a Foreign Country.[5]

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[1] The object of extents in aid has been already noticed. *See ante*, 408, n. When sued out for the benefit of the Crown, the queen is the real plaintiff; but when sued out for the benefit of the Crown debtor or surety, the queen is merely a nominal party. *Rex v. Larking*, 8 Price, 683.

[2] An extent in chief is an adverse proceeding by the Crown for a debt due to the Crown. 2 Tidd's Pr. 1090.

It has been held that an extent may issue against the agent of an insurance company for duties received by him. *Rex v. Wrangham*, 1 C. & J. 408; 1 Tyrw. 383.

It seems an extent against the lands and tenements of the Crown debtor only, and not against goods and chattels, is irregular. *R. v. Lambe*, 1 M'Clel. 402. An immediate extent cannot be ante-dated, as it may affect intermediate interests. *Rex v. Maberley*, 2 Dowl. 383.

[3] Upon the principle that the Crown is entitled not only to the goods, chattels, and lands of its debtor, but also to the debts of its debtor, the Crown may sue out an extent, not only against its immediate debtor, but, according to the present practice, against its debtor to the fourth degree. When an extent is sued out against the Crown's immediate debtor, an inquisition is held, under which debts due to the Crown debtor are found and seized into the Crown's hands. A second extent then issues, on the finding against the debtor to the Crown debtor; under which second extent also an inquisition is taken, by which the debts due to that debtor are found and seized into the Crown's hands. A third extent then issues against the party so found to be a debtor by the preceding inquisition; and so on to the fourth degree.

[4] A party liable to account to the Crown for the proceeds of sales effected by him is entitled to an extent in aid. *R. v. Kynaston*, 11 Price, 598. But a country banker receiving Crown monies, and having entered into the usual bond to pay over the same within twenty-one days after the receipt, is not entitled to an extent in aid, unless there has been an actual breach of the condition, and that shown in the affidavit; if there has been no breach, he is only entitled to the ordinary proceeding by commission and inquisition to find debts due to the Crown, as in the case of simple contract debtors to the Crown. *Rex v. Tarleton*, 9 id. 647. So, where the former committee of a lunatic had been declared a bankrupt ten years ago, the court refused a fiat for an extent in aid at the instance of the new committee, founded upon the bond to the Crown, but left the party to the course by *sci. fa.* *In re Lacy*, 10 id. 136.

In 1802, in pursuance of an order of the court under the 25 Geo. 3, c. 35, the extended lands of a Crown debtor were sold for more than the Crown debts, and the debtor being a lunatic, the amount of the purchase-money was, by order of the court, paid into the hands of the deputy-remembrancer, and was by him invested in the public funds in the name of the accountant-general. In 1841, by the 5 Vic. c. 5, the fund and accumulations were vested in the queen's remembrancer to attend the orders of the court. On the petition of the heir of the debtor:—*Held*, that he was entitled to the surplus of the monies after payment of the Crown debt, interest, and costs. *In re Delamotte*, 27 L. J. Ex. 110. S. C. nom. *Geo. III. v. Delamotte*, 3 H. & N. 589.

It has been held that an extent could not be obtained under the 11 Geo. 4, and 1 Wm. 4, against the editor of a newspaper and his sureties, unless a writ of execution have previously issued, and due diligence to procure satisfaction has been used. *Pennell v. Tompson*, 2 Dowl. 137; 1 C. & M. 857; 3 Tyrw. 823.

[5] This prerogative process cannot be had

III. Preliminary Steps to Issuing an Extent in certain Cases.

(A) *Commission to find Debts.*[1]

(*a*) *Of its Origin.*[2]

(*b*) *When Necessary.*[3]

(*c*) *General Nature of.*[4]

(*d*) *Judge's Authority for.*[5]

(*e*) *Notice to Defendant.*[6]

(B) *Inquisition on the Commission.*

(*a*) *Must be Openly Taken.*[7]

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recourse to in a foreign country belonging to her majesty, unless the law there allow it. Chitty's Prer. Cr. 34.

[1] It would be contrary to the first principles of law and justice to issue process of execution before it is ascertained what debt is due to the Crown, and such debt become a debt on record. It may, therefore, be laid down as a general rule, that till the debt, not being *per se* of record, be ascertained and become a record, by a commission and proceeding thereon, the Crown is not entitled to process of execution, unless in cases of danger or insolvency, when an immediate extent may be issued, subject to the rules which will be mentioned. The Crown has no election on this subject; it is bound strictly by this principle. Chitty's Pr. 265.

[2] Some doubt exists as to the origin of the commission to find debts. *Rex v. Knight*, Bunb. 18. But there is an instance of it (Tremaine's *Pleas of the Crown*, p. 600) in print as early as the 13 Car. 2 (Hard. 227). And as early as the statute of 10 Edw. 1, there is an enactment that commissions shall be appointed to inquire of the king's debts, and to record them. And the whole proceeding directed by this enactment is precisely the same as that of the present day, except that by that enactment the debtor was to be summoned by the sheriff: at the present day he is not summoned.

[3] It has been shown that a commission, &c., is in general necessary where a debt is not of record. What are such is governed by the rules in general cases, except where certain debts are created so by statute, as by the 23 Hen. 3, c. 39, s. 50. *Rex v. Vale*, West on Extents, p. 323; Bunb. 58; 2 Bro. P. C. 375.

Where the bond is within the statute, the remedy by extent is given to the queen, though the bond be not made to her, but made to her use. *Rorke v. Dayrell*, 4 T.R. 402.

[4] The commission is issued by the clerk in court of the crown, and is directed to two commissioners, whom it empowers to inquire whether the defendant be not indebted to her majesty in any and what sums of money, and to return the inquisition taken thereon, at the return of the commission; and it commands the sheriff also, in his character of sheriff, to cause a jury to attend before the commissioners; and it empowers the commissioners to summon these witnesses; and it concludes "by warrant indorsed," and by the "barons." West on Extent, p. 22.

[5] The Chancellor of the Exchequer or a Baron's authority is necessary to legalise the commission. *Rex v. Thompson*, Ex. 3 Price, 278.

The "warrant indorsed" at the conclusion of the commission is an indorsement of his name on the commission by a baron or the Chancellor of the Exchequer, and is the *fiat* or authority for its issuing. But in practice the commission is not taken to the baron to be indorsed till after the inquisition has been taken on it: the commission is then taken to him for his indorsement, and the extent and affidavit for his *fiat* at the same time. It is tested in the name of the Chief Baron, and signed by the queen's remembrancer, and sealed with the Exchequer's seal. It may be issued and tested in the vacation, but must be returnable in term. West, 22.

[6] No notice is given to the defendant of the execution of this commission; and the usual, if not universal practice is, to adduce no evidence of the debt before the jury, except the affidavit, which is prepared for the purpose of obtaining the immediate extent. On this affidavit, and this affidavit alone, usually, if not universally, the jury find the debt. West, 22, 23.

[7] The stat. 1 Hen. 8, c. 8, s. 2, enacts, that every escheator and commissioner shall sit in convenient and open places, according to the statutes theretofore made. Bunb. 233; 3 Price, 454.

If the Crown act upon an erroneous inquisition, it may move the court to annul the sale. *Rex v. Cracroft*, 1 M'Clel. & Y. 604.

Upon an inquisition issued to find whether any debt was due to the Crown for arrears of duties, the parties refusing to produce their books before the commission, until an indemnity given not to proceed for penalties which the contents must show to have been incurred, and an attachment moved for: — *Held*, that the solicitor of the Excise could not of his own authority give it, and that the proceeding by bill for duties was a waiver of penalties. *Rex v. Dansey*, 12 Price, 588.

(*b*) *Must be Precise and Decisive.*[1]

(*c*) *What Debts may be found under the Commission.*[2]

(*d*) *As to the Writ of* Melius Inquirendum.[3]

IV. Relative to Issuing a Scire Facias to Justify the Extent.

(A) *When Necessary.*[4]

(B) *Nature and Form of.*[5]

(C) *Teste of.*[6]

(D) *Returns to.*[7]

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[1] The subject-matter of the finding should be stated and explained with some degree of legal form and certainty. *Rex v. Sherwood*, Ex. 3; Price, 269.

[2] All debts may be proved under the commission, which could be the subject of an action against the debtor were the debt due to a subject; but a debt arising out of the non-payment of taxes would not, even before the late statute, support an extent in aid. *Rex v. Wilton*, Ex. 2; Price, 368. *Reg. v. Jobling*, 4 Ex. 483; 19 L. J. Ex. 14.

An extent in aid was set aside, although it appeared by affidavit that the party was indebted to the Crown by bond also. *Rex v. Mares*, Ex. 2; Price, 155. But this or any other liquidated demand would form a sufficient ground for issuing, not only an immediate extent in chief in the first degree, against a defaulter himself, but also subsequent proceedings against the debtors. *R. v. Bebb*, by Hughes, 40; Manning, Ex. Pr. 16.

Money imprested by the Crown cannot be found as a debt, without showing all that the party has applied for the use of the Crown. *Rex v. Rowe*. West on Extent, p. 321. MSS. *See* 11 Mee. & W. 694; 13 L. J. Ex. 70; id. 66.

As an action of debt, or *indebitatus assumpsit*, will lie for the balance, or rather for the items of an open account, the sums for which credit is given to the Crown, subject to such allowance and deductions as are connected with these credits (Mann. N. P. Digest), may be found under the commission. But an unsettled balance due from one partner to another will not support an action of debt or *assumpsit*. Under an extent against the latter, such an interest cannot therefore be seized as a debt (1 Stark. 78). But where a bill is drawn for the amount of Crown monies already received (Cro. Eliz. 545; Co. Rep. 92; 2 Leon. 34, pl. 32; 4 id. 32, pl. 89; Lane, 23; 2 Comyn's Rep. 494), by the acceptor, or even by the drawer (Hughes, 115, 116), the debt from the receiver may be found without waiting for the expiration of the time at which the bill is payable. Whether the giving of a bond to the Crown for the amount of money actually received creates such a merger of the simple contract debt as will preclude the Crown from suing until the bond is forfeited, appears to be unsettled. West, 45.

An extent has precedence though tested after seizure under a *fi. fa.* *Giles v. Grover*, 9 Bing. 128; 2 M. & Scott, 197. A term in premises reserved by the vendors of an estate to secure part of the purchase-money is paramount to the Crown debt. *Rex v. Lambe*, 1 M'Clel. 402. As to priority in bankruptcy, *see* 9 Ex. 32, 628.

An extent in chief may issue against a banker for the recovery of interest allowed by him in the half-yearly balance of a tax-collector's account, in which his own and the Crown monies are blended together; also, to recover the amount of a banker's promissory note in the hands of a tax-collector, and received by him in payment of taxes. *Reg. v. Adams*, 2 Ex. 299. See *Reg. v. Ward*, id. 301. *Reg. v. Austin*, 10 Mee. & W. 691; 12 L. J. Ex. 85.

A bond to the Crown under 33 Hen. 8, c. 39, binds all lands of the obligor over which he had a disposing power at the time he entered into the bond; the giving of such bond being a voluntary act on the part of the obligor, he cannot, by afterwards exercising the power, defeat the right of the Crown. *Ellis v. Reg.* 6 Ex. 721; 19 L. J. Ex. 77.

[3] If the matter be found against the queen, no new commission can issue. Paris, *Stoughter's case*, 8 Co. Rep. 168, m.; 4 Hen. 7, fo. 15, b; id. fo. 16, a, pl.; 1 Dyer, 248, 249, pl. 81, 82. The only remedy for the Crown is a writ of *melius inquirendum*. (Id.)

[4] Unless in cases of insolvency justifying an immediate extent, a *scire facias* is necessary to bring the defendant into court. *Rex v. Pearson*, 3 Price, 288. As no time runs against the queen, a *scire facias* is, generally speaking, unnecessary to revive proceedings at her majesty's suit. 2 Salk. 603; 1 Price, 295.

[5] The *scire facias* (Tidd. 492; Tremaine, 572), is under the seal of the Court of Exchequer, and signed by the Queen's Remembrancer, and tested by the Lord Chief Baron. It recites the inquisition, or the bond, recognisance, &c., and commands the sheriff to warn the defendant to appear before the barons on a day certain, to show cause why the debt should not be levied. West, 316.

[6] The *scire facias*, though it may be sued out in vacation, must be tested in term. *Rex v. Pearson*, 3 Price, 288. *See* 5 & 6 Vic. c. 86, *infra*.

[7] It may be in vacation under 5 & 6 Vic. c. 86, s. 8. *Reg. v. Newton*, 2 Ex. 216; 17 L. J. Ex. 204. If the sheriff warn the defendant, he returns *scire feci* (Tremaine, 609; Tidd,

(E) *Rule to Appear to.*[1]

(F) „ *Plead.*[2]

(G) *Time of Pleading to.*[3]

V. Relative to Extents in Chief.

(A) *Different Species of.*

(*a*) *In the First and Second Degrees, &c.*[4]

(*b*) Diem Clausit Extremum.[5]

(B) *As to an Immediate Extent in the First Degree.*

(A) *Affidavit for.*

(1) *Must State the Nature of the Debt.*[6]

(2) „ *Danger of its being Lost.*[7]

(3) *Before whom Sworn.*[8]

(4) *Application to Set Aside.*[9]

(B) *Fiat.*[10]

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492); if he do not warn him, he returns *nihil* (Tremaine, 609), in which last case a second *scire facias* issues. On the return of *scire feci*, or of two *nihils*, a four-day rule is given on the writ for the defendant to appear and plead thereto, or an extent to issue. West, 317.

[1] Where the *scire facias* is returnable on the last day of term, a rule may be given to appear by the sealing day after such term; and in default thereof proceedings may be had, as where there are days in term for giving such rules. West, 318.

[2] If the defendant appear, a four-day rule is given for the defendant to plead, or an extent to issue; but if the defendant do not appear on the first rule, or, appearing, does not plead on the second rule, process of extent issues without any judgment on the *sciri facias*. West, 308.

[3] The defendant may obtain six weeks' further time to plead after the expiration of the four days, on a motion of course on the signature of counsel; and may, on affidavit of special circumstances, obtain further time, after the expiration of the six weeks, by motion in court, on affidavit of special circumstances. West, 308.

[4] An extent in the first degree is an extent issued for the recovery of debts immediately due to the Crown; but when an inquisition is taken thereon, under which debts are found and seized into the queen's hands, the Crown, if they are not paid, may proceed for the recovery of them, either by *scire facias* (which is the ordinary mode of proceeding), or on an affidavit of danger, and a baron's *fiat*, by immediate extent, which is called an extent in the second degree; and upon such affidavit and *fiat* of a baron, an immediate extent (*see* 2 Tidd. 1093), may issue before the extent under which the debts are found is returnable, though it must be actually returned before the second extent can issue. In like manner, when debts are found and seized into the queen's hands under an extent in the second degree, an immediate extent may issue for the recovery of them, if not paid, on an affidavit of danger, and baron's *fiat*, which is called an extent in the third degree. West, 302, 303; Mann. L. Ex. App. 230.

[5] This is a special writ of *extendi facias*, or extent in chief, issuing after the death of the queen's debtor, against his lands and chattels. 2 Tidd's Pr. 1101.

[6] As to the statement of the debt, there seems no reason why the same rules that are laid down in civil actions in affidavits to hold to bail, should not be adopted in affidavits for immediate extents.

[7] The affidavit must not only state that the debt is likely to be lost, but must disclose the reason for deponent's thinking so. *Rex v. Smith*, Bunb. 300. *Rex v. Scott*, West on Estates, MSS.

All that is, however, requisite is, to disclose such facts in the affidavit as will show the nature of the apprehension dreaded by deponent, and enable the party applied to to judge of its extent. *Smith v. Enderopt*, Ex. Bunb. 134.

[8] The affidavit may be sworn either before a baron of the Exchequer in town, or before a commissioner of that court in the country. 2 Tidd's. Pr.; West on Extents, 54.

[9] As the court will not permit the defendant to deny the insolvency by a counter-affidavit, and he cannot traverse or demur to the statement of insolvency in the deposition, it being no part of the record, it is allowed him to apply to the court to set it aside if it be defective. Chit. jun. Pr. Cr. 279; West on Extents, 180.

[10] The authority for issuing the extent is the *fiat* of the Chancellor of the Exchequer, or one of the barons of the Exchequer. This *fiat* may be obtained at any time, either in vacation or in term, by application to the Chancellor of the Exchequer, or one of the barons. Nor is any motion in court necessary for it now in term time.

(C) *Time of Issuing, and Teste of*[1]

(D) *Out of what Court it Issues.*[2]

(E) *Form of.*[3]

(F) *Return of.*

(1) *In General.*[4]

(2) *Effect of Death of one of Defendants.*[5]

(G) *As to several Writs of Extent running at the same or different Times.*[6]

(H) *Sheriff's Duty under the Extent.*

(1) *As to the Body.*

(*a*) *In General.*[7]

(*b*) *As to whether he can be Discharged out of Custody.*[8]

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[1] An extent may issue on the day on which the *fiat* is signed, or on a subsequent day, and may bear *teste* on the *date* of the first, whether in or out of term. *Rex v. Mann*, 2 Stra. 749. It has been decided that an extent may be issued at any distance of time after the inquisition and *fiat*. *Rex v. Mallett*, 1 Price, 395. And that where it do so, it should be tested the day the *fiat* was granted. *Rex v. Bruce*, Ex.; Manning's Ex. Pr. 2d ed. MSS. *See* 5 & 6 Vic. c. 86.

Where after an extent is returned, and the inquisition taken thereon is quashed for irregularity, a new writ issues. 3 Price, 269. So, if the writ be rendered ineffectual by the non-attendance of witnesses (Parker, 271); and the second writ may bear *teste* on the date of the original *fiat*. Parker, 35; Manning's Ex. Pr. 2d ed. p. 27. But the court will not permit a second extent to issue on the same *fiat* after the return of the first writ, without motion in court and an affidavit of special circumstances. *Rex v. Robinson*, Bunb. 62. *Rex v. Harvey*, 7 Price, 238.

If the *teste* be prior to the *fiat*, the extent will be quashed on motion. *Rex v. Mann*, Ex. 2 Stra. 749; Bunb. 164. *Rex v. Vanderplank*, Bunb. 165, n. But where the *teste* is merely irregular or informal, it may be amended by the *fiat*. *Rex v. Powell*, id. 83. The court will not allow a second extent to issue on the same *fiat* after the return of the first writ, without motion in court and an affidavit of special circumstances to warrant it. But the issuing of a second extent, after notice given to the world by the execution of the first, is not so great a hardship as the issuing of the first extent at a long period after the *fiat;* yet even in that case an affidavit of special circumstances is required.

[2] The writ of extent in chief issues out of the Court of Exchequer. 2 Stra. 749; Gilb. Rep. 222; Bunb. 164; 2 Tidd's Pr. 1094, 8th ed.

[3] The extent, after reciting the judgment, or finding of the simple contract debt, on the inquisition, commands the sheriff to enter and take the debt, and to inquire by a jury what lands and tenements, and of what yearly values, the defendant had on the day when he first became debtor to the Crown, or at any time since (or in the case of a simple contract debt, what lands, &c., he now hath), and what goods and chattels, and of what sorts and prices, and what debts, credits, &c. the defendant, or any person in trust for him, or to his use, hath in his bailiwick; and to appraise and extend all and singular the said goods and chattels, lands and tenements, debts, &c., and take and seize the same into the queen's hands. It then directs the sheriff to summon before him such persons as he shall think proper, and examine them in the premises, but not sell the goods and chattels till he shall be otherwise commanded.

[4] The writ is always made returnable on a general return-day, and, if a *capias* clause be inserted, a term must not intervene between the *teste* and return. West, 58; Manning's Ex. Pr. 28, 2d ed. The sheriff files his return in the Queen's Remembrancer's office on the *quarto die post*, if the writ was returnable on a general return.

[5] Where a joint debt has been found, the death of one of the debtors in the interval between the *fiat* and extent does not vitiate the proceedings. *Rex v. Mallett*, 1 Price, 395.

[6] Any number of extents may issue into different counties at the same time. West, 59; 2 Tidd's Pr. 1095.

[7] Though the *capias* clause may be, and almost invariably is, inserted without a motion in court (*Rex v. Mares*, 2 Price, 153), it has not been usual to take the party under it. It is, however, the sheriff's duty to take the defendant in terms of the writ directed to him, if not countermanded. *Rex v. Blair*, 3 id. 94.

[8] When defendant is once in custody, he can only be discharged by a special application to the court, or to a baron in vacation, or under the Bankruptcy Act (*Rex v. Kenriew*, 3 Price, 536, n.), the granting of which is entirely discretionary. As

(2) *In taking the Inquisition.*

(*a*) *Impannelling the Jury.*[1]

(*b*) *Summoning Witnesses.*[2]

(*c*) *Notice of Executing.*[3]

(*d*) *Objects of Inquiry.*

(*a* 1) *Lands.*[4]

(i) *From what Time Bound.*

(1 *a*) *By Records.*[5]

(2 *a*) *By Bonds made like Records.*[6]

(3 *a*) *By other Bonds and Specialties.*[7]

(4 *a*) *By Statute Debts.*[8]

(5 *a*) *By simple Contract Debts.* See note[8] *infra.*

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to the 23 Hen. 6, c. 9, it does not extend to Crown process. *Rex v. Seton*, 8 Price, 671.

A party in custody under a writ of extent at the suit of the Crown was allowed voluntarily to escape, but was retaken and restored into the same custody, and under the same writ. It was held that he was not entitled to be discharged. *Reg. v. Renton*, 2 Ex. 216; 5 D. & L. 750; 17 L. J. Ex. 204.

Where the agent of an insurance company, who was indebted to them for premiums and duties payable to the Crown, filed his petition under the 5 & 6 Vic. c. 116, and was afterwards arrested on an extent in chief, the court refused to discharge him upon affidavit that he was informed and believed that the Crown debt had been paid by the company, who had in reality issued the extent. *Reg. v. Bennison*, 1 D. & L. 613.

[1] The next step to be taken by the sheriff is, first, if the defendant cannot be found, or is not meant to be arrested, to impannel a jury to inquire as to the defendant's lands and tenements, goods and chattels, &c. 2 Tidd's Pr.

[2] The sheriff is also required to summon witnesses on the part of the Crown, and if they do not attend the Court of Exchequer will attach them. Parker, 269, 271.

[3] On the taking of the inquisition on a writ of extent, all persons claiming an interest in the property sought to be extended may appear and produce evidence, and cross-examine the witness for the Crown (*Rex v. Buckley*, 3 Price, 454), and for that purpose may apply to the court for an order to give reasonable notice of the execution.

[4] Not only the legal estate, but trust estates (West, 129), may be taken under an extent; so may an equity of redemption. *Rex v. De la Motte*, Forest, 162. *Rex v. Coombes*, 1 Price, 207.

So lands in which the debtor has a power of revocation of uses may be taken under the extent. *Smith v. Wheeler*, 1 Vent. 128. But copyhold estates cannot be taken under it. Parker, 195. Lands in ancient demesne appear to be extendible.

Lands which the debtor holds *jure uxoris* are extendible during the coverture. M. 15; H. 7, fo. 14, pl. 6. But lands held by the debtor's widow in dower, or as her jointure, are not chargeable (F. N. B. 45, g); unless the lien of the Crown attached before the marriage. Bro. Distress, pl. 72. And, even in that case, they are to be taken only where the other property is insufficient. F.N.B. 150.

Tithes in the hands of lay impropriators, or leased for life or for years, may be extended as part of the realty. *Rex v. Ellis*, 3 Price, 323. But if the sheriff return that the extendee is a beneficed clerk, process may issue to the ordinary. Bunb. 192, pl. 168. When the benefices lie in several dioceses, it appears to be necessary to award separate writs to each bishop (F. N. B. 266, a); and if the bishop is a party, the process issues to the metropolitan. M. 34 Hen. 6, fo. 29, a. pl. 11. Or a writ of *levari facias* may issue to the bishop in the first instance. 2 Roll. Abr. Prerog. H.; Manning's Ex. Pr. p. 41.

[5] Debts of record always bind the lands from the date of the record. Gilb. Ex. 88; West. 123. Judgments bind the lands from the first day of the term of which they are recorded. Dyer, 224; 2 Roll. Abr. 156. Recognisances, from the caption or time they are entered into. Gilb. Ex. 83.

[6] The stat. 33 Hen. 8, c. 39, s. 50, puts bonds taken in the form thereby prescribed on the footing of statutes staple; and, consequently, *such* bonds so taken bind the obligor's lands, by virtue of the statute, from the time they are executed. 8 Rep. 171; 2 Roll. Abr. 156.

[7] All other bonds and specialties different from those already noticed only bind the party's lands, as at common law, from the time they become of record under the inquisition on a commission. *See* 1 Wightw. 34.

[8] Debts due from those officers enumerated in the stat. 13 Eliz. c. 4, s. 1, bind the land (if incurred at any time during the continuance of the office) from the time of entering into the office. *Rex v. Smith*, Ex. Wightw. 34.

(ii) *How far affected by Alienations or other Disposals of Property.*[1]

(*b* 1) *Chattels Personal.*

(iii) *Certificate of Discharge from Crown Debts.*[2]

(iv) *Where a Stranger claims a Property in the Goods.*[3]

(1) *In general.*[4]

(2) *As Assignee in Trust for Creditors.*[5]

(3) *As Pawnee, Bailee, Demisee, &c.*[6]

(4) *As to Assignees of Bankrupt.*[7]

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[1] Upon an extent in chief against the Crown debtor himself, if the debt accrued whilst he was one of the officers mentioned in 13 Eliz. c. 4, the writ directs the inquiry to be made with reference to the period at which the lien attached, namely, the day on which he first became an accountant, and at any time since, without regard to any subsequent alienation or charge. But where an alienation or charge prior to the lien appears clearly, the jury ought not to extend the land so aliened in the one case, or they should find it subject to the charge in the other.

[2] Any two of the Commissioners of the Treasury (*see* 12 & 13 Vic. c. 89) are empowered, upon such terms as they may think proper, to certify by writing under their hands that any lands of any Crown debtor, or accountant to the Crown, shall be held by the purchaser or mortgagee thereof, discharged from all further claims of her Majesty, her heirs or successors, in respect of any debt or liability of the debtor or accountant to whom such lands belonged. 2 & 3 Vic. c. 11, s. 10. A similar power has been given to any two of the commissioners or principal officers of any public department, with respect to any Crown bond or other security, concerning or incident to any such department; or if there be only one such commissioner or officer, then the power is vested in him. 16 & 17 Vic. c. 107, s. 105; 23 & 24 Vic. c. 115.

[3] It seems that the cattle of a stranger *levant* and *couchant* on the debtor's property cannot be taken on an extent, though they may be on a *levari facias*. 2 Roll. Abr. 159; 16 Vin. Abr. 519; 1 Ld. Raym. 307; 12 Mod. 178. It is even said, that if the king's debtor suffer A. to manure his land, the goods of A. may be seized on a *levari* by the king for his debt. Lane, 91. But in the case of tenants in common, the cattle of one going upon the land cannot be taken for the Crown debt due from the others. 2 Roll. Abr. 457; 16 Vin. Abr. 519, Prerog. I.

[4] Under an extent against one partner the Crown may seize partnership goods, but can only sell the interest of the partner against whom the extent issues. *Rex v. Sanderson*, 1 Wightw. 50. But, in general, under an extent against several, the separate goods of each may be taken, as appears by the form of the writ. 2 Tidd's Pr. 1099.

An account will not be directed to be taken till the whole fund seized be under the control of the Treasury. *Rex v. Marsh*, 1 M'Clel. 681. It appears that the Court of Exchequer has power to refer it to the master to take an account of the rents and profits of land extended to the plaintiff, and to order him to refund the overplus if it appears he has been overpaid. *Brookbank v. Miers*, 4 Dowl. 179.

Where a party against whom an extent has issued becomes bankrupt, his assignee may have an inspection of books seized under the extent. *Rex v. Winkles*, 1 M'Clell. & Y. 33. On an application against a surety on a bond, a breach of the condition must be distinctly shown in the affidavit. *Rex v. Marsh*, M'Clel. 688. Where a party had upon an inquisition under an extent against a Crown debtor been found a debtor to him, and an extent in chief in the second degree issued against him:—*Held*, that he could not avail himself of any alleged formal objection to the sufficiency of the affidavit for issuing the first extent; and *semble*, it was was no objection to such affidavit that it did not state expressly, nor was, in fact, shown from circumstances, that the Crown debtor was in insolvent circumstances, it appearing that there were other allegations in the affidavit sufficient to warrant the *fiat*. *Rex v. Bell*, 11 Price, 772.

[5] Goods *bonâ fide* assigned by the queen's debtor to trustees for the benefit of his creditors, before the *teste* of an extent, cannot be taken under it. *Rex in aid of Braddock v. Watson*, 3 Price, 6.

[6] An extent will be of no avail in the event of parties laying claim to the property upon which it would attach as pawnees, bailees, demisees, or such other characters, so as to vest a special property in them prior to the *fiat* or *teste* to the writ. Bro. Abr. Baron, 121; Plowd. 287; Chitty's Prerog. Cr. 285.

[7] As the Crown is not bound, by the bankrupt statutes not being named in them, the extent operates on the defendant's goods, though a bankruptcy have taken place, if the assignment of his effects be not executed before the *fiat* or *teste* of the writ; but the Crown cannot take the effect if actually assigned before the *fiat* or *teste*. Parker, 126; 7 Vin. Abr. 104; 1 Atk. 95; 4 T. R. 411; Stra. 749, 979; 1 East, 363; 5 Ves. jun. 297; 14 Ves. 87; 1 Mont. *Bankrupt Law*, 663; 16 Ves. 279. But an extent issued out of term could not be ante-dated, so as to overreach

(v) *Where a Stranger claims Interest without Property.*[1]

(vi) *Priority of Writs.*

(1 *a*) *As regards Crown Process.*[2]

(2 *a*) „ *Prerogative and Common Process.*[3]

(*c* 1) *Debts, Credits, and Specialties.*[4]

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the adjudication. Stra. 749. It is said, the Crown cannot prove under proceedings in bankruptcy. Id. 752. If, however, an extent be set aside, and the property passes to the assignees of the debtor, a bankrupt, it cannot be taken under a second extent. *Rex v. Marsh*, 1 M'Clel. & Y. 250. And where, by consent of the parties, an inquisition on an extent and other matters were referred to arbitration, and after the award the defendant took the benefit of the Insolvent Debtors' Act, and inserted the debt due on the extent in his schedule, and was discharged, it was held that such discharge was operative on the debt, for by referring to arbitration without consulting the Crown it had been made an individual matter between the parties. *Rex v. Bingham*, 2 C. & J. 130; 2 Tyr. 46.

[1] Where a stranger claims an interest without a property in the goods, though such interest arose prior to the *fiat* or *teste* of the writ, the prerogative shall prevail. *Rex v. De Caux*, 2 Price, 17. *Rex in aid of Myton v. Hill*, 6 id. 19. Therefore, where goods are distrained, but not sold, before the *fiat* or *teste*, they may be taken; because, till the sale, the property in them remains in the defendant. Park. 112, 21; 4 T. R. 211; 16 East, 279.

Goods which have become liable to the Crown for duties cannot be discharged, except by an actual *bonâ fide* sale. *Attorney-General v. Trueman*, 11 Mee. & W. 694. 13 L. J. Ex. 70. See *Attorney-General v. Walmesley*, 12 Mee. & W. 179; 13 L. J. Ex. 66.

A factor to whom goods have been sent for sale, and who has accepted bills of exchange drawn upon him by his principal to the amount of their value, has a lien available against the Crown. *Rex v. Lee*, Ex. 6 Price, 369.

In the case of extents in chief, the Crown is exempted from the operation of the clause in 8 Anne, c. 14, in favour of landlords, by an express provision. The 8th sect. enacts, "that nothing in this act contained shall extend to let, hinder, or prejudice her majesty, her heirs, &c. in levying, or recovering, or seizing any debts, fines, penalties, or forfeitures, due, payable, or answerable, to her majesty, her heirs, &c.; but that it shall and may be lawful for her majesty, her heirs, &c., to levy, recover, and seize, such debts, &c., in the same manner as if the act had never been made."

[2] By the stat. 33 Hen. 8, c. 39, s. 74, it is enacted, that "if any suit be commenced or taken, or any process awarded for the king, for the recovery of any of his debts, then the same suit and process shall be preferred before the suit of any person or persons; and that the king, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons; so always that the king's suit be taken and commenced, or process awarded for the said debt at the king's suit, before judgment given for the said other person or persons. *See* 2 Wms. Saund. 70, e, f.

An immediate extent, and an extent in chief in the second (or any) degree, are to be satisfied before an extent in aid of a prior *teste*. *Rex v. Larking*, Ex. 8 Price, 683.

It is not necessary that the Crown, in proceeding to recover the debts of its debtor by extent, within the degrees, should first apply the immediate debtor's proper effects in discharge of its debt, before it resorts to the debtor's debts. (Id.) But when the extent in chief has been satisfied, the parties prosecuting the extent in aid should apply to the court, by motion, to be paid out of the overplus, if any, which under the 57 Geo. 3, c. 117, s. 2, is directed to be paid into court, to abide their orders respecting it. 8 Price, 683.

Where the adjudication in bankruptcy and appointment of an official assignee take place at an earlier part of the same day on which a writ of extent is issued against the bankrupt for the same debt, the fraction of a day is not to be taken in account, and the title of the Crown must prevail. *Reg. v. Edwards*, 9 Ex. 32; in error, id. 628.

[3] The general rule is, that *quando jus domino regis et subditi insimul concurrent, jus regis preferri debet.* But it has been determined in the Court of Common Pleas (*Uppom v. Sumner*, 2 Bl. Rep. 1251, 1294) and Queen's Bench, that if goods be taken in execution on a *fieri facias* against the king's debtor, and before sale, an extent issues at the king's suit, grounded on a bond debt, and tested after the delivery of the *fieri facias* to the sheriff, the goods cannot be taken upon the extent. *Rorke v. Dayrell*, 4 T. R. 402. But the Court of Exchequer afterwards arrived at a different conclusion. *Rex v. Wells & Allnutt*, 16 East, 278, n. *Rex v. Sloper*, 6 Price, 114. *Attorney-General v. Fort*, Ex. 8 Price, 364, n. *Rex v. Giles*, 8 Price, 293.

[4] Debts owing to the debtor to the Crown may be found under an extent (21 Hen. 7, c. 12, s. 16; Godb. 291), whether due on record or specialty, or only on simple contract. Godb. 296. And it is now the constant practice to find debts due to the king's debtor on bills of exchange and promissory

(1) *Form of Inquisition.*[1]

(*a*) *Money.*[2]

(1) *In Seizing the Property.*[3]

(2) *In Returning the Writ. See infra*, note [4].

(1) *Rule to Appear and Claim.*[4]

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notes (West, 27, 28, 164, 165), though it was formerly otherwise. Id. 169.

Under an extent against one, debts due to that one and others jointly are objects of inquiry. *Rex in aid of the Kent Insurance Co. v. Ramsbottom*, 5 Price, 447; 7 id. 570. And under an extent against several, debts due to any one of them may be extended. West, 27.

Debts are in general bound from the *teste* of the extent, but not, as it should seem, so as to avoid an intermediate payment. And the creditor's right of suing his debtor remains entire until after the inquisition is taken. *Lakeman v. M'Adam*, 8 Price, 576.

The court, on motion for an *amoveas manus*, where the sheriff had seized debts due to the bankrupt at the *teste* of the writ, and paid to his assignees under a commission of bankruptcy issued after the writ of extent and before the taking of the inquisition, intimated that that was not regularly a subject for summary interference, but ought to be put on the record. *Rex in aid of Cox v. Glenny*, 2 Price, 396; *nom. Rex v. Gleny*; West on Extents, 163.

[1] The inquisition taken by the sheriff under an extent is an office of inquiry, not of information or instruction merely (10 Co. 115, a; Gilb. Ex. 108; Bull. N. P. 215; Man. I. Ex. 582, 583): it must, therefore, be direct, positive, and traversable; but it need not state the interest of the parties with the precision required in a plea. Thus, a particular estate may be found without showing from what it is derived. The inquisition must find facts, and not evidence; and it should not be argumentative finding: a matter of law is surplusage, which does not however destroy the effect of that which is properly stated. Man. Ex. 535, 605; West, 74. See *Dean v. Reg.* 15 Mee. & W. 475; 15 L. J. Ex. 236.

[2] The sheriff is also to seize money, the property of the defendant. There is no case on this subject, though many questions may arise on it. The goods and chattels of the Crown debtor are, as before stated, bound from the *fiat* or *teste* of the extent: but it may be a question whether money, like goods and chattels, is bound from the *teste* of the extent, and can be followed in the hands of the creditors to whom it has been paid *bonâ fide* after the *teste* of the extent. *See* 10 Mee. & W. 691; 12 id. 179; 2 Ex. 299; id. 301.

[3] After taking the inquisition the sheriff is to seize the goods, lands, choses in action, and money found by the jury. The transposition of the words "goods and lands," seems to point out the order in which the different funds are to be resorted to, and to show that if the goods are sufficient, the possession of the lands ought not to be disturbed. Madd, 667; West, 74; 2 Inst. 19, 395; Gilb. Ex. 127; Dyer, 67, b.

Where a sum of money in the hands of the accountant-general in bankruptcy, to the credit of a party against whom an extent had been issued, was seized by the sheriff into the hands of the Crown, although, in consequence of its being in the accountant-general's hands, he could not obtain actual possession of it, the court granted a rule, calling on the sheriff to pay over the money to the use of the Crown, but refused to make the accountant-general a party to the rule. *Reg. v. Austin*, 1 Dougl. N. S. 666; 10 Mee. & W. 691.

Renewable leaseholds are extendible. *Reg. v. Lane*, 6 Mee. & W. 489.

Under an extent the Crown can claim no greater interest than the debtor (*Rex v. Humphrey*, 1 M'Clel. & Y. 173); therefore, under an extent against a lessee, the right of the Crown can only be co-extensive with his interest. *Rex v. Topping*, id. 544.

A motion for the sale of lands need not be made personally by the attorney-general (*Rex v. Buckley*, 1 Y. & J. 256); but an interest in land can only be sold under the order of the court. *Rex v. Blunt*, 2 id. 120.

A sale under an extent is void if a puffer were employed by the auctioneer. *Rex v. Marsh*, 3 id. 331. But if an agent employed by the Crown for the sale of property under an extent bids *bonâ fide* for himself, the sale is not vitiated. *Rex v. Marsh*, 1 C. & J. 406. Upon an excise extent on the sale of real property seized, the court has directed a collector of excise to be present. *Rex v. Dyer*, 1 M'Clel. & Y. 261.

An extent having issued against the defendant, certain freehold property was seized and sold under the 25 Geo. 3, c. 35. The purchaser having paid the purchase-money into the Bank, afterwards, and before any conveyance was executed, sold the property to another person for a less sum; and, in order to avoid the necessity of paying the *ad valorem* duty on two conveyances, applied to the court that the subpurchaser's name might be substituted in the original conveyance for that of the original purchaser. The court declined to grant the application, unless with the consent of all parties; which was afterwards obtained and an order made. *Rex v. Rawlings*, 2 C., M. & R. 471; S. C. 4 Dowl. P. C. 407.

The court will allow incumbrancers to come in and claim. *Rex v. Rawlings*, 12 Price, 334.

[4] The general rules as to appearance and

(J) *Proceedings to try Validity of Writ.*

(1) *Motions to Set Aside.*

(*a*) *Grounds of.*[1]

(*b*) *When and how made.*[2]

(*c*) *By whom Motion may be made.*[3]

(*d*) *Notice of.*[4]

(*e*) *Where the only Remedy.*[5]

(*f*) *Consequence of Crown Officer's Absence when Motion heard.*[6]

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claim are, on the return of the writ of extent, in chief or in aid, or as soon after as the writ is actually returned, a rule or order is entered at the back of it by the prosecutor's clerk in court, that "if no one shall appear and claim the property of the goods, &c. mentioned in the inquisition, on or before that day se'nnight, a writ of *venditioni exponas* shall issue to sell the same (Man. Ex. 553; and *see* Gilb. Exch. 170); and where there are not six days remaining in term, without reckoning Sunday, the rule must be given for the seal day after term (Man. Ex. 553), being a day appointed on the last day of each term, at the discretion of the court. Id. (I); 2 Fowl. 4, 142; West, 175. If no one appear and claim the property within the time limited by the rule, a *venditioni exponas* issues to sell the goods seized under the extent.

Writs of extent are returnable in vacation under the 5 & 6 Vic. c. 86, s. 8. *Reg. v. Renton*, 2 Ex. 216; 5 D. & L. 750; 17 L. J. Ex. 204.

[1] When the inquisition is argumentative, presenting no distinct, material, and traversable allegation (3 Price, 269), or refers to other documents as evidence of the facts found (Hughes, 174), the court, without putting the claimant to the expense and delay of a demurrer, will set aside the extent on motion. *See* Dyer, 208, b; Com. Dig. Pleader. s. 22. But where the point is doubtful, the court will put the party to demurrer. Bunb. 33, pl. 50.

It does not seem irregular to issue an extent against a collector against whom the commissioners have granted no warrant. *Rex v. Collingridge*, 3 Price, 280.

Where the party is stated to be indebted on an instrument which, on the face of the proceedings, shows a duty not yet demandable (3 id. 288); or the Crown claims under a conveyance by which no estate could pass (M. 7 E. 4; Co. 16, 17, 22); or the writ bears *teste* before the *fiat* of the baron (2 Stra. 749; id. 755); or the property found is not by law extendible (Hardres. 226); or the record otherwise repugnant (13 Co. 72; Hughes, 7; Jones, J. E. R. *Memoranda Inquisitio*); or where it appears by the record, or upon affidavit, that the prosecutor of the extent is not entitled to the benefit of the prerogative process. 22 Car. 2, c. 6; 26 Geo. 3, c. 87; 30 id. c. 50; 34 id. c. 75; Jones, J. E. R. *Addenda*, Fee-Farms; 26 Geo. 3, c. 87, s. 14. But an inquisition need not describe the property with the same particularity as would be required in pleading. P. 15 H. 7, fo. 6, 8; and *see* Lane, 50, 110; Ley. 112.

[2] No motion can be made to set aside the extent when the writ is not before the court. *Rex v. Mallett*, 1 Price, 395. Where the irregularity or defect is not apparent on any part of the proceedings, it may be brought before the court by affidavit. Manning's *Ex. Pr.* 113, 2d edit. Nor can such an application be made after obtaining time to plead. *Rex in aid of Horn v. Rippon*, Ex. 3 Price, 38. But the party aggrieved may move to set an extent aside, as well after as before appearance. *Rex v. Pearson*, id. 288.

If any other person than the party against whom the process issues move to set aside the proceedings on affidavit, such person must, in his affidavit, show a title to the property seized.

And it is always advisable for a party moving against an extent for irregularity to do so as early as possible, as an irregularity seems to be waived by appearing and claiming, or by neglecting to take the objection in the first instance; or at least before any step has been taken by the other party. If the motion be refused as being made too early, the party may apply again in a later stage of the proceeding.

[3] It would seem that any person may move to set aside an extent for irregularity as *amicus curiæ*. M. 7 E. 4, fo. 16, pl. 11; id. fo. 22, pl. 25; Manning's *Ex. Pr.* 115.

[4] It is usual (1 Price, 385) to give two days' previous notice of a motion to set aside an extent (id.; 2 Mann. 610); and it is highly reasonable that the opposite party should be provided with the means of resisting the application. But on pressing occasions, towards the end of the term, the court will sometimes direct that short notice of motion for the following day be accepted. 1 Price, 117; Mann. App. 233. And no notice is necessary where the party moves for a rule to show cause only. *Rex v. Collingridge*, West, 179; *see* 3 Price, 280.

[5] Where an extent has been taken out under circumstances in which the practice of the court does not authorise the issuing of the prerogative process, the objection must be made by motion. *Rex in aid of Horn v. Scott*, Ex. 6 Price, 11.

[6] The court will not appoint a re-argument after a decision in the absence of the crown officer. *Rex v. Boyle*, Ex. 2 Price, 5.

(*g*) *As to Quashing an Inquisition in Part.*[1]

(2) *Petition of Right.*[2]

(3) Montrans de Droit.[3]

(4) *Traverse of Office.*

(*a*) *Entering Appearances and Claim.*[4]

(*b*) *Payment of Money into Court.*[5]

(*c*) *Rule to Plead.*[6]

(*d*) *Pleas to.*[7]

(*a* 1) *In Denial or Discharge of the Debt.*[8]

(*b* 1) *By Strangers Claiming the Property.*[9]

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[1] An inquisition may be quashed in part and stand good as to the residue (*Rex v. Sheriff*, Ex. 1 Anstr. 190); and a new writ may issue. M. 9, H. 4, p. 7, b.

And if two writs are issued, one regular and the other not so, the court will support that which can be shown to be correct. *Rex v. Mallett*, Ex. 1 Price, 395.

[2] By the common law, whenever the queen was in possession by virtue of an inquisition, the subject was put to his petition of right, unless the right of the party appeared in the inquisition; and then, at the common law, he might have had *montrans de droit.*

The proceedings in petitions of right are now regulated by statute 23 & 24 Vic. c. 34. *See post*, Petition of Right.

[3] One of the common-law methods of obtaining restitution from the Crown of either real or personal property. The most important rule as to this remedy appears to be, that it is not maintainable where the subject's title is inconsistent with that found for the king by the inquisition (in which event a traverse is the proper course), but only in cases in which the party, in showing his right, is able to confess the *primâ facie* title found for the king, and yet to avoid it. But in both cases, it is to be observed, he must make a title in himself; and if he cannot prove his title to be true, although he be able to prove that the king's title is not good, it will not serve him. Staundf. Prer. c. 20, p. 65; *see* 2 Salk. 448; 3 Bl. Com. 256.

[4] In cases of bankruptcy it is advisable to enter a claim in the name of the bankrupt as well as of the assignees. *Rex v. Aspinall*, West on Extents, p. 178. And where the assignment of a bankrupt's estate was not made until after the expiration of the rule to appear and claim, the court allowed a claim to be entered upon a motion made in the following term. *Rex in aid of Jolly v. Adams*, 5 Price, 39.

So, where the claim was admitted to be entered by the mistake of the clerk in the court. *Rex in aid of Horn v. Rippon*, Ex. 3 Price, 38, n. And in other cases, where the delay is satisfactorily accounted for by affidavit, they will grant relief. 2 Tidd's Pr. 1124. But where a defendant on an extent had moved to quash it, on facts stated by affidavits, which were satisfactorily answered, whereupon a *venditioni exponas* issued, the court will not permit a claim to be entered, and the inquisition traversed. *Rex v. Brixley*, 4 Price, 323.

[5] The court will, in any stage of the proceedings, grant a rule for an *amoveas manus* of payment of the debt into court. *Rex in aid of Simpson v. Hopper*, 3 Price, 40.

Where, upon an application for leave to pay the debt, the parties disagree with respect to the amount, the claimant seems to be entitled to pay the smaller sum (*see* 1 Taunt. 491; 2 id. 203, 283; 4 id. 255) into the receipt of the Exchequer, and this without costs, where the goods seized are appraised beyond the amount of the debt; as, under such circumstances, the land cannot be sold, even though the extent be in chief. Where, however, lands only are seized, the costs must be paid; but poundage forms no part of such costs, not being due on the sale of lands. For the guidance of the party in paying money in, he may obtain a summons for the particulars of the debt (West's Appendix, 87) for which the extent issued.

[6] If an appearance and claim be entered within the time limited by the rules, a rule to plead is given, under the entry of the appearance and claim (Man. Ex. 389) on the back of the writ. This is a four-day rule, on the expiration of which the defendant, or claimant, may obtain further time, upon a motion of course, requiring, in the first instance, only counsel's hand. West, 193.

[7] In *Rex v. Barbary*, 10 Price, 46, the court said, "We cannot interfere upon motion to control the pleadings upon any matters contained in the affidavit on which the fiat was obtained, as upon an alleged departure or variance from the claim set forth in the affidavit; but if it should turn out to be an abuse of process to enable persons not entitled to it to procure an extent, the court would, it seems, by staying proceedings after verdict, or otherwise, protect the parties from such abuse."

[8] Pleas of this nature go in denial or discharge of the debt, and can only be pleaded by the defendant, or those claiming under him. 2 Tidd's Pr. 1124.

[9] These pleas do not go to the discharge or denial of the debt, but are pleaded to the extent by third persons who claim the goods, &c. which have been seized as the

(*c* 1) *Different Species of Pleas.*

(1) *In General.*[1]

(2) *Limitations, Statute of.*[2]

(3) *Set-off.*[3]

(4) *Bankruptcy.*[4]

(5) Solvit post Diem.[5]

REX v. ELLIS, Ex. 1 Price, 23.

The plea of *solvit post diem* is ineffectual as regards an extent in chief.

This was a *scire facias* on a bond given to the Crown for excise duties. Plea of payment after the day, but before the writ issued, and acceptance by the Crown in satisfaction. It was urged that this was a good plea under the statute of the 4th of Anne.

Sed per Cur. This is a bad plea. The duties were to have been paid within the year, and payment after the end of the year is no satisfactory answer to the bond. Taking into consideration all the other parts of the statute, it is clear that it does not generally extend to the Crown, but only in particular instances.

(6) *Frauds, Statute of.*[6]

(7) *Release.*[7]

(8) *As to Pleading several Pleas.*[8]

(*e*) *Demurrers and Estoppels.*[9]

(*f*) *Rule to Reply or Join in Demurrer.*[10]

(*g*) *Replications and other Pleadings subsequent to the Traverse.*[11]

(*h*) *Waiving Plea, Replication, or Demurrer.*[12]

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defendant's, and which pleas go to the property of the goods, &c. seized under the extent. 2 Tidd's Pr. 1124.

[1] The usual pleas are *Non est factum*, or performance, if the debt upon which the extent has issued against the Crown debtor be upon a bond (Freem. P. C. 584, 608); or if it be claimed on a simple contract, *Non indebitatus*, or that the defendant is not indebted to the Crown, or its debtor, as alleged in the inquisition.

[2] This plea does not affect the Crown on an extent in chief. 6 Price, 24.

[3] On an extent in chief, the defendant cannot plead a set-off. Hughes, 204.

[4] Bankruptcy is no defence to an extent in chief. 2 Tidd's Pr. 1125.

[5] The plea of *solvit post diem* is ineffectual as regards an extent in chief. *Rex v. Ellis*, 1 Price, 23.

The queen, not being named by the Statute of Frauds, is not bound thereby.

[7] The Crown debtor may plead a release of all executions (Co. Litt. 291, a; 2 B. & A. 269); but not a release of all suits: for though such a release from a common person would operate as a bar of executions, it is otherwise in the case of the queen, in whose favour the judges are bound to award execution *ex officio*, without any prayer or suit. Co. Litt. 291, a; 2 B. & A. 269.

[8] The defendant, or party claiming the goods, &c. can plead but one plea to the whole inquisition; the stat. 4 Anne, c. 16, s. 7, which gives the liberty of pleading several matters, being holden not to extend to the Crown. West, 210, 211, 212; Man. L. Ex. 598. But he may plead several pleas to distinct parts of the inquisition, or traverse as to part and demur to the residue. Trem. P. C. 582.

[9] When the inquisition finds a bad title for the Crown, the claimant may demur in law upon the record, without traversing. 2 Tidd's Pr. 1126. Mere defects of form are not, however, a ground of demurrer, unless specially stated as such.

[10] The defendant or party pleading cannot rule the Crown to reply. But where the attorney-general will not reply, or demur, in a reasonable time, the court will order judgment to be entered for the defendant, unless the attorney-general, upon being attended, will either enter a *nolle prosequi*, or proceed.

[11] The Crown, being in the situation of a defendant, may reply in abatement (P. 26, H. 8, 1, c. 13, pl. 22; Bac. Abr. Replevin, A); or in bar, or in abatement of the traverse, as to part of the goods claimed, and in bar as to the residue. 1 Wms. Saund. 285, a; 2 Saund. 210, &c.; 2 Roll. Parl. 25 E. 3, 42; 2 Lutw. 1614.

[12] After replication, the king, by his prerogative, may waive it, and reply *de novo*, before issue joined, in the same or another term (2 Roll. Rep. 41); or he may waive his demurrer to the defendant's plea, and reply to issue. Cro. Car. 347; Vaugh. 65; Hardr. 455; Plowd. 322, a. So, if the de-

(*i*) *Abatement by Death of Extendee.*[1]

(*j*) *Jury Process.*[2]

(*k*) *Trial.*[3]

(K) Venditioni Exponas.[4]

(L) *Poundage.*

(1) *In General.*[5]

(2) *By whom and out of what Payable.*[6]

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fendant demur, the Crown, instead of joining in demurrer, may traverse, or confess and avoid, the inducement. T. Jon. 9, 10; Co. Ent. 402; Man. L. Ex. 602. But the defendant is not allowed to change his plea, or waive it, and plead the general issue, without the consent of the attorney-general. Cro. Car. 347; 2 Roll. Rep. 41.

[1] An extent being an execution, the proceedings under it do not abate by the death of the extendee. 5 Price, 628; Man. Ex. Pr. 107, 2d ed.

[2] As soon as issue is joined, a *venire facias juratores* (Hughes, 145, 200; Brown. P. C. 487; Cro. Jac. 666; S. C. Godb. 286; S. C. 2 Roll. Rep. 291; 1 Co. Rep. 162, b; Palmer, 330) may be awarded in any county at the election of the Crown. 1 Vent. 17; 1 Sid. 412; Cro. Car. 438.

[3] The notice of trial is, of course, always given by, and cannot be given to, the Crown. Man. L. Ex. 612.

Notice of trial being given, the record is entered, and cause called on. And at the trial, the defendant, or claimant, being considered as a plaintiff, may be non-suited. 2 Salk. 448.

A writ of error does not divest the Crown of the right to have the money paid over. *Rex v. Burns*, 1 Y. & J. 579.

Where the levy exceeds the debt, or includes costs as poundage, when none are payable, the court will order restitution. *Rex in aid of Cook v. Edwards*, 1 Price, 448.

[4] The sheriff being restrained from selling by the inhibitory clause inserted in the writ of extent, it becomes necessary to sue out a writ of *venditioni exponas* (Brown, P. C. 486; Tidd's App. 6, 22) to authorise a sale upon the non-appearance of an adverse claimant. Under special circumstances, a sale will be directed pending the suit. Where there are not six days remaining in the term without counting Sunday, the rule must be given for the seal-day after term. R. T. 2 Jac. 2; 2 Fowler, 4, 142, 2d ed.

[5] At common law, poundage was not due on an extent. But it is enacted by the 3 Geo. 1, c. 15, s. 3, that "that all sheriffs who shall levy any debts, duties, or sums of money whatsoever, except post fines due or thereafter to become due to the king's majesty, his heirs or successors, by process to them directed, upon the summons of the pipe or green wax, or by *levari facias*, out of the Court of Exchequer, shall from time to time, for their care, pains, and charges, and for their encouragement therein, have an allowance upon their accounts of twelve pence out of every twenty shillings, for any sum, not exceeding 100*l.*, so by them levied or collected; and the sum of sixpence only for every twenty shillings over and above the first one hundred pounds; and for all debts, duties, and sums of money, except post fines due or to become due to his majesty, his heirs and successors, by process on *fieri facias* and extent issuing out of any of the offices of the Court of Exchequer, the sum of one shilling and sixpence out of every twenty shillings, for any sum, not exceeding one hundred pounds, so by them levied or collected; and the sum of twelve pence only for every twenty shillings over and above the first one hundred pounds: Provided always, such sheriff shall duly answer the same upon his account by the general settling of such term in which he ought to be dismissed the court, or in such time, to which he shall have a day granted to finish his said accounts, by warrants signed by the lord chief justice, or one of the barons of the coif of the said court for the time being, and not otherwise."

And by sect. 13, "for preventing of oppressions and injuries which may happen to his majesty's subjects by the abuse of sheriffs, bailiffs, and others employed in levying or collecting any debts, duties, or sums of money due or thereafter to become due to his majesty, his heirs or successors, by process of the Court of Exchequer," it is enacted, "that no sheriff, under-sheriff, bailiff, or other person employed in levying or collecting any of the said debts, duties, or sums of money, shall take, ask, or receive any fee, gratuity, or reward whatsoever, of the person or persons liable to pay the said debts, duties, or sums of money, or of any other person, for or upon pretence of such levying or collecting, except the sum of fourpence only for an acquittance of such sum as shall be so levied or collected, which acquittance such officer is thereby required to give and deliver to the person upon or from whom such debt shall be levied, collected, or received; and the bailiff or other person receiving such debt or sum of money shall, from time to time, answer and account for the same to the sheriff or his deputy, and may require an acquittance also from such sheriff or his deputy for such sum, who are hereby required to give the same without any fee or reward." *See* 7 Wm. 4; 1 Vic. c. 55; 15 & 16 Vic. c. 73, s. 123.

[6] If the debt be secured by penalty, poundage may be levied in addition to the

(3) *How Apportioned between different Sheriffs.*[1]

(C) *As to an Extent in the Second or any Subsequent Degree.*

(*a*) *Mode of Reckoning Degrees.*[2]

(*b*) *Mode of Obtaining.*[3]

(*c*) *Form of.*[4]

(*d*) *Proceedings Under.*[5]

(*e*) *Priority between Extents in Aid.*[6]

(D) *As to the Writ of* Diem Clausit Extremum.

(*a*) *Nature and Form of.*[7]

(*b*) *When it may be Resorted to.*[8]

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debt, so that the levy do not exceed the penalty. *Rex v. Deane*, 2 Anst. 369. And whenever the Crown is entitled to levy its costs and charges, and is bound by the stat. 3 Geo. 1, to allow the sheriff poundage, in such case poundage may be levied by the Crown as an item of such costs and charges. 3 Price, 230. The stat. 3 Geo. 1 does not, however, relate to the sale of land under an order of the court, in pursuance of the 25 Geo. 3; and, consequently, the sheriff not being entitled to poundage, the Crown cannot claim poundage, as an item of its costs and charges, as against the defendant. West, 237.

[1] With respect to the apportionment of poundage between the different sheriffs, *see* the 9th sec. of the stat. 3 Geo. 1.

When two extents issue into two different counties for the same debts, and both sheriffs seize goods, and the debts are paid to one of the sheriffs before a *venditioni exponas* to either, that sheriff to whom the money is paid shall have full poundage. *Rex v. Caldwell*, Ex. 1 Anst. 279. *Rex v. Barber*, 3 Anst. 717. *Rex v. Bowles*, Ex. Wighton, 117. But in such case, where the debt is paid to the officer of the Crown immediately, the poundage shall be apportioned between the sheriffs. *Rex v. Fry*, 3 Anst. 718, n.

[2] In reckoning the degrees allowed for proceedings in aid, the king's debtor is not to be convicted. Accordingly, where A. was the original debtor, B. was indebted to A., C. to B., and D. to C.; and on an extent against C., which had issued after extents against A. and B., the debt due from D. to C. had been seized. The court held that this was properly done, and that the debt due to the Crown from its debtor was not to be counted in reckoning the degrees. *Rex v. Lushington*, 1 Price, 94, 95; 8 id. 293, 386, 683: but *see* West, 299.

[3] The observations which have been made as to an extent in chief will apply as to the extent in aid.

[4] For the purpose of obtaining an extent in the second or any subsequent degree, it is not necessary to swear to the fact of the debt being due from the former debtor, such debt being found by the inquisition against him, which, therefore, need not be stated in the affidavit. West, 245; id. App. 25, 26. The writ of extent in the second degree begins by stating the debt due to the king from his debtor; and if it be a simple contract debt, the inquisition taken on commission for finding it; after which it recites the inquisition by which the debt is found to be due to the king's debtor, and that the same remains unpaid, and then proceeds with the mandatory part of the writ, which is similar to that of extent in chief. West, App. 27, 29.

[5] Under this writ, the sheriff is to take the body, lands, and goods, &c. of the debtor to the king's debtor, in the same manner as under an extent in chief against the original debtor to the Crown, which has been already described. But the lands which the sheriff is directed to seize under an extent in the second degree, are bound merely from the recording of the debt from the debtor against whom it issues under the inquisition against him; unless, indeed, such debt be owing on a judgment or recognisance, in which case the Crown, of course, takes the lien of the plaintiff in the judgment or conusee in the recognisance on the land of the defendant or conusor, which they had at the time of the judgment entered or recognisance acknowledged. As to registering Crown debts under 1 & 2 Vic. c. 11, and 18 & 19 id. c. 115, *see* 22 & 23 Vic. c. 35, s. 22.

The Crown, of course, takes the lien of the plaintiff in the judgment or conusee in the recognisance on the land of the defendant or conusor, which they had at the time of the judgment entered or recognisance acknowledged. West, 247.

[6] An extent in chief in the second degree was preferred to an extent in aid of a prior *teste* when the same effects had been seized under both writs. *Rex v. Lacking*, 8 Price, 683.

[7] The writ of *diem clausit extremum* is a special writ of *extendi facias*, or extent in chief, issuing after the death of the king's debtor.

[8] Whenever an extent might have issued against the king's debtor in his lifetime, a writ of *diem clausit extremum*, which is an extent against the goods and chattels, may issue after his death. Bunb. 119; and *see* Park. 95.

(*c*) *Mode of Obtaining.*[1]

(*d*) *Teste of.*[2]

(*e*) *Sheriff's Duty under.*[3]

(E) *Contribution between Debtors.*[4]

(F) *Liability of Sheriff.*[5]

VII. Relative to Extents in Aid.[6]

EXTINGUISHMENT. *See* Commons, vol. iii. p. 143; Copyholds, id. p. 223; Deeds, *ante*, p. 1; Estates, id. p. 268; *post*, Franchises; Ways.

I. As to Contracts and Debts.[7]

II. „ Services.[8]

EXTORTING Property by Menaces. 24 & 25 Vic. c. 96, s. 45. *See post*, Larceny.

by Threatening Letter. Id. s. 46; *post*, Larceny; Threatening Letter.

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[1] An affidavit of danger does not seem necessary for grounding a writ of *diem clausit extremum*. 13 Price, 279; 1 M'Clel. 105.

[2] It has been said that a writ of *diem clausit extremum* must bear *teste* in term. Hardw. 1256; and *see* Bunb. 39; 2 Stra. 749, 756; R. H. 1 & 2 Geo.; 4 Ex. 9; Price, 86; Tidd, 1104, 8th ed.

[3] Under the writ of *diem clausit extremum* the Crown may seize lands devised before lands descended. 13 Price, 279; S. C. 1 M'Clel. 105. And a *scire facias* against the devisees is not necessary to prove it where the debt is on record. Id.; 2 Tidd's Pr. 105, 198, 9th ed.

[4] When lands are extended in the hands of feoffees of the debtor, an application may be made for an equal apportionment. *See* Manning, 116, 117.

[5] Though no action lies against the sheriff or any subordinate officer for what he does in obedience to the writ of extent, except, perhaps, in cases within 21 Jac. 1, c. 19, s. 10 (*see* id.), yet, if he remain in possession for an unreasonable time after the goods are or might have been sold, an action on the case lies against him at the suit of a party injured by the delay: thus, the landlord of the premises. *Rex in aid of Mython v. Hill*, 6 Price, 19.

[6] This is a writ issued at the instance and for the benefit of the *Crown Debtor*, for the recovery of his own debt (Burr. 24, 127, 134; and *see* 8 Price, 683); or it may be had against a principal debtor to the Crown at the instance and for the benefit of his surety who has paid the Crown debt. West, 13, 14, 307, &c.; Man. L. Ex. 2; Price, 385, n. In these cases the queen is merely the nominal plaintiff. West, 14.

The foundation of an extent in aid is a debt due to the Crown from its debtor, for which an extent in chief has issued against him.

By 57 Geo. 3, c. 117, an extent in aid cannot now be had by persons indebted to the Crown by simple contract only, unless it be for a debt due from collectors or receivers of her majesty's revenue, and one or more of them be bound by bond or specialty of record in the Exchequer for payment of the same. And it may be sued out by a Crown debtor for a debt due to himself and others jointly (West, 273; Man. L. Ex. 83, 2nd ed.); and if several are jointly indebted to the Crown, they may sue out an extent in aid against the debtor, or any one or more of them, as under an extent in chief against several, for a joint debt. Debts due to any one of the parties may be seized into the hands of the Crown. West, 273; 2 Tidd, 9th ed. 1060.

[7] An acceptance by a creditor of a higher security than he had before operates as an extinguishment of the former security. *See* 1 Roll. Abr. 470; 6 Co. 44. But the acceptance of a security of an inferior nature (Cro. Jac. 579; 2 Brownl. 27), or of equal degree, is not an extinguishment. Litt. Rep. 58. So, the giving of another security which, in itself, would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the result of a judgment. *Drake v. Mitchell*, 3 East, 251. *See* Award and Satisfaction, vol. i. p. 88.

As to bills of exchange, *see* vol. ii. p. 446.

If a testator charges an estate with an annuity, and afterwards devises the estate to the annuitant, the annuity is extinguished. *Dennett v. Pass*, 1 Bing. N. S. 388.

[8] If the lord purchases or accepts parcel of the tenancy out of which an entire service is to be done, it is an extinguishment of the whole; but if the service be *pro bono publico*, then no part of it shall be extinguished. *See* 6 Rep. 105; Co. Litt. 149. And if the lord and another person purchase the lands whereon he is to have services, they are extinct. *See* Co. Litt. 147; 1 And. 257.

EXTORTION.

I. What Amounts to.[1]

[1] Extortion, in a large sense, signifies any oppression under colour of right; but, in a more strict sense, it denotes the unlawful taking by any officer, by colour of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. See *Rex v. Holland*, 5 T. R. 607.

By the Statute of Westminster, 1, c. 26, which is only in affirmance of the common law, it is declared and enacted to be extortion for any sheriff, or other minister of the king, whose office any way concerns the administration or execution of justice, or the common good of the subject, to take any reward whatsoever, except what he received from the king. This statute extends to escheaters, coroners, bailiffs, gaolers, and other inferior officers of the king, whose offices were instituted before the making of the act. *See* 2 Inst. 209; 2 Burn, J., Extortion, p. 393. Justices of the peace, whose office was instituted after the act, are bound by their oath of office to take nothing for their office of justice of the peace to be done but of the king, and fees accustomed, and costs limited by statute. And, generally, no public officer may take any other fees or reward for doing anything relating to his office than some statute in force gives him, or such as have been anciently and accustomably taken; and if he do otherwise, he is guilty of extortion (*see* Dalt. c. 41; 2 Burn, J., Extortion, p. 341); and it should be observed that all prescriptions which have been contrary to the statute and to the common law, in affirmance of which it was made, have been always holden to be void; as where the clerk of a market claimed certain fees as due time out of mind for the examination of weights and measures, this was adjudged to be void. *See* 1 Hawk. P.C. c. 68, s. 2; 3 Bac. Abr. Extortion, 108; Arch. C. Pl. 722, 15 ed. *See* 29 Eliz. c. 4, which is not repealed by 7 Wm. 4 and 1 Vic. c. 55; 16 Mee. & W. 615; 10 Q. B. 1.

All masters, clerks, and messengers of the court appointed by virtue of 7 Wm. 4, and 1 Vic. c. 30, s. 19, and 1 & 2 Vic. c. 110, are prohibited from taking gratuities on pain of dismissal. All officers appointed, or to be appointed under 15 & 16 Vic. c. 73, taking or receiving any gratuity, perquisite, or reward other than their salaries respectively, shall forfeit a sum of 50*l.*, and on judgment being recovered, shall be incapable of any longer holding office or employment.

The 33 Geo. 3, c. 52, s. 62, enacts, that the demanding or receiving any sum of money or other valuable thing as a gift or present, or under colour thereof, whether it be for the use of the East India Company or of any other person whatsoever, by any British subject holding or exercising any office or employment under his majesty, or the Company in the East Indies, shall be deemed to be an extortion and a misdemeanor at law, and punished as such. The offender is also to forfeit to the king the present so received, or its full value; but the court may order such present to be restored to the party who gave it, or may order it, or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer.

By 32 Geo. 2, c. 28, for the more speedy punishing gaolers, bailiffs, and others employed in the execution of process for extortion, or other abuses in their respective offices and places, every court at Westminster, judges of assize, &c., are authorised and required to hear and determine the same in a summary way, and to make such order thereupon for redressing the abuses which shall by any such petition be complained of, and for punishing such officer or person complained against, and for making reparation to the party or parties injured, as they shall think just, together with the costs of every such complaint. *See* statute as to penalty payable to party grieved.

The stats. 7 Wm. 4, and 1 Vic. c. 55, enact, that it shall be lawful for sheriffs and their officers to receive such fees, and no more, as shall be allowed by the taxing officers of the courts of Westminster, under the sanction of the judges; and that any sheriff or officer receiving any fee or gratuity greater than is allowed, shall be guilty of a contempt of court, and punishable accordingly.

By 5 & 6 Vic. c. 28, s. 31, it is enacted, that no poundage shall be payable to sheriffs, bailiffs, and others, for taking the body of any person in execution (*Hayley v. Racket*, 5 Mee. & W. 620); but there shall be payable to the sheriff or other person having the return of writs, upon every such execution against the body, such fees only as shall be allowed to be taken under 7 Wm. 4, and 1 Vic. c. 55. The sheriff is still entitled to his poundage under the statute of Elizabeth, on an execution against the goods of the debtor, and also to any additional fee that may be allowed by the judges under 7 Wm. 4, and 1 Vic. If his officer take more, the sheriff is guilty of extortion, and liable to an action for treble damages. *Wrightup v. Greenacre*, 10 Q. B. 12. *Pilkington v. Cooke*, 16 Mee. & W. 615. *Woodgate v. Knatchbull*, 2 T. R. 155.

If a sheriff's officer take more fees than are allowed, the sheriff is liable for the extortion in an action for the penalties incurred (*Jons v. Perchard*, 1 Esp. 508. *Woodgate v. Knatchbull*, 2 T. R. 148), or the court will summarily direct him to return the excess. 5 D. & L. 601; 4 id. 359; 17 L. J. Q. B. 216. But to charge the sheriff he must appear to be connected with the acting bailiff, and that such acts were done under his express authority at the time of committing the illegal act, the delegation of which authority must be shown, by proving the warrant to be directed to the officer. *George v. Perring*, 4 Esp. 63.

It is extortion in an under-sheriff if he obtain his fees by refusing to execute the

II. Action for.[1]
III. Indictment for.[2]
IV. By Threatened Accusation of a Crime. *See post*, Threat.

process till they are paid. *Hescott's case*, 1 Salk. 330. And if a sheriff's officer admit a prisoner to bail upon an agreement to receive a larger sum than allowed, it will be extortion. *Stotesbury v. Smith*, 2 Burr. 924; 1 Black. 204. See *Watson v. Edmonds*, 4 Price, 309. It is extortion for a gaoler to take from a prisoner a larger sum for lodgings than is allowed by the magistrates' regulations. *Miller v. Aris*, 3 Esp. 231. It is extortion to arrest a man on an unfounded charge in order to get a release from him. *Williams v. Lyons*, 8 Mod. 189. So, if a toll be payable by custom it is extortion to exact more than the custom warrants; as for a ferry (*Rex v. Roberts*, 4 Mod. 101; 3 Salk. 198); or for grinding corn at a mill. *Rex v. Burdett*, 1 Ld. Raym. 149. And if the owner of lands on which a customary market is held erects several stalls, and does not leave sufficient room for the market-people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the defendant, the taking the money for the using such stalls is an extortion. *Rex v. Burdett*, *supra*: *per Holt, C. J.* But an indictment does not lie against a turnpike-keeper for extortion in taking toll, on the ground of an exemption not claimed when the toll was paid. *Rex v. Hamlyn*, 4 Camp. 379.

[1] If one man has obtained money from another through the medium of oppression, extortion, or deceit, or by the commission of a trespass, such money is, in contemplation of law, money received for the use of the injured party. Hence, when a man having a claim or lien to a certain amount on goods and securities in his possession, unlawfully refuses to give them up without receiving more than he is strictly entitled to claim, or, having no lien at all upon them, wrongfully refuses to give them up without being paid for so doing, and the owner, in order to get the goods or securities, is obliged to satisfy and discharge the extortionate demand (2 Stra. 915; 9 D. & R. 889, 892), he may recover back the money.

Where a railway company or carrier make excessive charges for the conveyance of goods, and the consignee, in order to get possession of the goods, pays the extortionate demand (2 Q. B. 837; 3 C. B. 715; 20 L. J. Ex. 442);—Where a married man, pretending to be single, marries a lady, and, under colour of such pretended marriage, gets possession of her estates, and receives the rents (Salk. 28);—Where one man takes and wrongfully pledges (1 M. & S. 583) or sells the goods of another, and receives the price (2 Ld. Raym. 1216); or extracts usurious and illegal payments from a distressed debtor (2 Dougl. 697, b); or claims or receives rents or money under a false or pretended authority (2 T. R. 62; 4 C. P. 102), or under the coercion of threatened penal proceedings (1 M. & Gr. 752); or wrongfully usurps the office of another, and receives the fees annexed thereto (2 Lev. 245; 2 Jon. 127; 2 Mod. 263; 5 Q. B. 548); or receives a masquerade ticket, to be sold or re-delivered, and refuses to re-deliver it, the presumption being, in such a case, that he has sold it and received the money (1 Dougl. 137);—An action lies for the recovery of the penalty imposed by the 32 Geo. 2, c. 28, in case of extortion within that statute. See *Wright v. Agar*, 5 Moore, 330. And if the plaintiff fail on the count for the penalty, he may still recover the excess under a count for money had and received. *Lovell v. Simpson*, 3 Esp. 153. The declaration must show the place where the extortion was committed and the sum extorted with certainty; saying that the defendant did extort divers sums generally is bad. Godb. 438; pl. 583.

By the 8 Eliz. persons taking more fees than allowed are subject to pay treble damages to the party grieved, and a penalty of 40*l.*, one half to the king and the other to the party suing for the same. The treble damages are calculated as three times the amount of the damages found by the jury. *See* 2 T. R. 159; 6 D. & R. 1; S. C. 4 B. & C. 154.

In a declaration on the case for extortion on the statute of Elizabeth, it is not necessary to negative the defendant having had authority under the statute of Victoria to take the fees complained of; but that is matter of defence which should come by way of plea. *Pilkington v. Cooke*, 16 Mee. & W. 615. *See* as to form, 4 Q. B. 553; 12 L. J. Q. B. 246; 20 L. J. Ex. 46; 21 L. J. C. P. 194.

[2] Two persons may be indicted jointly for extortion. *Reg. v. Atkinson*, 1 Salk. 382. *Rex v. Loggen and Froome*, 1 Stra. 75. It is said that an indictment for extortion may be laid in any county by the 31 Eliz. c. 5 (1 Hawk. P. C. 68, s. 6); but this position has been questioned. 2 Hawk. P. C. c. 36, s. 10; 2 Chit. Crim. 274, n. The indictment must state a sum; which need not, however, be proved as laid. *Rex v. Burdett*, 1 Ld. Raym. 149.

The charge should be laid either that *colore officii sui extorsive* took; or generally, that he *colore officii sui injuriose et extorsive* took *pro fœdo, &c. Reg. v. Baynes*, 2 Salk. 680. And it should name the time when committed. *Rex v. Roberts*, 4 Mod. 101. Though it omit to state for what cause the extortion was taken, it will be good after verdict. *See* Sid. 91. The indictment may be tried by the justices at sessions. *Rex v. Loggen*, 1 Stra. 72.

The offence is punished at common law by fine and imprisonment, and also by a removal from the office, in the execution of which it was committed (*see* 1 Hawk. P. C. c. 68, s. 5); and there is an additional punishment by Statute of Westminster 1, c.

EXTRA Work. *See* Contracts, vol. iii. p. 193; *post*, Work and Labour.

EXTRACT of Protestation. In Scotch Law, equivalent to judgment of *non pros.*

EYRE, Justices in. Judges who are itinerant. (Obsolete.)

F.

FACTOR. *See* Principal and Agent.

FACTORIES.

(A) *Hours of Labour of Women and Young Children employed in.*[1]

(B) *Duty of Millowner to Fence Machinery.*[2]

(C) *Effect of Provision in Factory Acts taking away Writ of* Certiorari.[3]

26, by which it is enacted, "that no sheriff nor other king's officer shall take any reward to do his office, but shall be paid of that which they take of the king, and that he who so doth shall forfeit twice as much, and shall be punished at the king's pleasure."

An attachment lies against a bailiff for extortion. *Shipway v. Clark*, Barnes, 32.

[1] The legislature has by various statutes regulated the hours and intervals of labour which it shall be lawful to exact of women and young children employed in factories, and has by the same statutes required the observance of certain precautions in the construction and fencing of machinery, with a view to lessen the danger to which factory operatives are exposed. *See* 3 & 4 Wm. 4, c. 103; 7 & 8 Vic. c. 15; 10 & 11 Vic. c. 29; 13 & 14 Vic. c. 54; 16 & 17 Vic. c. 104; 19 & 20 Vic. c. 38.

The Factory Acts apply to bleaching (25 & 26 Vic. c. 8) and lace factories (*see* 24 & 25 Vic. c. 117, s. 1); but it is lawful to employ youths of the age of sixteen and under eighteen between the hours of four in the morning and ten at night; provided, if employed earlier than six in the morning, or later than six in the evening, they must not be employed longer than nine hours in such day. Id. s. 2.

These acts limit the periods between which women and young persons are to work, and the number of hours, and also require the same hour and a half to be allotted to all for meal times, but do not enact that all shall work during the same ten hours. So that, subject to the above limitations, working by relays is legal. And further, all children, young persons, and females, must be taken to have commenced work, within the meaning of the statutes, when any one child, young person or female, commenced work. *Ryder v. Mills*, 3 Ex. 853; 19 L. J. M. C. 82.

[2] By the 7 & 8 Vic. c. 15, s. 21, it is enacted, "that every fly-wheel directly connected with the steam-engine or water-wheel, and every hoist or teagle, near to which children or young persons are liable to pass or be employed, and all parts of the mill-gearing in a factory, shall be securely fenced, and every wheel-race not otherwise secured shall be fenced close to the edge of the wheel-race, and the said protection to each part shall not be removed while the parts required to be fenced are in motion by the action of the steam-engine, water-wheel, or other mechanical power for any manufacturing process." In an action founded upon a neglect of the duty imposed by this section, it is not sufficient to allege that at the time the mischief happened the machinery was not fenced, but it must also be alleged that it was not in motion for a manufacturing process. *Coe v. Platt*, 6 Ex. 752, in error; 7 id. 460; 21 L. J. Ex. 146. The act does not impose an obligation to fence machinery in a room where no manufacturing process is carried on. *Coe v. Platt*, 7 Ex. 923; 22 L. J. Ex. 164.

If the person injured has by his own negligence or improper conduct contributed to the mischief, he will not be in a position to visit the consequence upon the millowner, notwithstanding the latter has neglected the duty imposed by the statute. *Caswell v. Worth*, 25 L. J. Q. B. 121; 20 Jur. 116.

But a plea alleging that the machinery was in such a position that no danger could arise from want of fencing, and that it did not require to be fenced, was held bad. *Doel v. Shepherd*, 25 L. J. Q. B. 124; 20 Jur. 118.

[3] By the 69th sect. of the 7 & 8 Vic. c. 15, the writ of *certiorari* is taken away in certain cases of conviction for offences created by the statute. The Court of Queen's Bench held that the following objections did not afford ground for the issuing of the writ to remove the proceedings, since they failed to show that the justices had not

FACULTY. *See* Ecclesiastical Persons, *ante*, p. 161; *post*, Pew.

FAIRS.[1] *See* Market; and *see* 10 & 11 Vic. c. 14, the Fairs Consolidation Act.

FALSA Demonstratio non Nocet. 6 T. R. 670. *An Instrument is not Invalidated by a False Description.*[2]

FALSE IMPRISONMENT. *See* Arrest, vol. i. p. 519; Assault, id. p. 562; Constable, vol. iii. p. 182; *post*, Justice of the Peace; Malicious Prosecution; Notice of Action.

I. What is an Imprisonment, and in what Cases the Action Lies, p. 428.

II. Of the Pleadings in the Action, p. 431.

(A) *Of the Declaration*, p. 431.

(B) „ *Pleas*, p. 431.

III. Of the Evidence, p. 432.

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V. Of the Costs. *See* vol. iii. p. 292.

I. What is an Imprisonment, and in what Cases the Action Lies.[3]

jurisdiction: namely, that the summons was not served in sufficient time before the hearing to give the party reasonable notice; that he was convicted in his absence; and that, although an attorney was present on his behalf, he was authorised only to apply for an adjournment; and that the conviction took place without proof of service of the summons, and without any evidence of the facts charged. *Ex-parte Hopwood*, 15 Q. B. 121; 19 L. J. M. C. 197.

[1] The words in an original grant, "*Cum omnibus liberis consuetudinibus, &c. ad feriam pertinentibus*," do not, it seems, include tolls. *Earl of Egremont v. Saul*, 6 Ad. & E. 924.

[2] The meaning of the above rule is, that if there be an adequate and sufficient description in a deed, will, or written instrument, of what was meant to pass, a subsequent erroneous addition will not vitiate it: *per Alderson, B., Morrell v. Fisher*, 19 L. J. Ex. 273; *per Parke, B., Llewellyn v. Earl of Jersey*, 11 Mee. & W. 189; Com. Dig. Fait, E. 4. *Thomas v. Thomas*, 6 T. R. 676. *Mosley v. Massey*, 8 East, 149. *Doe d. Smith v. Galloway*, 5 B. & Adol. 51. *Doe d. Ashforth v. Bower*, 3 id. 459. *Selwood v. Mildmay*, 3 Ves. jun. 306. *Lindgren v. Lindgren*, 15 L. J. Ch. 428. *Gynes v. Kemsley*, 1 Freem. 293. *London Grand Junction Railway Co. v. Freeman*, 2 Scott, N. R. 705. *Reg. v. Wilcock*, 7 Q. B. 317. *Ormerod v. Chadwick*, 16 L. J. M. C. 143. *Jack v. M'Intyre*, 12 Clark & Fin. 151. The characteristic of cases strictly within the rule is this, that the description, so far as it is false, applies to no subject; and so far as it is true, it applies to one subject only: and the court in these cases rejects no words but those which are shown to have no application to any subject. Wigram, Ex. Ev. 142. Thus, where an estate is devised called A., and described as in the occupation of B.; and it is found that though there is an estate called A., yet the whole is not in B.'s occupation (*Goodtitle v. Southern*, 1 M. & S. 299); or where an estate is devised to a person whose surname or Christian name is mistaken, or whose description is imperfect or inaccurate, parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence. *Miller v. Travers*, 8 Bing. 248. *Doe d. Hiscocks v. Hiscocks*, 5 Mee. & W. 363. *Rishton v. Cobb*, 5 Mylne & C. 145. *Day v. Trig*, 1 P. Wms. 286. *Doe d. Dunning v. Cranstown*, 7 Mee. & W. 1. *Parker v. Marchant*, 6 Scott, N. R. 485. The rule in these cases is, *Nil facit error nominis cum de corpore vel persona constat.* *See* Broom's *Max.* 490; *ante*, Ambiguity, vol. i. p. 320; Deed, vol. iv. p. 25; *post*, Will.

[3] Bare words do not in general amount to an imprisonment. Add. Torts, 400–509; 1 Hill, 207. There must be some act whereby the plaintiff was deprived of his freedom for some portion of time, however short; there must be a laying hold of the person, or some actual restraint, or submission without force; but actual laying on the hand is not necessary. 3 Stark. Ev. 1112, 3d ed. If a person is restrained from leaving a room, or going out of a house, without the presence of a constable, this infringement

of his personal liberty will constitute an imprisonment. *Warner v. Biddiford*, 4. C. B. (N. S.) 206. If an officer or other person say, "You are my prisoner," &c., or state that he holds a warrant, and the party must accompany him, and he submit in either case, there is a sufficient imprisonment. *Bridgett v. Coyney*, 1 M. & R. 211. *Pocock v. Moore*, 1 R. & M. 211. *Chinn v. Morris*, 2 Car. & P. 361; Bull. N. P. 62. For if a person be ordered by a constable to go with him, and the order is obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment, though no actual force be used, since the party addressed feels that he has no option, no more power of going in any save the one direction prescribed to him, than if the constable or bailiff had actual hold of him; and it is that entire restraint upon the will which constitutes the imprisonment. *Bird v. Jones*, 7 Q. B. 743: *per Williams, J.* But where, upon a magistrate's warrant being shown to the plaintiff, he voluntarily and without compulsion attended the constable, that was held to be no imprisonment. *Arrowsmith v. Mesurier*, 2 N. R. 211. To constitute an imprisonment there must be an entire deprivation of liberty for a period, no matter how brief. And, therefore, it is not enough merely to show that the defendant at a police-office stood before the plaintiff and said, "You cannot go away till the magistrate comes," if he relinquished that attitude and went to another part of the office *before the plaintiff had made any attempt to depart*. *Cant v. Parsons*, 6 C. & P. 504. And where a part of a public footway on a bridge was taken and appropriated for seats to view a regatta, and separated for that purpose from the adjoining carriage-road by a temporary fence, and the plaintiff insisted on a right of way over the part so appropriated, and climbed over the fence, but was stopped by two policemen, who prevented him from proceeding onwards, but at the same time told him he might go back if he pleased, which the plaintiff refused to do, and remained where he was for half-an hour, it was held that this was no imprisonment. *Bird v. Jones*, 7 Q. B. 742. *See* also Arrest, vol. i. p. 519; Assault, id. p. 562; Constable, vol. iii. p. 182.

A schoolmaster's refusing to allow a parent to see or take away her child is not an imprisonment, unless there be evidence of actual restraint. *Herring v. Boyle*, 1 C., M. & R. 377; 6 C. & P. 496.

An innkeeper, by detaining the carriage of his guest, and thus preventing him from proceeding on his journey, is not guilty of an imprisonment. *Gordon v. Cox*, 7 C. & P. 172. And where a man and his wife refused to go out of the shop of a baker, and continued to abuse him in relation to an alleged overcharge, until a crowd of 100 or 150 persons collected round the shop, and obstructed the public passage:—*Held*, that the baker was justified in giving the man and his wife into custody; and that their conduct amounted to a breach of the peace, and that trespass would not lie. *Cohen v. Huskisson*, 2 Mee. & W. 477. But where the defendant, an ostler, charged the plaintiff, a cab-driver, with having cruelly ill-used a horse, and gave him in charge to a police-officer:—*Held* liable for the false imprisonment, as, not being the owner of a horse, nor having seen the alleged cruel treatment, he had no right to give him in charge, nor would the officer on such a statement have been justified in taking the party into custody of his own authority:—*Held* also, that the defendant, having no right to apprehend, was not entitled to any notice of action. *Hopkins v. Crowe*, 7 C. & P. 373. So, trespass against a gaol-keeper for false imprisonment:—*Held* to lie where the defendants, being prisoners, were removed without a *habeas corpus* to be present at the trial of other prisoners. *Bint v. Lavender*, 1 id. 659. And where the plaintiff went without compulsion, with a constable, who was directed by the defendant to take him into custody on a charge of felony:—*Held*, that it was a sufficient imprisonment, and therefore including an assault. *Pocock v. Moore*, 1 R. & M. 321. And if a constable tell a person given into his charge that he must go with him before a magistrate, and such person in consequence goes quietly, without any force being used by that constable, it is a sufficient imprisonment to support an action of trespass. *Chinn v. Morris*, 2 C. & P. 361.

Forcibly to take a person to a place where a felony has been committed to ascertain if he be the felon is an imprisonment. *Hall v. Booth*, 3 Nev. & M. 316. And a private person cannot justify giving a party in charge for a misdemeanor without a justice's warrant (*Fox v. Gaunt*, 3 B. & Adol. 798); nor on suspicion of a felony, unless a felony has been actually committed. *Beckwith v. Filby*, 6 B. & C. 635. *See* 103d sect. 24 & 25 Vic. c. 96, authorising the apprehending of a person committing any larceny or offence within that act without warrant; so as to malicious injuries to property, s. 61, 24 & 25 Vic. c. 97. A creditor having the debtor in custody may nevertheless be sued in trespass for detaining him on an unfounded charge of felony. *Humphreys v. Mitchell*, 2 Bing. N. S. 619.

An action for false imprisonment lies for an arrest on civil process on Sunday (*Wilson v. Tucker*, Salk. 78; 5 Mod. 95), or which is made after the return-day of the writ. *Loveridge v. Plaistow*, 2 H. Black. 29. *Parrot v. Marford*, 2 Esp. 585.

An officer may take a prisoner before the return of the writ on mesne process, though he had voluntarily permitted him to go at large after the arrest; but if an officer suffers a prisoner in execution to escape by his voluntary permission, the gaoler cannot retake him without rendering himself liable to an action for false imprisonment. *See ante*, Escape, p. 263. So false imprisonment lies for executing process on the wrong person. *Oxley v. Flower*, Selw. N. P. 874. But when the officer, having a warrant against A. B., asked the plaintiff, C. D., his name, who

replied A. B., the action was held not maintainable. *Price v. Harwood*, 3 Camp. 108. And there is a distinction between the arrest of a person not originally liable, and one who has merely a temporary exemption, as a witness, bankrupt, &c., who are only entitled to be discharged on motion. *Cameron v. Lightfoot*, 1 Black. 1190.

The action lies where any imprisonment has been committed through the influence or procurement of another, as where the defendant, who was an East India governor, prevailed upon the nabob to imprison the plaintiff. *Rafael v. Verelst*, 2 Black. 983. It was held not to lie where the imprisonment was merely in consequence of taking a ship as prize, though the ship has been restored. *Le Caux v. Eden*, Dougl. 594.

False imprisonment does not lie against a judge acting judicially. *Calder v. Halket*, 3 Moore, P. C. C. 28. *Tuffe v. Downes*, id. 36. And a judge of a court of record is answerable for an act done when he has no jurisdiction, and has not been misinformed as to the facts upon which his jurisdiction depends. 14 Q. B. 841; 19 L. J. Q. B. 170; 3 Man. & G. 523. *See* 8 T. R. 424. Therefore this action was held to lie against commissioners of bankrupts, who committed a person suspected of detaining part of the bankrupt's effects, without conforming to the provisions of the 6 Geo. 4, c. 16, the 31st sect. of which enacts, that a summons shall first issue to the party, and if he then neglect to appear, a second summons, or warrant, at their discretion, to bring him before the commissioners in custody, to be examined, and if he then refuse to be examined, or does not comply with the second summons, the commissioners have power to commit, and not before: therefore, if they committed a person on the first summons, it is contrary to law, and the plaintiff was entitled to recover. *See* 2 Bl. Rep. 1035; 8 East, 319. But although it was formerly holden to lie against commissioners for a commitment in consequence of improper questions, or for not answering in a proper manner, or for committing a party for an improper time (*see* 1 Jac. c. 18; 6 Geo. 4, c. 16, s. 134; 2 Black. 1141; 2 Wils. 382), it seems now to be well settled, that if the commissioners do any act beyond the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be within the limit of their authority, although it be done through an erroneous and mistaken judgment, they are not thereby liable to such action. 1 B. & C. 168; S. C. 2 D. & R. 350. When a court has a jurisdiction of the cause, but proceeds irregularly, or under a misconception, an action does not lie against any of the parties connected with the suit. 10 Rep. 76, a.

An action for false imprisonment may be maintained by a person arrested under a *ca. sa.* on a judgment debt for less than 20*l.*, although the writ has never been set aside. *Brooks v. Hodgkinson*, 7 W. R. 735; 33 L. T. 227, Ex.: but see *Reddell v. Pakeman*, 3 Dowl. 714; 2 C., M. & R. 30.

A justice has no right to order a party in custody to be taken out of court to see if the matter can be arranged. *Bridgett v. Coyney*, 1 M. & R. 211. Accordingly where, in trespass, it appeared that the plaintiff being taken before the defendant, a magistrate, on a complaint of having killed a dog, and refusing to adopt the recommendation to make terms, was told by the defendant that, unless he paid a certain sum, he should convict him in a penalty for the offence under the Malicious Trespass Act; the plaintiff rejected the proposal, and declared he would carry the case elsewhere: upon which the defendant called in a constable, and ordered him to take the plaintiff out, and if the parties did not settle to bring him in again, and he would proceed to convict him under the act; and the plaintiff accordingly went out with the constable. The court held the fact to be sufficient evidence of an imprisonment of the plaintiff by order of the defendant, and nothing to furnish a justification as a ground for disturbing the verdict found by the jury for the plaintiff. (Id.)

The commander of an English merchant ship lying in a port of a foreign state sent a seaman, who had committed mutiny on board the ship, ashore in custody of the soldiers of the port, and procured him to be flogged and imprisoned by the local authorities:—*Held*, that the captain was answerable in trespass for what was done on shore, he having taken an active part in instigating and promoting the proceedings. *Aitken v. Bedwell*, 1 M. & M. 69.

If a party be committed by a justice for an offence not punishable, the justice cannot in an action produce a conviction for another and different offence. *Rogers v. Jones*, 3 B. & C. 409; 5 D. & R. 268.

If the superintendent at a railway station, or the guard of a train, give a railway passenger into custody for infringing a bye-law of the company, and the charge turns out to be without foundation, the railway company will be responsible without further evidence of express authority or subsequent ratification, if, from the position and duties of the officer who so acted, it may be reasonably inferred that he had, as incidental to his office, authority so to act. *Goff v. Great Northern Railway Co.* 30 L. J. Q. B. 148; 7 Jur. N. S. 286. But see *Broom v. Eastern Counties Railway Co.* 6 Ex. 314. *Roe v. Birkenhead, &c. Railway Co.* 7 id. 36. *Giles v. Taff Vale Railway Co.* 2 E. & B. 822.

"If an individual prefers a complaint to a magistrate, and procures a warrant to be granted, on which the accused is taken into custody, the complainant in such case is not liable in trespass for the imprisonment; and that even although the magistrate had no jurisdiction." According to the case of *West v. Smallwood*, 3 Mee. & W. 418, a party who shall make a direct application to a magistrate for a warrant that another may be taken into custody, is deemed thereby only to make an appeal to the magistrate to exercise his jurisdiction; and the imprisonment is referred to the magistrate's authority, so as to exempt the complainant from

II. On the Pleadings in the Action.

(A) *Of the Declaration.*[1]

(B) „ *Pleas.*[2] *See* Forms, B. & L. Pl. 241.

all liability in trespass; and what takes place in the presence of the magistrate ought to be referred to the exercise of his authority, as in *Barber v. Rollinson*, 1 C. & M. 330. In that case the plaintiff, having been discharged from criminal custody by a police magistrate, was leaving the police office, when the defendant said, "I have another charge against him for forgery;" upon which the plaintiff was again taken and placed at the bar, and upon the trial before *Lord Lyndhurst*, in an action of trespass in respect of this second imprisonment, the plaintiff was nonsuited; and upon motion to set aside the nonsuit, it was held that the acts of the defendant were part of the proceedings before the magistrate, for which the defendant could not be held liable in trespass; that the taking could not be considered as the act of the defendant, who had only put the law in motion, for which he might be liable in case:" *per Coltman, J., Brown v. Chapman*, 6 C. B. 365.

So where all the defendant did was to point out to a constable, having a man in custody, another person in a crowd as being the real offender, without any request to take such person into custody, he was held not liable for his arrest and imprisonment. *Gosden v. Elphick*, 4 Ex. 445; 19 L. J. Ex. 9.

And where, after the plaintiff was given into custody, he has been taken before a magistrate and remanded, the defendant is not responsible for the imprisonment consequent upon the remand, for that is the act of the magistrate. *Lock v. Ashton*, 12 Q. B. 871; 18 L. J. Q. B. 76.

[1] A. caused B. to be taken into custody on suspicion of felony, and taken before a magistrate, who remanded B. for two days, and then discharged him. *Semble*, that B. on a declaration for false imprisonment cannot recover for the two days' imprisonment after the remand (*Holtum v. Lotun*, 6 C. & P. 726), at least under a declaration in the common form. See *Barber v. Rollinson, supra.*

A declaration, which consisted of one count, stated an imprisonment of the plaintiff at a shop, and at a station-house, and at a police-office. The only imprisonment was in the shop. The jury found for the plaintiff; and the Lord Chief Justice would not order the verdict to be entered as to part of the count for the plaintiff and as to the residue for the defendant. *Myers v. Goodchild*, 8 C. & P. 313. *See* Forms, B. & L. Pl. 241, &c.

In an action for false imprisonment the venue is transitory (Co. Litt. 282), unless against justices of the peace, constables, &c. 7 & 8 Geo. 4, c. 29, s. 41. *See* vol. iii. p. 190. And in *Mostyn v. Fabrigas*, Cowp. 161, it was holden, that an action for false imprisonment being a transitory action, it was competent to the plaintiff to lay it in any county in England, although the matter arose beyond the seas.

[2] Matters of justification must be pleaded, and such plea must admit the trespass. *Rowe v. Tutte*, Willes, 14. Hence a defendant may plead that he did it by lawful authority. *Matthews v. Cary*, 3 Mod. 137. But a justification of an arrest and false imprisonment, under a writ sued out against plaintiff by another name, averring that they are one and the same person, but not that the plaintiff was known by the one name as well as the other. *Shadgett v. Clipson*, 8 East, 328. But see *Crawford v. Satchwell*, 2 Stra. 1218. A peace-officer may justify an arrest on a reasonable suspicion of felony, without a warrant. *Samuel v. Payne*, Dougl. 358. *Hogg v. Ward*, 3 H. & N. 417; 27 L. J. Ex. 443. *Beckwith v. Philby*, 6 B. & C. 635), but not on suspicion of a misdemeanor. *Griffin v. Colman*, 4 H. & N. 265; 28 L. J. Ex. 134. *Bowditch v. Bal*, 5 Ex. 380. And he may imprison a person who encourages another in his custody to resist. *White v. Edmunds*, Peake, N. S. 89. A police-constable is not justified in imprisoning a person who talks loudly in the streets at night. *Hardy v. Murphy*, 1 Esp. 294.

Several pleas will in general be allowed, stating distinct offences, in justification of the apprehension of the plaintiff. *Currie v. Almond*, 5 Bing. N. S. 224. A plea justifying on the ground of suspicion must show sufficient materials on the face of it to authorise the imprisonment (*Hedges v. Chapman*, 2 Bing. 523), and to enable the court to judge whether his suspicions were reasonable. *Mure v. Kaye*, 4 Taunt. 34.

Where the plea contained a number of allegations, with a view to show that there was reasonable ground for suspecting the plaintiff to have stolen certain goods, of which a felony had been committed, and the defendant did not prove all the facts stated, but proved sufficient in the opinion of the learned judge to constitute such reasonable ground, and the judge amended the plea by striking out the allegations not proved, it was held that the judge had power to make the amendment. *Hailes v. Marks*, 7 H. & N. 56. *Williams v. Crosswell*, 2 C. & Kir. 422.

The question of reasonable and probable cause is one for the judge, and not for the jury to decide. *Hailes v. Marks, supra. West v. Baxendale*, 9 C. B. 141; 19 L. J. C. P. 149. The jury are to find what facts are proved, and the question of reasonable and probable cause on those facts is for the judge. *West v. Baxendale, supra.*

It is, however, lawful for a private individual to do anything to prevent the committing of a felony; and upon this ground

III. Of the Evidence.[1]

the following plea to an action for false imprisonment was held good, namely, that the plaintiffs in the said dwelling-house broke the peace and assaulted his wife, and purposed to have feloniously killed and slain her, and was on the point of so doing; and that her life being in great danger she cried murder, and called for assistance: whereupon the defendants, for the preservation of the peace, and to prevent the plaintiff from so killing and slaying his wife, and committing the said felony, endeavoured to enter by the door, and knocked thereat; and because the same was fastened, and there was reasonable cause to presume that the wife's life could not have been otherwise saved than by immediately breaking open the door, and entering the said dwelling-house, and they could not otherwise obtain possession, they did for that purpose break and enter the said dwelling-house, and somewhat break, &c., doing as little damage as possible, and gently laid hands on the plaintiff, &c. *Handcock v. Baker*, 2 B. & P. 260. So, if two persons are fighting, and there is reason to fear that one of them will be killed by the other, it is lawful to part them, and imprison them, until their anger is cooled. 2 Roll. Abr. 559, pl. 3. In general, when an affray occurs in the presence of a constable, he may keep the parties in custody until the affray is over; and in a plea justifying an imprisonment by a constable, not authorised by warrant, it seems necessary to aver that the constable had view of the breach of the peace: for it has been in several cases determined, that a constable cannot arrest for an affray out of his view, without process, unless felony is expected to ensue. 3 Hawk. P. C. 174; Cro. Eliz. 375; 1 Esp. N. P. C. 294.

Under a plea justifying an imprisonment because the plaintiff assaulted the defendant in his house, and would not depart, the assault must be proved. *Reece v. Taylor*, 4 Nev. & M. 469.

Where one of the defendants gave the plaintiff in custody of the other defendant, a constable, on a charge of felony, and assisted in arresting him:— *Held*, that it afforded no title to an acquittal as to him, on the general issue in trespass, under 7 Jac. 1, c. 5. *Hough v. Marchant*, 1 M. & M. 510.

In an action for false imprisonment, brought by a master of a man-of-war against his captain, the defendant pleaded two sets of pleas. The first set stated that he imprisoned the plaintiff in order to bring him to a court-martial for disobedience of his orders, quarrelling, &c.; the second set stated that the imprisonment took place in consequence of charges brought against the plaintiff by a superior officer. The sentence of a court-martial, held to investigate the charges, cannot be received as conclusive evidence on this state of the pleadings, but, to make it so, should be pleaded as an estoppel; and it is open to the jury, if they believe that the imprisonment took place on the charges stated in the first set of pleas, to inquire into the truth of those charges, notwithstanding the decision of the court-martial upon them. *Hannaford v. Hunn*, 2 C. & P. 148.

If a party, after being illegally imprisoned, receive a sum of money from the person imprisoning, and express himself satisfied, a plea of accord and satisfaction may be sustained. *Price v. Severne*, 1 Dowl. 215, 7 b.

In an action of trespass and false imprisonment for causing a person to be taken to a police station-house, if it appear that the going proceeded originally from the plaintiff's own wish, the defendant will be entitled to a verdict on either "not guilty" or "leave and license" pleaded; but the plaintiff will not be deprived of his right to recover damages, if it appear that, being acted upon by the defendant's having made a charge of felony against him in the presence of a policeman, he went voluntarily with the policeman to the station-house for the purpose of meeting the charge. *Peters v. Stanway*, 6 C. & P. 737.

To justify an arrest under a *ca. sa.* it must appear that the outer door was open, or the party will be a trespasser *ab initio*. *Kerbey v. Denby*, 1 Mee. & W. 336. Where a wrong party was taken under a *ca. sa.*, and to trespass the defendant pleaded "not guilty," and the *ca. sa.*, the court refused to strike out the last plea. *M'Craudle v. Barwise*, 6 Bing. 432; 4 M. & P. 120.

In trespass for imprisoning plaintiff:— *Held*, that if a plea justifying detention by the defendant (the Marshal of the Queen's Bench) for chamber-rent had been proved, the defendant would have been entitled to a verdict; but the evidence being that rent was demanded in connexion with another claim for fees, &c., the plea failed. *Stockdale v. Chapman*, 7 C. & P. 363.

A constable, by joining with an unprivileged person in a bad plea, will have a verdict against him, although, had he severed in pleading, he might have been entitled to a verdict. *Hedges v. Chapman*, 2 Bing. 523.

In an action by A. against B. for false imprisonment, B. cannot defend himself under a magistrate's warrant against C., although A. was charged with felony before the magistrate, and was the person against whom the warrant was intended to issue. *Hoye v. Bush*, 2 Scott, N. R. 861; 1 Man. & G. 775.

[1] In trespass for false imprisonment, proof must be given of circumstances from which the judge and jury may decide whether there was or was not a detention or restraint of the person; and it is not enough for witnesses to swear that they considered the plaintiff was in custody, and thought that he was under restraint; nor is it enough to show that the defendant, at a police-office, stood before the plaintiff and said, "You cannot go away till the magistrate comes," if it appears that he relinquished that attitude, and went to another part of the office before the plaintiff had made any attempt to depart. *Cant v. Parsons*, 6 C. & P. 504.

IV. As to the Damages.[1]

In an action for false imprisonment, the defendant justified on the ground that the plaintiff had been his lodger, and after she had left her apartments he discovered that some feathers were missing from a bed which she had occupied, and he, suspecting her to be the person that had stolen them, caused her to be apprehended, &c. It appeared that the defendant took a policeman at night to the new lodging of the plaintiff, a few days after she had left his house, and had her apprehended and taken to the station-house, and the next day she was examined before the magistrate and discharged: —*Held*, that, as the defendant had taken the law into his own hands, and not adopted, as a prudent person would under such circumstances, the cautious course of having a previous investigation by a magistrate, and obtaining a warrant from him, it was incumbent on him to make out to the entire satisfaction of the jury, not only that a felony had been committed, but that the circumstances of the case were such that they, or any reasonable person, acting without passion or prejudice, would fairly have suspected the plaintiff of being the person who had committed it. *Allen v. Wright*, 8 C. & P. 522.

In trespass and false imprisonment, upon a charge of felony: — *Held*, that under not guilty, evidence showing that the defendant had reasonable grounds of suspicion was admissible in reduction of damages. *Chinn v. Morris*, 1 R. & M. 424. *See* 2 B. & P. 224.

So evidence is admissible under the general issue in mitigation of damages that the plaintiff had been guilty of a misdemeanor, in a case where it does not afford a justification. *Linford v. Lake*, 3 H. & N. 276; 6 W. R. 515.

Where the defendant's son, a youth, had given a servant into custody on a charge of obtaining money from him by false pretences, and after the plaintiff had been remanded the matter first came to the knowledge of the defendant, who did not prohibit his son from going on, but said that he should not interfere, the court held there was no evidence of previous authority or subsequent ratification by the defendant. *Moon v. Towers*, 8 C. B. (N. S.) 611.

In an action of false imprisonment for an arrest under an invalid county-court order, the evidence affecting the defendant was, that he was one of two plaintiffs, at whose suit in the county court the order was granted; that the process could not have been obtained, according to the practice of the county court, without producing to the clerk the plaint note; and that the defendant had threatened to enforce the order. It was held there was some evidence to support the action. *Ahley v. Dale*, 11 C. B. 378; 20 L. J. C. P. 233.

If a party is taken into custody by a constable on a warrant, the signature to which is proved to be of the handwriting of the defendant, a magistrate, this is *primâ facie* evidence against the defendant, without further proof that the warrant was issued by him. *Mason v. Barker*, 1 C. & Kir. 100.

Primâ facie every imprisonment is a trespass, and a party justifying under a warrant must produce it. *Holroyd v. Doncaster*, 3 Bing. 492. Evidence of all details connected with the imprisonment is admissible.

If A. imprison B., and, in continuation of that imprisonment A. deliver B. into the charge of C., who keeps B. in custody, the acts and declarations of C. are evidence against A. in an action for false imprisonment. *Powell v. Hodgetts*, 2 C. & P. 432.

Proofs of annoyance and disturbance by a person present at a meeting, such as crying "Hear, hear," and putting questions to a speaker, and making observations on his statement, will not justify the chairman of the meeting in giving such person in charge to the police; but, to justify such course of proceeding, it must be shown that what was done amounted to a breach of the peace. *Wooding v. Oxley*, 9 C. & P. 1.

A. telling a policeman to take charge of B., is the same as *his* telling the policeman to take B. into custody, and is sufficient to support an action for false imprisonment by B. against A. *Wheeler v. Whiting*, 9 id. 262.

The fact that the defendant signed the charge-sheet is strong, but not conclusive evidence that he authorised the arrest. *Harris v. Dignum*, 29 L. J. Ex. 23. Accordingly where the defendant, who had been robbed of his watch, gave a truthful narrative of the facts to a police-constable, who of his own motion arrested the plaintiff on suspicion, and requested the defendant to accompany him to the police-station, and when there required him to sign the charge-sheet, which he did, it was held, in an action for false imprisonment, that there was no evidence of the defendant having given the plaintiff into custody. *Grinham v. Willy*, 23 Jur. 444; 7 W. R. 463.

Where a plea justifies that the plaintiff had committed a felony, the jury must try the question in the same way as if sitting in a criminal court trying the plaintiff for the offence itself; and if a witness who admits that he stole similar property at the same time is called to sustain the plea, though he is not exactly in the situation of an accomplice, yet it seems that his testimony ought to receive some confirmation. *Richards v. Turner*, Car. & M. 414.

Where, in trespass for false imprisonment, the defendant pleaded that the plaintiff had stolen goods from furnished lodgings, to which the plaintiff replied *de injuriâ*: — *Held*, that the plaintiff was entitled to begin; and the felony being jointly charged upon the plaintiff and his son, pawnbrokers' duplicates found on the latter were admissible; and that it was sufficient to support the plea if the jury believed a felony to have been committed by the plaintiff alone or jointly. *Atkinson v. Warne*, 6 C. & P. 687.

[1] In estimating the damages the jury should

FALSE PRETENCES.

I. What amounts to, p. 434.

(A) *Obtaining Chattel, Money, or Valuable Security by*, p. 434.

(B) *Procuring Chattel, Money, or Valuable Security to be delivered or paid to another by*, p. 435.

(C) *Inducing Person to Execute, &c. Valuable Security by*, p. 436.

II. Indictment, p. 438.

(A) *Venue*, p. 439.

III. Evidence, p. 439.

I. What amounts to.

(A) *Obtaining Money, Chattel, or Valuable Security by.*

Obtaining chattel, money, or valuable security by false pretences is a misdemeanor.[3]

By 24 & 25 Vic. c. 96, s. 88, "whosoever shall, by any false pretence, obtain from any other person any chattel,[1] money, or valuable security,[2] with intent to defraud, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement: Provided that if, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law

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look to all the circumstances characterising the inquiry. Under the words, the "plaintiff paid large sums to procure his discharge," the sums actually paid can only be recovered. *Pritchett v. Boevey*, 1 C. & M. 775; 3 Tyr. 949. But the expense of quashing an inquisition, necessarily done as a preliminary to procuring the plaintiff's discharge from custody, may be recovered under an allegation that the plaintiff had incurred expense in procuring his discharge from custody. *Foxall v. Barnett*, 2 E. & B. 928; 23 L. J. Q. B. 7. *See ante*, vol. iii. p. 547.

If two persons are jointly sued, and one of them has acted from improper motives and the other not, the damages ought to be assessed neither with reference to the act or motives of the most guilty or of the most innocent of the defendants; but the true criterion of damage in such a case is the entire injury the plaintiff has sustained by the joint act of trespass. *Clark v. Newsam*, 1 Ex. 131; 16 L. J. Ex. 297. *See* Mayne on Dam. 263. *See ante*, vol. iii. p. 547, n.[3].

Reasonable and probable cause of suspicion may be given in evidence under the plea of not guilty, in mitigation of damages in a case where it is not available as a defence; *e. g.* in an action against a private individual who has given the plaintiff into custody on a charge of felony (*Perkins v. Vaughan*, 5 Scott, N. R. 881; 4 Man. & G. 989); and for the same purpose it may be shown that the plaintiff was guilty of a lesser offence (*Linford v. Lake*, 2 H. & N. 276; Mayne, 262, 263); but anything which amounts to a justification must be pleaded. See *Watson v. Christie*, 2 B. & P. 224.

A magistrate who commits a person to prison in a case in which he has no jurisdiction, is liable for all the circumstances which *usually* attend the execution of a warrant of commitment; such as the party being handcuffed, having his hair cut short, his being put in a bath there, &c.: but he is not responsible for any violence or excess of the officers. *Mason v. Barker*, 1 C. & Kir. 100; Mayne, 264. *See* 12 & 13 Vic. c. 44, s. 1.

The defendant is not, merely because he made the charge, responsible for the act of the magistrate in remanding the plaintiff, and no damages can be given in respect thereof. *Lock v. Ashton*, 12 Q. B. 871; 18 L.J.Q.B. 76.

The damages may be aggravated by the charge being persisted in at the trial, or even by a plea re-asserting it being placed on the record, although abandoned at the trial. *Warwick v. Foulkes*, 12 Mee. & W. 507; 1 D. & L. 638.

[1] A dog not being the subject of larceny at common law, is not a chattel within this act. *Reg. v. Robinson*, 1 Bell, C. C. 34. *See* s. 18.

[2] The defendant, who was the secretary of a burial society, had, by the false pretence of a death, obtained from the president of the society an order on the treasurer in the following form:—"B. United Burial Society. No. 23. Bolton, September, 1853. Mr. A. E. treasurer. Please to pay the bearer 2*l.* 10s., and charge the same to the above society. R. L. president." This was held to be a valuable security. *Reg. v. Greenhalgh*, Dears. C. C. 267.

[3] The pretence must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property. There-

to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts: Provided also, that it shall not be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud, any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud."

(B) *Procuring Chattel, Money, or Valuable Security, to be delivered or paid to another, by.*

By sect. 89, "whosoever shall, by any false pretence, cause or procure any money to be paid, or any chattel, or valuable security, to be delivered to any other person, for the use or benefit, or on account of, the person making such false pretence, or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel, or valuable security, within the meaning of the last preceding section."

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fore, a pretence that the party would do an act he did not mean to do, as a pretence to pay for goods on delivery, is not a false pretence within the act, but merely a promise for future conduct. *R. v. Goodhall*, R. R. 461. But where the statement consists partly of a fraudulent misrepresentation of an existing fact, and partly of an executory promise to do something *in futuro*, as that the defendant kept a shop, and that the prosecutor might go and live with her at the said shop until she obtained a situation, whereas the defendant kept no shop; the jury found that the prosecutrix parted with her money under the belief that the prisoner kept a shop, and that she should have the money when she went home with her: this was held a false pretence within the act. *Reg. v. Fry*, 1 Dears. & B. 449. And so it was decided where the false representation was that the defendant had bought certain skins and would sell them to the prosecutor. *Reg. v. West*, id. 575.

A false pretence knowingly made to obtain money, &c., is a false pretence within the statute, although the money be obtained under a contract which the prosecutor was induced to make by means of the representation. Accordingly, where A. and B. conspired to make a statement, knowing it to be false, that some horses were the property of a private person, and not of a horse-dealer, and thereby induced D. to buy them. *R. v. Kenrick*, 5 Q. B. 49. So where A. bought a cheese of B. at a fair; but before he bought it B., who was offering cheese for sale, bored two of the cheeses with an iron scoop, and produced a piece of cheese at the end of the scoop for A. to taste: he did so, believing that it had been taken from the cheese, but it had not, and was of a superior kind of cheese, and had been fraudulently put by B. into the scoop, the cheese bought by A. being very inferior to it. It was held, on a case reserved, that B. was indictable for obtaining the price of the cheese from A. by false pretences. *R. v. Abbott*, 2 C. & Kir. 630.

So, passing off a flash note as a Bank of England note on a person unable to read, and obtaining goods from him for part of its represented value, and money for the residue, is an obtaining of goods and money by a false pretence within the meaning of the statute. *R. v. Coulson*, 4 Cox, C. C. 227; 19 L. J. M. C. 192.

Money obtained by means of a begging letter, containing a false description of the condition and character of the writer, is a false pretence within the statute. *R. v. Jones*, 4 Cox, C. C. 198; 19 L. J. M. C. 162; 14 Jur. 533.

Where a railway ticket, by means of which the prisoner was enabled to travel between two places, was obtained by a false pretence, it was held to be an obtaining of a chattel, notwithstanding it was necessary to deliver up the ticket at the end of the journey. *R. v. Boulton*, 3 Cox, C. C. 576; 19 L. J. M. C. 67; 13 Jur. 1034.

Where the defendant obtained goods by a false statement that a bill drawn on and accepted by himself, and purporting to be payable at the London and Westminster Bank, which he gave the prosecutor for the price of the goods, would be paid at the bank the next day, and that he had made arrangements for it, this was held a false pretence within the act. *Reg. v. Hughes*, 1 F. & F. 355.

In *Reg. v. Eagleton*, Dears. C. C. 515, the defendant had contracted with the guardians of a poor-law union to deliver loaves of a specified weight to any poor person bringing a ticket from the relieving officer. According to the course of business the tickets were to be returned by the defendant at the end of each week, together with a statement of the number of tickets sent back, whereupon he was credited with the amount, and the money paid at the time stipulated in the contract. The defendant delivered to certain poor persons, who brought tickets, loaves of less than the specified weight, returned the tickets, with a note of the number sent, and obtained credit on account of the loaves so delivered; but before the time for payment had arrived the fraud was discovered. It was held that the delivery of a less quan-

(C) *Inducing Persons to Execute, &c. Valuable Security by.*

By sect. 90, "whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to execute, make, accept, indorse, or destroy the whole or any part of any valuable security, or to write, impress, and affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as a valuable security, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

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tity of bread than that contracted for was a mere private fraud, no false weights or tokens having been used, and that it was not, therefore, an indictable offence; but that the defendant was properly convicted of an attempt to obtain money by false pretences: for although he had only obtained credit on account, and could not, therefore, have been convicted of the offence of actually obtaining money by false pretences, yet he had done all that was depending on himself towards the payment of the money, and was therefore guilty of the attempt; and that the case was within the stat. 7 & 8 Geo. 4, c. 29, s. 53, because it was an attempt to obtain money by a false and fraudulent representation of an antecedent fact, and not a mere sale of goods by a false pretence of their weight.

A person who obtains from a pawnbroker upon an article, which he falsely represents to be silver, a greater advance than would otherwise have been made, is guilty of a false pretence within the statute, although the pawnbroker have the opportunity of testing the article at the time. *Reg. v. Ball*, Car. & M. 249. See *Reg. v. Roebuck*, 1 Dears. & B. 24. *Reg. v. Goss*, 1 Bell, C. C. 208. But a false representation merely as to the quality of goods sold or pledged is not indictable. In *Reg. v. Bryan* (1 Dears. & B. 265), the defendant was convicted on an indictment for obtaining money by false pretences; the pretences charged being that certain spoons were of the best quality, that they were equal to Elkington's A (meaning spoons made by the Messrs. Elkington, and stamped by them with the letter A), that the foundations were of the best material, and that they had as much silver on them as Elkington's A. The representations were made to a pawnbroker for the purpose of obtaining, and the defendant did thereby obtain, advances of money on the spoons, which were in fact of inferior quality, and of less value than the money advanced on them: and the pawnbroker stated that he was induced by the defendant's misrepresentations alone to advance the money, and that if he had known the real quality of the goods he would have advanced no money upon them. The jury found the prisoner guilty of falsely and fraudulently representing that the spoons had as much silver on them as Elkington's A, and that the foundations were of the best material, and that he thereby obtained the money. It was held by a large majority of the judges that the conviction could not be sustained. But where the defendant sold spurious blacking as Everett's, he was held indictable for the false pretence. *Reg. v. Dundas*, 6 Cox, C. C. 380.

Where the secretary of an Odd Fellows' Society falsely pretended to a member of the society that a sum was due from him for fines, whereby he fraudulently obtained such sum, it was held to be a false pretence within the statute, although the prosecutor had full means of inquiring into the fact. *R. v. Woolley*, 19 L. J. M. C. 165; 4 Cox, C. C. 195; 14 Jur. 465. "If," said *Lord Campbell, C. J.*, "a tradesman, who knew that nothing was due to him from a customer, should come to the latter and tell him that 5*l.* was owing, and the customer should believe and pay the amount, I think the tradesman might be indicted for obtaining the money by false pretences; for it seems to me that it can make no difference whether the person attempted to be imposed on might have ascertained the truth by turning to his own ledger, or, as in the ordinary case, by inquiring of a third party." *R. v. Woolley, supra.*

Where the defendant, by false and fraudulent representations as to the value of his business, induced the prosecutor to enter into partnership with him, and to advance 500*l.* as part of the capital of the concern, and the prosecutor after such advance recognised and acted in the partnership, it was held that this was not obtaining money by false pretences within the meaning of the statute, for the prosecutor, as partner, continued to be interested in the money. *Reg. v. Watson*, 1 Dears. & B. 348.

In *Reg. v. Gardner* (id. 40), the defendant, by falsely pretending that he was a naval officer, induced the prosecutor to enter into a contract with him to board and lodge him at a guinea a-week, under which contract he was lodged and supplied with various articles of food. It was held that a conviction for obtaining the food by false pretences could not be supported, for the obtaining of the food was too remotely the result of the false pretence.

Where the defendant was indicted for conspiring with others to obtain money by false pretences, it was held to be no bar to his conviction that the prosecutor had the intention of cheating the defendant if he could. *Reg. v. Hudson*, 1 Bell, C. C. 263. And if the defendant obtain the money by a false pretence, knowing it to be false, it is no answer to show that the party from whom he obtained it laid a plan to entrap him into the commission of the offence. *R. v. Ady*, 1 Dears. & B. 140.

A pretence to a parish officer as an excuse for not working that the party has not clothes, when he really has, though it induced the officer to give him clothes, is not a pretence within the statute, the statement being rather a false excuse for not working than a false pretence to obtain goods. *R. v. Wakeling*, R. & R. 504.

Where, in order to induce his bankers to pay his cheques, a defendant drew a bill on a person on whom he had no right to draw, and which had no chance of being paid, in consequence of which the bankers paid money for him, it was held not to be within the act, because he only obtained credit, and not any specific sum on the bill. *R. v. Wavell*, 1 M. C. C. 224. See *Reg. v. Garrett*, Dears. C. C. 233.

Where the prosecutor knows the falsehood of the pretence, but parts with his money or goods notwithstanding, the defendant cannot be convicted. *Reg. v. Mills*, 1 Dears. & B. 205. But his having the *means* of such knowledge will not secure the defendant any immunity. Thus, where the defendant falsely represented a 1*l.* Irish bank-note to be a 5*l.* note, and thereby obtained the full value of a 5*l.* note, though the prosecutor could read, and the note on the face of it furnished obvious means of detecting the fraud, the defendant was held to be properly convicted. *Reg. v. Jessop*, id. 442.

Where money was obtained from the prosecutor by two prisoners by a trick, under pretence of a wager with one, the other persuading and receiving the money as stakeholder:—*Held*, that if the jury were satisfied it was obtained from the owner with a preconceived intention to convert it to a joint use, then it would amount to a felonious taking; but to convict both, the jury must be satisfied they were acting in concert. *Rex v. Wynne*, 1 Gow. 223.

Where a party obtained money by a pretence which he knew at the time to be false:—*Held*, it was immaterial that the party from whom he obtained it laid a plan to entrap him into the offence. *Rex v. Ady*, 7 C. & P. 140. And where an attorney, who appeared for a party summarily convicted and fined 2*l.*, represented to his wife that he had before prevailed in compromising a similar case for 1*l.*, and that if she would give him a sovereign he would go and do the same for her, it appearing that he had never made any such application, but that both the fines were paid in full:—*Held*, that it was an obtaining money by false pretences. *Rex v. Asterley*, 7 id. 191. But it cannot be deemed a false pretence where a party takes a covenant as a security. *Rex v. Codrington*, 1 id. 661. And where it would have been a breach of the law in the drawer of an order for payment of money, which ought to have been stamped, to have drawn it without:—*Held*, that it was not a valuable security within the 7 & 8 Geo. 4, for the obtaining of which by false pretences the party might be indicted. *Yates' case*, 1 M. C. C. 170. So where the prisoner, having previously banked with the prosecutor, obtained further advances on his promising to procure a good bill as a fund for repayment, and delivered a pretended good bill, but which was not so:—*Held*, that as all which was obtained was credit in his account, and not any specific sum on the bill, the conviction for obtaining money on false pretences was wrong. *Wavell's case*, id. 224.

Where the prisoner had represented himself as a gentleman's servant living at B., and that he had bought twenty other horses at the same fair, which he had at an inn, and that if the prosecutor would take down his filly there he would pay him the price agreed; but the prosecutor stated that he parted with his filly, not on account of his believing any of the pretences charged, but because he expected the purchaser would call at the inn and pay him:—*Held*, that if the jury believed that he parted with his property only on such expectation the prisoner was entitled to be acquitted. *Rex v. Dale*, 7 C. & P. 352.

Where the prosecutor owed the prisoner's master money, and the prisoner obtained goods from the prosecutor's wife by representing that his master had bought them:—*Held*, that if the jury thought that the prisoner only intended to put it into his master's power to enforce a just debt, and not to defraud the prosecutor, the prisoner was entitled to be acquitted. *Rex v. Williams*, id. 354.

In *Wickham v. Reg.* (10 Ad. & E. 34; 2 Per. & D. 333), the prisoner was indicted for obtaining money under false pretences. The false pretences alleged were, that the prisoner stated that he was a captain in the East India Company's service, and that a note was a good and valuable consideration for the sum of 21*l.* The court held, that it not appearing that the note was his own, or that he knew it to be worthless, the latter false pretence was insufficient, and the two being to be taken together as the means of defrauding, the indictment was bad, and judgment reversed.

It is not necessary to constitute the offence that the pretence should be made to the person from whom the money is obtained. *R. v. Brown*, 2 Cox, C. C. 348. If the pretence be made to A. in B.'s hearing, and money is obtained from B., it may be laid as made to B. *R. v. Dent*, 1 C. & Kir. 249.

To have constituted an offence within the 30 Geo. 2, c. 24, money or goods must have been obtained by a *false pretence with an intent to defraud*, and it was no objection that the pretence consisted in a representation,

II. Of the Indictment.[1]

as of some transaction to take place *at a future time*. *Young v. the King*, in error; 3 T. R. 98.

Where a superintendent in a clothing manufactory having to keep an account of the number of shearers employed, and the amount of their earnings and wages, and to deliver it in every week, delivered in a false account, by which he obtained a larger sum of money than was due, that was holden to be within the statute (*Mitchell's case*, 2 East, P. C. 830); so where the prisoner obtained money from the keeper of a post-office, by assuming to be the person mentioned in the money order which he presented for payment, but did not make any false declaration or assertion to obtain the money, still the case was holden to be within the statute. *Rex v. Story*, 1 Russ. & Ry. 81. And the fact of uttering a counterfeit note as a genuine note was holden to be tantamount to a presentation that it was so. *Freeth's case*, id. 127.

Upon an indictment for delivering in payment for a horse certain promissory notes as for good and available promissory notes, which the prisoner knew to be not good, nor of any value, purporting to be the notes of a country bank, which was supposed to have failed: — *Held*, that at all events it was necessary to prove the notes were of no value, and bad. *Rex v. Flint*, id. 640. And where a carrier pretended to the consignor of goods that he had delivered them to the consignee, and thereby obtained money for the carriage, it was holden that the offence was within the 30 Geo. 2, c. 24, now repealed. *Rex v. Airey*, 2 East, Rep. 30. So the offence of borrowing money, by pretending that the person was sent by a neighbour, was holden within the statute. *Coleman's case*, 2 East, P. C. 672.

On an indictment under 30 Geo. 2, c. 24, it was no objection in arrest of judgment that the indictment contained several charges of the same nature in the different counts; and where the pretence was conveyed by words spoken by one defendant in the presence of others who were acting in concert together, it was holden they might be all indicted jointly. *Young v. the King*, 3 T. R. 98. It was not essential to prove that the prisoner used the very words which constitute the false pretence, as alleged in the indictment; it was sufficient to prove acts and conduct which virtually amount to the false pretence laid. *See* 2 Stark. Co. 563. But the proof of the pretence must correspond with the allegations, and it was also necessary to prove that the money or goods were obtained by means of the false pretence, and the intention to defraud. *See* 2 Stark. Ev. 565.

Formerly, in cases where goods had been obtained from another by mere fraud, the court had not power of awarding restitution on conviction of the offender, as in cases of felony. See *Parker v. Patrick*, 5 T. R. 175. *Rex v. De Vaux*, 2 Leach, C. L. 585. But now, by the 7 & 8 Geo. 4, c. 29, s. 57, the court may order restitution of the property in a summary manner, but not to extend to securities *bonâ fide* paid for or transferred.

The 8 & 9 Vic. c. 109, s. 17, enacts, that every person who shall by any fraud or unlawful device, or ill-practice in playing at or with cards, dice-tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any person to himself any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such person by a false pretence, with intent to cheat and defraud such person of the same, and being convicted thereof shall be punished accordingly.

Costs may be allowed on prosecutions under this section. *R. v. Gardner*, 7 L. T. 7. *See post*, Gaming.

[1] It is sufficient to allege in an indictment for obtaining money, &c. by false pretences, "that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security." 24 & 25 Vic. c. 96, s. 88.

The omission of the word "knowingly" is no ground for arresting the judgment (*R. v. Bowen*, 19 L. J. M. C. 65; 13 Jur. 1045); for as the word "knowingly" is not in the statute, an indictment which does not contain that word, but follows the language of the statute, is sufficient after verdict. *Reg. v. Hamilton*, 9 Q. B. 271.

But where an indictment against A. and B. charged that C. was possessed of a mare and A. of a horse, and that A. and B. falsely pretended to C. that B. was then and there possessed of a certain sum of money, to wit, 12*l.*, and that if C. would exchange his mare for A.'s horse, B. was willing and ready to purchase the horse of C., and give him 12*l.* for it; whereas, in truth and in fact, B. was not then and there possessed of the said sum of 12*l.*, and was not then and there ready and willing to purchase the said horse of C., and to give him the 12*l.*; and it was held bad on demurrer for not averring that the defendant knew that B. was not possessed of the 12*l.* *Reg. v. Henderson*, 2 M. C. C. 192; C. & M. 328. See *R. v. Philpotts*, 1 C. & Kir. 112.

The false pretence must still be stated; and it has been held that an indictment which merely charged that the defendant did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from A. B. a large sum of money, with intent to cheat and defraud him, was bad in arrest of judgment. *R. v. Marsh*, 19 L. J. M. C. 12; 13 Jur. 1010; 3 Cox, C. C. 571.

In *R. v. Leonard*, 2 C. & Kir. 514, A., the servant of B., rendered an account to B. of

(A) *Venue.*[1]

III. Evidence.[2]

14*l.* 1*s.* 2*d.*, as due from A. to his workmen, and B. gave A. a cheque for the amount. All that sum was so due except 7*s.*, which A. kept when he got the cheque cashed, and paid the workmen the residue. In one count of the indictment for false pretences it was charged that, by this false pretence, A. obtained the cheque of B. with intent to defraud him of the same. It was objected, that the intent was only to defraud B. of a part of the proceeds of the cheque. A. was convicted, and the conviction, after argument before the fifteen judges: it was held that the evidence supported the count. *R. v. Leonard*, 2 C. & Kir. 514.

Where the false pretence averred in the indictment was that the defendant having executed certain work, there was a certain sum due and owing to him on account of it, whereas only a smaller sum was due to him; this was held bad, as not sufficiently averring a false pretence of an existing fact, and being provable by evidence of a mere wrongful over-charge. *Reg. v. Oates*, Dears. C. C. 459.

Where the false pretence was that "the defendant then was a captain in her majesty's 5th Regiment," &c., the pretence was held to be well negatived by an averment that the defendant was not, "at the time of making such pretence," a captain, &c. *Hamilton v. Reg.* 9 Q. B. 271.

An indictment for false pretences charged in the first count that the defendant "unlawfully did falsely pretend to one J. B. that he the said J. T. was sent by W. P. for an order to go to J. B. for a pair of shoes," by means of which false pretence he did obtain from J. B. a pair of shoes of the goods and chattels of J. B., with intent to defraud J. L. of the price of the said shoes, to wit, 9*s.* of the monies of J. L. The second count charged that he falsely pretended to J. L. that W. P. had said that J. L. was to give him, the said J. T. (the defendant), an order to go to J. B. for a pair of shoes, by means of which false pretence he did obtain from J. B., in the name of J. L., a pair of shoes of the goods of J. B., with intent to defraud J. L. of the same:—*Held*, that both these counts were bad in arrest of judgment, as neither of them charged a sufficient false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53. *Reg. v. Tully*, 9 C. & P. 227.

Where the goods received were obtained by false pretences:—*Held*, that the indictment alleging only that the prisoner received the goods, knowing them to have been "unlawfully obtained, taken, and carried away," was insufficient; it ought to appear that the knowledge was of their having been obtained under false pretences to bring the case within the statute. *Reg. v. Wilson*, 2 M. C. C. 52.

Obtaining goods on a cheque drawn by the prisoner on bankers where he had no account, representing that he had an account there, and that it would be paid:—*Held* within the statute. And the indictment, on the pretence that it was a good and genuine order for the payment, and of the value of the sum stated:—*Held* sufficient. *Reg. v. Parker*, id. 1.

Where a written instrument has been used in making the false pretence, it is not necessary to set it out in the indictment unless it is essential that the court should be able to judge whether the legal description given of it is accurate; where, therefore, the indictment merely alleged that the defendant falsely pretended that a printed paper which he produced was a good and valid promissory note, it was held sufficient without setting out the printed paper. *R. v. Coulson*, 19 L. J. M. C. 182; 14 Jur. 558; 4 Cox, C. C. 227.

[1] Where the defendant, by means of a false pretence contained in a letter written by him in the county of C., received there the money obtained thereby, which money was sent to him by the prosecutor in a registered letter; the letter containing the false pretence being received by the prosecutor in the county of the borough of C., and the registered letter being posted by him in the county of the borough of C.; the venue was held to be well laid in the county of the borough. *Reg. v. Leech*, Dears. C. C. 642. See *Reg. v. Cooke*, 1 F. & F. 64.

Where a begging-letter which contained false pretences was addressed to the prosecutor, who resided in Middlesex, requesting him to put a letter containing a post-office order for money in a post-office in Middlesex, to be forwarded to the prisoner's address in Kent, the venue was held to be rightly laid in Middlesex, as the prisoner, by his request, constituted the postmaster in Middlesex his agent to receive the letter there for him; consequently, there was a receipt of the money-order by the prisoner within the county of Middlesex. *R. v. Jones*, 19 L. J. M. C. 162; 4 Cox, C. C. 198. *See post*, Indictment.

[2] It is not necessary on the trial of an indictment for obtaining money, or a chattel, &c., by false pretences, to prove an intent to defraud any particular person; it is sufficient to prove that the party accused did the act charged with an intent to defraud. 24 & 25 Vic. c. 96, s. 88.

On a charge of obtaining money by false pretences from A., evidence of a subsequent obtaining of money by the defendant from B. by the same false pretence is not admissible. *Reg. v. Holt*, 1 Bell, C. C. 280.

Where a false pretence was contained in a false letter, which was lost before the trial, the prisoner was convicted on parol evidence of its contents. *Rex v. Chadwick*, 6 C. & P. 181.

Where the defendant offered a chain in pledge to a pawnbroker, which he falsely stated to be silver, but the pawnbroker stated

FALSE Representation. *See* Deceit, vol. iii. p. 560.

Returns. *See* Mandamus; Sheriff.

Weights. *See* Weights and Measures.

FAVORABILIORES rei Potius quam Actores habentur. D. 50, 17, 125. *See post*, Melior est Conditio Defendentis; and vol. iii. p. 158, n; id. p. 530, n. [2].

FEE,[1] and FEE-SIMPLE.

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(A) *By Right.*

(*a*) *By Purchase.*

(1) *By Bargain and Sale.* *See* Bargain and Sale, vol. ii. p. 372.

(2) „ *Covenant to stand Seised.* *See* Covenant, vol. iii. p. 481.

(3) „ *Devise.* *See* Will.

(4) „ *Exchange.* *See* Exchange, *ante*, p. 342.

(5) „ *Feoffment.* *See* Feoffment, *post*, p. 453.

(6) „ *Grant.* *See* Grant.

(7) „ *Release.* *See* Release.

(*b*) *By Descent.* *See* Descent, *ante*, p. 47.

(B) *By Wrong.*

(*a*) *By Abatement.* *See* Disseisin, *ante*, p. 77.

(*b*) „ *Disseisin.* *See* Id.

(*c*) „ *Intrusion.* *See* Intrusion.

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that he advanced money upon it, not in consequence of the defendant's statement, but in reliance on its withstanding a test which he himself applied to it, it was held that the defendant could not be convicted of obtaining the money by means of the false pretence. *Reg. v. Roebuck*, 1 Dears. & B. 24.

A. was indicted for obtaining 200*l.* by falsely pretending that he had obtained from Lord S. the appointment of emigration agent at P., which was worth 600*l.* a-year, and that for 200*l.* he would give the prosecutor one-third of the agentship. The prosecutor proved that he gave the money on this pretence, which was false; but that before he parted with his money, the defendant prevailed on him to execute a deed of co-partnership with him, in which the consideration was stated to be 200*l.*, and in which nothing was said of the agentship, or how it was obtained. It was held on a case reserved that the putting in of this deed, in support of the case for the prosecution, did not exclude parol evidence of the false pretences; and that if the deed was a part of the defendant's scheme to effect the fraud, the defendant might be found guilty. *R. v. Adamson*, 1 C. & Kir. 192.

[1] The word "fee" is sometimes used for the compass or circuit of a lordship or manor, as we say, "the lord of the fee," &c., as well as the particular estate of the tenant; and also for a perpetual right incorporeal, as to have the keeping of prisons, &c. in fee. Bracton, l. 2, c. 5; Old Nat. Br. 41. And where a rent or annuity is granted to one and his heirs, it is a fee personal. Co. Litt. 1, 2.

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I. Different Species of.

(A) *Fee-Simple Absolute.*[1]

(B) „ *Qualified or Base.*[2]

[1] "Tenant in fee-simple," is thus described by Littleton, s. 1: "He who hath lands or tenements to hold to him and his heirs for ever. And it is called in Latin *fœdum simplex;* for *fœdum* is the same that inheritance is, and *simplex* is as much as to say lawful, or pure; and so *fœdum simplex* signifies a law or pure inheritance." Littleton has been censured for annexing an improper meaning to the word *fœdum* in his definition; and it has been contended that that word signifies land holden of a superior lord by military or other services. But although this was certainly the original meaning of the word, yet when the feudal law was fully established here, and it was universally acknowledged that all the lands in England were held mediately or immediately of the Crown, the word *fœdum*, or fee, became generally used to denote the quantity of estate or interest in the land. Thus it appears from Bracton, that the word *fœdum* was then often used in both these senses. *Est sciendum quod fœdum est id quod quis tenet, ex quâcunque causâ, sibi et hæredibus suis. Item dicitur fœdum alio modo ejus qui alium feoffat, et quod quis tenet ab alio; ut si qui dicat, talis tenet de me tot fœda per servitium militare.* And it is evidently for the purpose of denoting the quantity of interest that the word *fœdum* is used in pleading an inheritance in the king, viz. *Rex seisitus fuit in dominico suo ut de fœdo;* where the word *fœdum* cannot possibly import an estate holden, the king not holding of any superior lord, but merely denotes an inheritance. *See* Smith, R. & P. 132.

An estate in fee-simple is the entire and absolute interest and property in the land, from which it follows that no one can have a greater estate, so that whenever a person grants an estate in fee-simple, he cannot make any further disposition of it, because he has already granted away the whole interest, consequently nothing remains in him. An estate in fee-simple may, however, be granted on condition; and in devises by will, and deeds deriving their effect from the Statute of Uses, an estate in fee-simple may be rendered defeasible on the happening of some future event. Tenant in fee-simple is the absolute master of all houses and other buildings erected on the land, as also of all timber growing thereon; for trees are considered as parcel of the inheritance, and the law does not favour the severance of them from the freehold, because they would be thereby wasted and destroyed. He is also entitled to all mines of metal, except gold and silver, and to dig up and dispose of all minerals and fossils which are under the land. 1 Cru. Dig. 63.

[2] A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A. and his heirs, tenants of the manor of Dale; in this instance, whenever the heirs of A. cease to be tenants of that manor (Yelv. 150; Prest. on Estates, 20; 1 Leon. 74), the grant is entirely defeated. So, when Henry the Fourth granted to John Talbot, lord of the manor of Kingston, Lisle in Berks, that he and his heirs, lords of the said manor, should be

(C) *Fee-Simple Conditional.* *See* Conditions, vol. iii. p. 164; and *post*, Tail, Estate in.

II. By what Means such an Estate may be Acquired. *See* Analysis.

III. In what Things a Man may have a Fee-Simple.[1]

IV. By what Words such an Estate may be Created.

(A) *In a Deed.*[2]

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peers of the realm, by the title of barons of Lisle. Here John Talbot had a base or qualified fee in that dignity (Co. Litt. 27), and the instant he or his heirs quitted the seigniority of this manor the dignity was at an end. This estate is a fee, because by possibility it may endure for ever in a man and his heirs, yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee. 2 Bl. Com. 110; Smith, R. & P. 144, 163.

[1] A man may have an estate in fee-simple of all lands or tenements, or other things real (Co. Litt. 1, b); of lordships, advowsons, commons, estates, and all hereditaments. Id. 4, a. So, he may have a fee-simple in things mixed, as in franchises, liberties, &c. Id. 2, a. So, if a man grants to another, and his heirs, all woods, underwoods, timber trees, or others, in such a part of a forest, saving the soil, the grantee has a fee to take *in alieno solo*. R. 8, Co. 137, b. So, in things personal, as an annuity. Co. Litt. 2, a. In a dignity granted to him and his heirs. (Id.) In a swan mark. 7 Co. 17. In a part, as share of the New River Water Company, 207. So, in the patronage of an hospital, or other thing created *de novo*, in which there was not a precedent estate, a man may have a fee to him and his heirs qualified in a particular manner; as if a queen-consort institutes an hospital, and reserves the patronage *sibi et reginis Angliæ succedentibus*. Ch. Ca. 214. But in estates *in esse*, before such desultory inheritance, it cannot be; as the Duchy of Cornwall limited to the prince *et filis regis Angliæ progenitis* shall not be good, except when limited by act of parliament. 8 Co. 16.

[2] With respect to the words required to create an estate in fee-simple, it is laid down by Littleton and Lord Coke, that in all feoffments and grants the word heirs is absolutely necessary for that purpose, and cannot be supplied by any other word whatsoever. Mr. Maddox, however, contends that this doctrine is not so ancient as is generally supposed, for that formerly there were several modes of expression by which an estate in fee-simple might have been created without the word heirs, such as that the feoffee, *et suis*, or *suis post ipsum*, or *habendum et jure hæreditario perpetuo possidendum*; so that it is probable this maxim was not fully established till the principles of the feudal law were generally adopted, in which it was a rule that in the donation of a feud the words should be strictly technical. Second, in Bracton's time, the form of a gift in fee-simple was *habendum tali et hæredibus suis*, or *tali et hæredibus suis, vel cui terram illam dare vel assignare voluerit*; and it may now be laid down as a general rule, that in all feoffments and grants to natural persons, and also in all conveyances deriving their effect from the Statute of Uses, no word but the word heirs, however strong the intention may appear to give the entire property, will create an estate in fee-simple; nor is there, in fact, any other word in the English language expressive of all the circumstances which constitute the idea of an heir. A gift to a man *et hæredibus*, with livery of seisin, though the word *suis* be omitted, will pass an estate in fee-simple, because the livery shall be taken most strongly against the feoffer. But if one gives land to two persons, to hold to those two *et hæredibus*, omitting *suis*, they only take an estate for life for the uncertainty. Lord Coke says, if lands are given to a man and his heir, in the singular number, he will not take an estate in fee. But Mr. Hargrave observes that, according to many authorities, the word heir may be *nomen collectivum*, and operate in the same manner as heirs in the plural number.

It has been held that the words, "to the use of all and every the child or children of a marriage, equally share and share alike; if more than one, as tenants in common, and not as joint-tenants; and if but one child, then to such only child, his or her heirs or assigns for ever," will be construed so as to create an estate in fee in all the children; the words, "his or her heirs" being allowed to operate as words of limitation on all the preceding words in the sentence. The rule that the word heirs is absolutely necessary to create an estate in fee-simple admits of a few exceptions. Thus, if a father enfeoffs his son, to hold to him and his heirs, and the son re-enfeoffs the father as fully as the father enfeoffed him, an estate in fee-simple will pass to the father. If one co-parcener or joint-tenant releases all his right to another, it will pass a fee, without the word heirs. So, if one co-parcener grants a rent to the other, for equality of partition, an estate in fee-simple in the rent will pass without the word heirs; for as the rent comes in lieu of the inheritance, it has as strong a relation to the inheritance as if the word heirs had been mentioned.

In releases that enure by way of *mitter le droit*, the word heirs is not necessary to

(B) *In a Devise.* *See* Devise, *ante*, p. 71.

V. Relative to the Abeyance of.[1]

VI. „ Adverse Possession of such an Estate. *See* vol. i. p. 208, *et seq.*

VII. „ Incidents to such Estates.

(A) *As regards Curtesy.*[2]

(B) „ *Dower.*[3]

(C) „ *its Alienation.*[4]

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create a fee-simple, as has been already stated. In conveyances to corporations, whether sole or aggregate, the word heirs is not necessary to create a fee-simple. But the law makes a distinction between a corporation aggregate and a sole corporation; for a feoffment to a corporation aggregate will pass a fee without any words of limitation, whereas in a feoffment to a corporation sole the word successors is necessary.

An estate in fee will pass to the king without the word heirs or successors, partly on account of his prerogative, and partly because in judgment of law the king never dies.

[1] The law requires the freeholder should never, if possible, be in abeyance; but where there is a tenant of the freehold, the remainder or reversion in fee-simple may exist for a time without any particular owner, in which case it is said to be in abeyance. Thus, if an estate be limited to A. for life, remainder to the right heirs of B., the fee-simple is in abeyance during the life of B., because it is a maxim of law that *nemo est hæres viventis.* The law, however, does not favour the abeyance of the fee-simple, for in that case many operations are suspended. The particular tenant or person in possession of the freehold is rendered dispunishable at law for waste; for a writ of waste can only be brought by one entitled to the fee-simple. The title, if attacked, could not formerly be completely defended, for there was no person in being whom the tenant of the freehold could pray in aid to support his right. Nor could the mere right itself, if subsisting in a stranger, be recovered in this interval, for in a writ of right patent, a tenant for life could not join the *mise* on the mere right. And in modern times, the courts do not favour the abeyance of the fee-simple, because it operates as a restraint on alienation. *See* vol. i. p. 50.

[2] Under Curtesy, vol. iii. p. 531, it was merely mentioned that estates in fee-simple were subject to curtesy. It appears from Glanville, l. 7, c. 18, that the right to curtesy was originally confined to the *maritagium* of the wife. But when Bracton wrote (Bract. 437, b. 8, a), this right appears to have been extended to all the lands whereof the wife was seised, whether she acquired them by inheritance, or as a *maritagium*, or by donation. And Littleton's description of curtesy extends to all estates in fee-simple. 1 a woman, tenant in tail, after possibility of issue extinct, takes a husband, has issue, and the fee-simple descends upon her, the husband will be entitled to curtesy, because, by the descent of the fee, the estate tail after possibility was merged, and the wife became tenant in fee-simple executed. Bro. Abr. Estate, 25.

A man may be tenant by the curtesy of a capital messuage, though it be *caput comitatûs* or *baroniæ*, as well as of a castle, which serves for the public defence of the realm, and also of an honour or manor, with all their rights and appurtenances. 1 Inst. 30, b.

Where, by articles previous to marriage, a woman granted to her intended husband, during their joint lives, the interest of her money, and the rents of her estate, of which she was seised in fee, to maintain the house, &c., *Lord Hardwicke* held that this was not intended to abridge the husband's legal rights; therefore that he was entitled to be tenant by the curtesy of the estate whereof his wife was seised at the time of the marriage, as well as to an estate which came to her after. 3 Atk. 423; 1 Cru. Dig. 152.

[3] Estates in fee-simple are subject to dower. *See ante*, Dower, p. 130.

[4] Of the several incidents inseparably annexed to an estate in fee-simple, the first is a power of alienation. Any general restriction, therefore, of this power, annexed to the creation of an estate in fee-simple, is absolutely void, and of no effect. *See* Alienation, vol. i. p. 284.

This unlimited power of alienation comprises in itself all inferior powers; so that a tenant in fee-simple may create any inferior estate or interest out of his own. Therefore, a custom that a tenant in fee-simple cannot demise his lands for more than six years is void, because it is contrary to the freedom of the estate of one who hath a fee-simple. Dyer, 357, b. An estate in fee-simple will descend to the heirs general of the person who was last seised thereof, whether male or female, lineal or collateral. And it is for this reason that the word simple is added to the word fee, importing an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs, in contradistinction to another class of estates of inheritance, which are only descendible to some particular heirs. 1 Cru. Dig. 66.

VIII. Relative to its being Subject to Debts.

(A) *From the Crown.* *See ante*, Extent, p. 409.

(B) *From a Subject.*[1]

IX. Relative to the Law of Merger, as Connected with.[2]

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[1] Estates in fee-simple, we have seen, are subject to the curtesy of the husband and the dower of the wife. They are also liable to the payment of all debts contracted by the tenant, for which he has acknowledged any security on record, or has bound himself and his heirs by any deed or instrument under his seal, which latter are called debts by specialty. And his heir is bound to satisfy those debts as far as the land descended to him from such ancestor will extend, which sufficient lands are called in law assets by descent. By the common law, if the heir had aliened the assets before an action brought against him for the recovery of a debt due by his ancestor, the creditor was without any remedy. Plowd. 439. But now fee-simple estates are subject, in the hands of the heir or devisee, to debts of all kinds contracted by the deceased tenant.

By the 3 & 4 Wm. 4, c. 104, real estate, whether freehold, customaryhold, or copyhold, shall be assets to be administered in equity for the payment of simple contract as well as specialty debts, but the priority of creditors by specialty, in which the heirs are bound, shall be preserved. This statute does not make the simple contract debts of a deceased person a specific charge on his real estate. It makes them a general charge thereon; so that the heir-at-law or devisee takes no beneficial interest therein, except subject to and after payment of those debts; and hence judgments entered up against the heir for his own debts, before any action or suit by the simple contract creditors of the ancestor, have no priority over those simple contract creditors, notwithstanding the statute 1 & 2 Vic. c. 110, s. 13, constitutes a judgment a charge on any lands of which the judgment debtor is seised, or over which he has any disposing power. *Kinderley v. Jervis*, 22 Beav. 1.

By virtue of the 1 & 2 Vic. c. 110, the whole of a judgment debtor's lands, of which the debtor was seised or possessed at the time of entering up the judgment, or at any time afterwards, may be taken under the writ of *elegit*. But before purchasers, mortgagees, or creditors can be affected under the provisions of this act, the name, abode, and description of the debtor, with the amount of the debt, damages, costs, or money recovered against him, or ordered by him to be paid, together with the date of registration, and other particulars, are required to be registered in an index which the act directs to be kept, for the warning of purchasers, at the office of the Court of Common Pleas. 1 & 2 Vic. c. 110, s. 19; 2 & 3 Vic. c. 11, s. 3; 18 & 19 Vic. c. 15, s. 10; 23 & 24 Vic. c. 38, s. 1. *See* Elegit, *ante*, p. 224; Execution, *ante*, p. 344; *post*, Judgment.

The personal estate is, however, the first and immediate fund for the payment of debts; and though a person charge his real estate by his will with the payment of his debts, yet that does not exempt the personal estate from being first applied for that purpose, unless the testator expressly exonerate it. 1 Bro. C. C. 454; 3 Ves. jun. 107, 111; 1 Cox, 185; 1 Meriv. 193; 19 Ves. 494.

[2] All inferior estates and interests in land are derived out of the fee-simple; therefore, whenever a particular estate, or limited interest in land, vests in the person who has the fee-simple of the same land, such particular estate or limited interest becomes immediately drowned or merged in it, upon the principle that *omne majus continet in se minus*. Where a sum of money is charged upon a real estate, which estate comes to the person entitled to the money, if in fee, the charge is merged; and where the money is secured by a term for years, or other legal estate, in a third person, there the charge is also merged, except where creditors are concerned (2 P. Wms. 604); or where the person becoming entitled to the charge is an infant, and dies during his minority, having by will disposed of the charge. 2 Eden. 162.

A term of five hundred years was vested in trustees to secure a daughter's portion, payable at eighteen, or marriage. The fee-simple of the estate descended to the daughter, who afterwards died an infant, about eighteen, having made a nuncupative will, which was good as to personal estate, whereby she devised all in her power to her mother. It was decreed by *Lord Somers* that this portion was not merged, but should go to the mother. And the decree was affirmed by the House of Lords. 2 Vern. 348; Colle's *Cases in Parliament*, 112; 2 Vern. 90; Ambl. 246; 2 Eden. 162.

And although the courts of law do not recognise trusts of equity, they yet take notice in some few cases of property being held by one person in right of another, or *in autre droit;* and in these cases the general rule is, that the union of the term with the immediate freehold will not cause any merger if such union be occasioned by the act of law, and not by the act of the party. Thus, if a term be held by a person to whose wife the immediate freehold afterwards comes by descent or devise, such freehold, coming to the husband in right of his wife, will not cause a merger of the term. *Doe d. Blight v. Pett*, 11 Ad. & E. 842. *Jones v. Davies*, 5 H. & N. 766. So, if the owner of a term make the freeholder his executor, the term will not merge (Co. Litt. 338), for the executor is recognised by the law as

X. Relative to the Forfeiture, as Connected with.[1]

FEES. *See* Attorney, vol. ii. p. 43; Barrister, id. p. 379; Extortion, *ante*, p. 425; *post*, Money had and Received; Sheriff.

FEES of Court. *See* also Costs, vol. iii. p. 287.

(A) *Table of.*[2]

usually holding only for the benefit of creditors and legatees; but if the executor himself should be the legatee of the term, it seems that, after all the creditors have been paid, the term will merge. 3 Prest. Com. 310. *Law v. Urlwin*, 16 Sim. 377. Wms. R. P. 376.

In consequence of this principle, if an estate had been given before the statute *De Donis* to A., and the heirs of his body, if the fee-simple was limited to A. by the same conveyance, or came to him afterwards, the estate tail would have become merged. But it was determined by the judges in the reign of Edw. 3 (Plowd. 296; 2 Rep. 61, a), that an estate tail could not be merged, surrendered, or extinguished, by the accession of the greater estate. So that a man may have at the same time, and in his own right, both an estate tail, and the immediate reversion in fee-simple, in the same land. The reason of this discrimination was, that the object of the statute *De Donis* being to render estates tail inalienable, if they were allowed to merge in the fee-simple, an obvious mode of destroying them might have been adopted by the tenant in tail purchasing the reversion. 1 Cru. Dig. 85.

[1] Estates in fee-simple are forfeited to the Crown by attainder of treason, and the lands whereof a person so attainted dies seised in fee-simple become vested in the Crown without any office, because they cannot descend on account of the corruption of blood of the person last seised, and the freehold shall not be in abeyance. 2 Hawk. P. C. c. 4, s. 1. This forfeiture relates backwards to the time when the crime was committed, so as to avoid all intermediate sales and incumbrances, but not those made. In cases of petty treason and felony, the estate is only forfeited to the Crown for a year and a day, which was formerly called the *annum diem et vastum*. After that period, in consequence of the corruption of blood, it escheats to the lord of whom it is held. But where the attainted person dies before the descent, such attainder does not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through the relation who has been so attainted (3 & 4 Wm. 4, c. 106, s. 10); and attainder of trustee or mortgagee does not occasion the lands to escheat or be forfeited. 13 & 14 Vic. c. 60, s. 46. *See* Attainder, vol. ii. p. 1; Smith, R. & P. 414, 500.

[2] *Table of Fees published in the* "London Gazette," *Nov. 24th*, 1852.

In pursuance of an act passed in the sessions of Parliament held in the fifteenth and sixteenth years of the reign of her Majesty, cap. 73, entitled, "An Act to make Provision for a Permanent Establishment of Officers to perform the Duties at Nisi Prius in the Superior Courts of Common Law, and for the Payment of such Officers and of the Judges' Clerks by Salaries, and to Abolish certain Offices in those Courts;" we, the undersigned, being Two of the Commissioners of Her Majesty's Treasury, have caused the under-mentioned Tables of Fees to be prepared, specifying the fees proper to be demanded and taken in the offices under-mentioned, and at the Judges' Chambers in the Superior Courts of Common Law, and that all other fees in such offices and chambers should be abolished, namely:—

Offices of the Masters of the Three Superior Courts.

	£	s.	d.
Every writ (except writ of trial or subpœna)	0	5	0
Every concurrent, alias, pluries, or renewed writ	0	2	6
Every writ of trial	0	2	0
Every writ of subpœna before a Judge or Master	0	2	0
" " before the sheriff	0	1	0
Every appearance entered	0	2	0
" " each defendant after the first	0	1	0
Filing every affidavit, writ, or other proceeding	0	2	0
Amending every writ or other proceeding	0	2	0
Every ordinary rule	0	1	0
Every special rule, not exceeding six folios	0	4	0
" exceeding six folios, per folio	0	0	6
Note.—Plans, sections, &c., accompanying rules, to be paid for by the party taking the rule, according to the actual cost.			
Every judgment by default	0	5	0
Every final judgment otherwise than judgment by default	0	10	0
Taxing every bill of costs, not exceeding three folios	0	2	0
" " exceeding three folios, when taxed as between party and party, per folio	0	0	6

	£	s.	d.
Taxing every bill of costs, exceeding three folios, when taxed as between attorney and client, or where the attorney taxes his own bill, per folio	0	1	0
Every reference, inquiry, examination, or other special matter referred to the Master, for every meeting not exceeding one hour	0	10	0
For every additional hour, or less	0	10	0
Upon payment of money into court, viz. for every sum under 50*l.*	0	5	0
,, ,, 50*l.* and under 100*l.*	0	10	0
,, ,, 100*l.* and above that sum	1	0	0
Every certificate	0	1	0
Office copies of præcipe or other proceedings, per folio	0	0	6
Every search, if not more than two terms	0	0	6
,, exceeding two, and not more than four terms	0	1	0
,, ,, four terms, or a general search	0	2	6
Every affidavit, affirmation, &c., taken before the Master	0	1	0
Filing every recognisance or security in ejectment or error	0	2	6
Every allowance and justification of bail	0	3	0
For taking special bail as a commissioner	0	2	0
Filing affidavit and enrolling articles previous to the admission of an attorney	0	5	0
Every re-admission of an attorney	0	5	0

All other fees than those before-mentioned are hereby abolished, and are not to be taken by any person in the Masters' offices, under any pretence whatever.

Offices of the Associates to the Three Chief Judges.

Every record of Nisi Prius delivered to the associate to be entered for trial	1	5	0
Every trial of a cause from a plaintiff	1	0	0
,, ,, from a defendant	0	15	0
,, ,, if the trial continue more than one day, then for every other day, from plaintiff and defendant, each	0	10	0
Returning the postea	0	5	0
Every cause made remanet at the instance of the parties, to be paid by plaintiff or defendant, as the case may be	0	10	0
Every cause withdrawn, to be paid by the party at whose instance it is withdrawn	0	5	0
Re-entering every record at Nisi Prius made remanet, &c.	0	2	0
Every reference from plaintiff and defendant, each	0	5	0
Every amendment of any proceeding whatever	0	2	0
Every order or certificate	0	5	0
Every special case or special verdict, in addition to the charge for engrossing and copying, at the rate of 4*d.* per folio, from plaintiff and defendant, each	0	10	0
Attending any court or otherwise with any record or other proceeding under writ of subpœna or special order of court, per day	1	0	0

All other fees than those before mentioned are hereby abolished, and are not to be taken by any person in the Associates' offices, under any pretence whatever.

Chambers of the Chief and Puisne Judges.

Every summons to try an issue before the sheriff	0	1	0
Every other summons whatever, whether in term or vacation	0	2	0
Every order to try an issue before the sheriff	0	1	0
Every other order whatever of an ordinary nature	0	2	0
Every order of a special nature, such as reference to arbitration, or attendance of witnesses at arbitration, service of process on persons residing abroad, reference to the Master to fix sum for final judgment, revival of judgment, and the like	0	5	0
Every fiat, warrant, certificate, caveat, special case, special verdict, and the like	0	5	0
Every affidavit, affirmation, &c., whether in term or vacation, each deponent	0	1	0
Every affidavit kept for the purpose of being conveyed to the proper office to be filed	0	1	0
Every proceeding filed	0	2	0
Every admission of an attorney	1	0	0
Every approbation of commissioners for taking affidavits or special bail	0	2	6
Every commission for taking affidavits or special bail, exclusive of stamp-duty, engrossing, and sealing	1	0	0
Every other commission for any purpose whatever, exclusive of stamp-duty, engrossing, and sealing	0	10	0
Every acknowledgment by married women	0	10	0
Office copies of judge's notes, or of any other proceeding whatever, per folio	0	0	6
Every recognisance or bond of any description whatever	0	10	0
Every allowance of writ of error	0	10	0
Bail or cepi corpus, habeas corpus, error, or ejectment	0	2	0

FEIGNED ISSUE.

See also *post*, Interpleader Issue; Special Case.

I. In what Cases, p. 447.

II. Of the Issue, 447.

(A) *Form of Feigned Issue*, p. 448.

III. Of the Trial of the Issue and Subsequent Proceedings, p. 448.

(A) *Of the Trial*, p. 448.

(B) „ *Costs*, p. 448.

(C) „ *a New Trial*, p. 449.

(D) *Error*, p. 449.

I. In what Cases.[1]

II. Of the Issue.

8 & 9 Vic. c. 109, s. 19, after reciting that many important questions are now tried in the form of feigned issues, by stating that a wager was laid

	£	s.	d.
Delivering bail-piece off the file, or justification of bail	0	2	0
Every committal	0	5	0
Every exhibit signed by judge	0	1	0
Producing judge's notes	0	5	0
Bill of exceptions signed by judge	0	5	0
Order in legacy-duty cases	1	5	0
Crown revenue cases from defendant	0	5	0
Attendance in any court or otherwise under subpœna or special order of court to give evidence or produce documents, per day	1	0	0
Attendance as a commissioner to take affidavits, &c., or at a judge's house, or elsewhere, at request of parties	0	10	0
Appointment of commissioners under glebe exchange	1	0	0
Allowance of bye-laws or table of fees	1	0	0
Report on private bill	5	0	0
Attendance by counsel, each side	0	5	0

Note.—All plans, sections, &c. accompanying any order or office-copy to be paid for by the party, according to the actual cost.

In cases where the party has been allowed to sue *in formâ pauperis* the fees are not to be demanded or taken, nor in cases where such fees would be payable by any revenue or other government department.

All other fees than those before mentioned are hereby abolished, and are not to be taken by any person at the Judges' Chambers under any pretence whatever.

For the Table of Fees in Associates' Offices, *see* vol. i. p. 574.
„ „ in the Crown Office, vol. iii. p. 528.
„ „ in the Queen's Remembrancer's Office, *see post*, Queen's Remembrancer's Office.

[1] A feigned issue may be directed by a court of equity, or by a court of law, or by a judge. Thus, if any important question arise on affidavits before the court, which chiefly involve a conflict of testimony, the court may direct a feigned issue to try the question. *Haynes v. Robertson*, 16 C. B. 554. *R. v. Mayor of Rye*, 2 Burr. 798. *Hoskins v. Berkeley*, 4 T. R. 402. Such issues, however, most frequently occur under the Interpleader Act, 1 & 2 Wm. 4, c. 58; the Tithe Commutation Acts, 6 & 7 Wm. 4, c. 71, s. 46; and 2 & 3 Vic. c. 62, s. 35; and the Inclosure Acts, 8 & 9 Vic. c. 118; and other acts. Under interpleading applications, judge may decide without an issue when goods seized are of small amount. 23 & 24 Vic. c. 126, s. 14. *See* 10 Mee. & W. 556; 13 id. 816.

A court of equity may order such an issue to be prepared on certain terms, which are embodied in a rule or order; and a court of law may order such an issue on terms embodied in some rule of court. In either case the attorney of the party appointed to be the plaintiff should obtain a copy of the decree, order, or rule, and instruct counsel to draw the issue: and after this serve a copy of the draft on the opposite attorney, who will procure it to be settled by his own counsel. When the issue is settled notice of trial may be given. In case difficulty is experienced in settling the issue, application may be made to the court or judge by whom it was ordered. Courts of equity are empowered by 21 & 22 Vic. c. 27, to try issues of fact and assess damages, and take oral evidence.

between two persons interested in respectively maintaining the affirmative and the negative of certain proportions, but such questions may be as satisfactorily tried without such form, enacts, "that in every case where any court of law or equity may desire to have any question of fact decided by a jury, it shall be lawful [1] for such court to direct a writ of summons to be sued out by such person or persons as such court shall think ought to be plaintiff or plaintiffs, against such person or persons as such court shall think ought to be defendant or defendants therein, in the form set forth in the second schedule to this act annexed,[2] with such alterations or additions as such court may think proper, and thereupon all the proceedings shall go on and be brought to a close in the same manner as is now practised in proceedings under a feigned issue."

(A) *Form of Feigned Issue.*

III. Of the Trial of the Issue and Subsequent Proceedings.

(A) *Of the Trial.*[3]

(B) „ *Costs.*[4]

[1] The form prescribed by the statute is not compulsory, and it is no ground of objection that the old form is adopted. *Luard v. Butcher*, 2 C. B. 858; 3 D. & L. 815. The *nisi prius* record is made up and entered as in ordinary cases. All motions respecting the issue must be made in the court by whom it was directed. *Hargrave v. Hargrave*, 4 C. B. 650. Where ordered by a court of equity, even a motion for a special jury, or to postpone the trial, must be made in that court. *Kebel v. Philpot*, 9 Sim. 614. *Anon.* 2 P. Wms. 67. Should the defendant wish to force on the trial, he may apply to the court for leave to try by proviso. *Humpage v. Rowley*, 4 T. R. 767. *Sandys v. Mayor of Beverley*, 12 Mee. & W. 568. *Wick v. Collin*, 1 D. & L. 227.

[2] The following is the form prescribed in the schedule of

A Feigned Issue.

In the Court of Q. B. [C. P. *or* Ex. of Pleas, *or any inferior court, as the case may be*].

Middlesex to wit [*or such other county as may be directed*]. Whereas A. B. affirms, and C. D. denies [*here state fully the fact or facts in issue*], and the Lord Chancellor [*or such other court, &c.*] is desirous of ascertaining the truth by the verdict of a jury, and both parties pray that the same be inquired of by the country.

Now, let a jury, &c.

[3] Unless otherwise directed, the trial proceeds in the same way as in ordinary cases: the rule or order may, however, restrict the parties to the proof of certain facts, and may direct the depositions of certain witnesses to be read in certain circumstances. The plaintiff may be nonsuited. *Barnes v. Headley*, 1 Camp. 164. The *postea* is delivered to the successful party. It is not necessary to enter up judgment. On an issue from Chancery, the judge who tries the issue certifies the finding of the jury, mentioning on the certificate any special circumstances attending the trial. The successful party may apply to the judge to have the *postea* delivered up to him before the ordinary time. *Abbott v. Clarke*, 2 C. & Kir. 209.

[4] A court of equity in directing an issue generally gives directions as to how the costs of the issue shall go. Where directed by a court of law, if nothing is said in the rule or order directing the issue, the costs of the issue follow the event. *Hoskins v. Lord Berkeley*, 4 T. R. 402. *Herbert v. Williamson*, 1 Wils. 324. *Earl Fitzwilliam v. Maxwell*, 7 Taunt. 31. *Bowen v. Bramidge*, 2 Dowl. 213. By the costs of the issue, is meant the costs appertaining to the issue beginning from the time it is directed and including the costs of settling it. *R. v. Phillips*, 1 Wils. 261. *Thomas v. Powell*, 1 Burr. 603. And where the rule directing the issue provided that "the costs," without specifying what should follow the event, the court held, that it must be restricted to the costs of the issue. *Oldknow v. Wainwright*, 2 Burr. 1017.

In cases of feigned issues under the Tithe Commutation Rent-Charge, it is enacted by 6 & 7 Wm. 4, c. 71, s. 46, "that the costs of every such action, or of stating such case and obtaining a decision thereon, shall be in the discretion of the court in or by whom the same shall be decided, which may order the same to be taxed by the proper officer of the court; and the like execution may be had for the same as if such costs had been recovered upon a judgment of record of the said court." The proper interpretation of the words of the statute, that the costs "shall be in the discretion of the court," is to make costs arising under the act as nearly as possible analogous to those cases where costs are given according to the usual course of law to the party succeeding in the cause. It is necessary, therefore, in order to restrain the application of the rule, that there should be something in the circumstances of the case to draw it out of the limits within which the rule operates. *Barker v. Birch*,

Feigned Issue, continued —
(C) *Of a New Trial on.*[1]
(D) *Error.*[2]

FELO DE SE.[3] *See post*, Murder.

FELONY. For particular Felonies, *see* Arson, vol. i. p. 539; Burglary, vol. iii. p. 2; Coin, &c. id. p. 131.

I. Definition of, p. 450.
(A) *Difference between Felony and Misdemeanor*, p. 450.
II. What amounts to a Felony, p. 450.
(A) *At Common Law*, p. 450.
(B) *By Statute*, p. 450.
III. Relative to the Prevention of, and Rewards for the Apprehension of Offenders, p. 451.

1 D. & L. 816: *per Tindal, C. J.* Even where a party is unsuccessful in supporting the decision of the tithe commissioner in his favour, he will in general be made to pay the costs of the feigned issue in which he has thus failed. *Earl of Stamford v. Dunbar*, 2 D. & L. 852. *Croughton v. Blake*, 12 Mee. & W. 205. *Barker v. Birch, supra.* If the feigned issue under this statute contain distinct issues upon separate claims, and some of them are found for the plaintiff and others for the defendant, the court will order the costs to be apportioned so as to give to each the costs applicable to those issues upon which he is successful. *M'Carthy v. Napean*, 6 Q. B. 252. Where, however, there is but one indivisible issue, the party succeeding will be entitled to his costs of the action, although it be not found in his favour to the entire extent to which it is claimed. *Brown v. Hutchinson*, 7 D. & L. 35. *See* also Costs, vol. iii. p. 303.

[1] A motion for a new trial may be made as in other cases: but if the issue is from a court of equity the motion must be made in that court, even although the judge at the trial reserved a point which was one strictly of law. *Stone v. Marsh*, 1 D. & R. 71; but see *Holdsworth v. Richards*, 2 Chit. R. 370. Where the issue had been directed by the Master of the Rolls, it was held that the application might be made to the Chancellor. 11 Ves. jun. 50. It is better, however, in general, to make it to the judge who directed the issue. As to the cases in which a new trial will be granted, it may be laid down as a general rule that the Court of Equity will grant a new trial in all cases in which it would be granted in the court of law, and in some cases also in which the court would refuse it. Thus, if the judge certify that the verdict was contrary to the weight of evidence, the Court of Equity will order a new trial, in order that justice may be done between the parties, and the conscience of the court be satisfied. Amb. 210.

After the expiration of the term allowed by the court of law to move for a new trial, a petition must be presented to the Court of Equity for leave to set down the cause to be heard upon the equity reserved; and a copy of the interlocutory decree, and of the record of *nisi prius* and *postea* thereon, must be left with the petition. *See* Hammon's Ch. Pr. 428.

Where a rule for a new trial upon an issue under the Interpleader Act is made absolute upon payment of costs by the defendant, the latter is bound to draw up the rule promptly. *Chase v. Gobble*, 4 Scott, N. R. 317.

[2] In issues directed by a court of law or equity there can be no error, and consequently no bill of exceptions; nor is there any error on an interpleader issue. *King v. Simmonds*, 7 Q. B. 312; 1 H. of L. C. 754. Error does not lie on an issue under the Tithe Commutation Act. *Thorpe v. Plowden*, 2 Ex. 387.

[3] *Intentional* self-destruction by a party of years of discretion and in his senses. 4 Steph. Com. 109. It is described as a peculiar instance of malice directed to the destruction of a man's own life, by inducing him deliberately to put an end to his existence, or to commit some unlawful malicious act, the consequence of which is his own death. 1 Russ. Crimes, 507; 4 Bl. Com. 189. If a man attempting to kill another miss his blow and kill himself (1 Hale, 412); or, intending to shoot at another, mortally wound himself by the bursting of the gun (1 Hawk. P. C. c. 27, s. 4), he is *felo de se*, his own death being the consequence of an unlawful malicious act towards another. So, where two persons agree to die together, and one of them at the persuasion of the other buys poison and mixes it in a potion, and both drink of it, and he who bought and made the potion survives by using proper remedies, and the other dies, it is said to be the better opinion that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in this particular manner. 1 Hawk. P. C. c. 27, s. 6; Kerlw. 136; Moor, 754; 1 Russ.

IV. Relative to the Indictment for. *See post*, Indictment.
V. „ Evidence. *See post*, Indictment.
VI. „ Punishment. *See* Particular Offence.
VII. „ Disabilities created by.
VIII. Compounding. *See* vol. iii. p. 162.

I. Relative to the Definition of Felony.[1]

(A) *Difference between Felony and Misdemeanor.*[2]

II. What amounts to a Felony.

(A) *At Common Law.*[3]

(B) *By Statute.*[4]

Cr. 508. Suicide is not regarded as a crime in the United States. 1 Burr. *Dict.*

[1] Felony appears to signify the degree or magnitude of crime committed, rather than the penal consequence of forfeiture awarded for its commission according to its original signification. *See* 1 Russ. C. & M. 42. But Mr. J. Blackstone says: "Felony, in the general acceptation of our English law, comprises every species of crime which occasioned, at common law, the forfeiture of goods and lands," and to which capital or other punishment may be added, according to the degree of guilt. 4 Bl. Com. 94. Capital punishment does by no means enter into the true definition of felony, but the idea of felony is so generally connected with that of capital punishment, that it is hard to separate them; and to this usage the interpretations of the law have long conformed. *See* 1 Russ. C. & M. 42. *See* 3 M. & S. 549. In America forfeiture, as a consequence of crime, being generally abolished, the word has lost its original and characteristic meaning, and is used to denote any high crime punishable by death or imprisonment.

[2] The word misdemeanor, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name; and they may be punished according to the degree of the offence by fine or imprisonment, or both. 3 Burn's *Just.* Misdemeanor, citing Barlow's *Just.* Misdemeanor. A misdemeanor is, in truth, any crime less than a felony, and the word is generally used in contradistinction to felony, misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances. 4 Bl. 5, n. 2; 3 Burn's *Just.* Misdemeanor. Misdemeanors have been sometimes termed misprisions; indeed, the word misprision in its larger sense is used to signify every considerable misdemeanor which has not a certain name given to it in the law, and it is said that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason may be proceeded against for a misprision only, if the Queen please. 1 Hawk. c. 20, s. 2, and c. 50, s. 1; 2 Burn's *Just.* Felony. But generally misprision of felony is taken for concealment of felony, or procuring a concealment thereof, whether it be felony by the common law or by statute. 1 Hawk. P. C. c. 59, s. 2; and silently to observe the perpetration of a felony without using any endeavours to apprehend the offender is a misprision, a man being bound to discover the crime of another to a magistrate with all expedition. 3 Inst. 140; 1 Hale, 371, 375. If this offence were accompanied with some degree of maintenance given to the felon, the party committing it might be liable as an accessory after the fact. 1 Hawk. P. C. c. 59, s. 6. The concealment of treasure trove is misprision of felony. 4 Bl. Com. 121; 3 Inst. 133; *see* 1 Russ. C. & M. 43, 2d. ed.

[3] Felony by the common law is against the life of a man, as murder, manslaughter, *felo de se*, &c.; or against a man's goods, such as larceny and robbery; against his habitation, as burglary, arson, or housebreaking; and against public justice, as breach of prison. *See* 3 Inst. 31.

[4] The word "feloniously" in a statute makes the offence felony. *Rex v. Johnson*, 3 M. & S. 556. It seems also clear that not only those crimes which are made felonies in express words, but also all those crimes which are decreed to have or undergo judgment of life or member by any statute, become felonies thereby, whether the word felony be omitted or mentioned. *See* 1 Hale, P. C. 703; 1 Hawk. P. C. c. 40, s. 2. But an offence shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and, therefore, if it be prohibited under "pain of forfeiting all that a man has," or of "forfeiting body and goods," it shall amount to no more than a high misdemeanor. *See* id s. 3. And though a statute make the doing of an act felonious, yet if a subsequent statute make it penal only, the latter statute is considered as a virtual repeal of the power as far as relates to the punishment of the offence. Id. s. 5. And where a statute makes a second offence

III. Relative to the Prevention of Felony, and Rewards for Apprehension of Offenders.[1]

felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first: whence it follows, that if it be not so laid in the indictment, it shall be punished as but for the first offence, for the gentler method shall first be tried, which, perhaps, may prove effectual. Id. s. 4.

Where a statute makes an offence felony, which was before a misdemeanor, no indictment lies for the misdemeanor. *Rex v. Cross*, 1 Ld. Raym. 711; 3 Salk. 193.

[1] It is the duty of all persons to prevent the perpetration of a felony. *Handcock v. Baker*, 2 B. & P. 260.

By 7 & 8 Geo. 4, c. 64, s. 28, it is enacted, "that where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property, knowing the same to have been stolen, every such court is hereby authorised and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with receiving stolen property, knowing the same to have been stolen, such court shall have power to order compensation to such person, in the same manner as the other courts hereinbefore mentioned: Provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are by this act empowered to allow to prosecutors and witnesses respectively." This provision empowers the courts to grant rewards to those who have been active in or towards the apprehending of any person charged with the following offences:—"Murder; feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at any other person; stabbing; cutting; poisoning; administering anything to procure the miscarriage of any woman; rape; burglary; feloniously house-breaking; robbery on the person; arson; horse-stealing; bullock-stealing; sheep-stealing; being accessory before the fact to any of the offences aforesaid; receiving stolen property, knowing it to have been stolen."

By this statute the former stat. 4 Wm. & M. c. 1, is repealed, and the 2d, 3d, and 4th sects. of the stat. 10 & 11 Wm. 3, c. 23, are also repealed. The stats. 5 & 6 Anne, c. 31, and 58 Geo. 3, c. 70, are wholly repealed, with the exception of the 7th sect. of the latter, which regards disorderly houses. And by the stat. 7 Geo. 4, c. 64, s. 29, it is enacted, "that every order for payment to any person in respect of such apprehension as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such person, upon being paid for the same the sum of 5*l.* and no more; and the sheriff of the county for the time being is hereby authorised and required, upon sight of such order forthwith, to pay to such person, or to any one duly authorised, on his or her behalf, the money in such order mentioned, and every such sheriff shall and may immediately apply for repayment of the same to the commissioners of his majesty's treasury, who, upon inspecting such order, together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid, without any fee or reward whatever."

The latter part of this enactment is similar to that contained in 3 Geo. 1, c. 15, s. 4, which is not repealed by this act.

By stat. 7 Geo. 4, c. 64, s. 30, it is enacted, "that if any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any offences hereinbefore last mentioned, it shall be lawful for the court before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children, in case his wife shall be dead, or to his father or mother, in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court; and every such order

VIII. Relative to the Disabilities created by.[1]

FEME Covert. *See* Husband and Wife; Marriage.

FENCES. *See* Building Act; Negligence; Nuisance; Party Walls.

(A) *Presumption as to Ownership*, p. 452.

(B) *Action for not Repairing Fence*, p. 452.

(C) *Malicious Injury to Fences*, p. 453.

(D) *Stealing part of Fence*, p. 453.

(E) *Obligation of Railway Companies with respect to.* *See* Railway.

(A) *Presumption as to Ownership.*[2]

(B) *Action for not Repairing Fence.*[3]

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shall be paid by, and repaid to the sheriff, in the manner hereinbefore mentioned."

This statute repeals the provisions of the 58 Geo. 3, c. 70, which relate to the matter.

[1] An attainted felon cannot be heard, either at law (*see* Russ. C. & M. 592) or in equity, unless in a proceeding, the direct object of which is to reverse his attainder; therefore he cannot petition the Chancellor to supersede a commission under which he has been declared a bankrupt, though the consequence of a supersedeas would be a removal of the attainder. *Rex v. Bullock*, 1 Taunt. 71; and *see* Attainder, vol. ii. p. 1; *post*, Outlawry.

[2] Where fields belonging to different owners are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not; but if there are two ditches, one on each side, the ownership of the hedge must depend upon evidence of acts of ownership. *Guy v. West*, 2 Selw. N. P. 1324; 8 B. & C. 259, n.; Add. Torts, 154; 7 B. & C. 308.

The common user of a wall separating lands or houses which belong to different proprietors is *primâ facie* evidence that the wall, and the land on which it stands, belongs to them in equal moieties as tenants in common. *Cubit v. Porter*, 8 B. & C. 257. *Wiltshire v. Sidford*, 1 M. & R. 404. But this presumption may be rebutted by showing that the wall in fact stands on land, parts of which were separately contributed by each proprietor. *Murley v. M'Dermot*, 8 Ad. & E. 138. *Murray v. Hall*, 7 C. B. 141. *Matts v. Hawkins*, 5 Taunt. 20.

A distinction has been taken between a bank and a wall: the former, being made of earth taken from the adjacent soil, is presumed to belong to the party whose land adjoins thereto; the latter, being built of materials brought from a distance, is *primâ facie* the property of the person who is bound to repair it. *Duke of Newcastle v. Clark*, 8 Saund. 627; Callis on Sewers, 74.

"No one making a ditch can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own lands. He is of course bound to throw the soil which he digs out upon his own land, and often, if he likes it, he plants the hedge on the top of it. Therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, and cuts into his neighbour's land, he is a trespasser. *Vowles v. Miller*, 3 Taunt. 137.

Where a building was placed against the wall by one of two tenants-in-common of the wall, and the wall was heightened and carried up into a chimney, this was held to be evidence of an ouster of the other tenant-in-common, as the altered wall and the old wall were not identical things, and the nature of the property was substantially changed. *Stedman v. Smith*, 8 E. & B. 1; 26 L. J. Q. B. 315. Fences pass under the word land. 1 Burr. *Dict.* 614.

[3] An action lies for damage sustained by the neglect to repair a fence. *Starr v. Rookby*, 11 Mod. 168; 1 Salk. 335. This action should be brought against the tenant, and not the landlord, for he, as occupier, is *primâ facie* bound to repair (*Cheetham v. Hampsen*, 4 T. R. 318); but if it can be shown that the landlord is to repair, the landlord will be liable for such neglect, and the action will lie against him. *Payne v. Rogers*, 2 H. Black. 349. If neither of the owners of closes which adjoin is bound to repair, each is liable if his cattle escape into the other's close. *Churchill v. Evans*, 1 Taunt. 529. *Anon.* 3 Wils. 126. Add. Torts, 46, 72.

As to trees on boundary hedges the rule is, if a landowner who has land abutting upon a highway neglects to fence the land from the highway, so that cattle stray from the high road and injure his crops, he cannot immediately distrain the beasts damage feasant, or treat the owner of the beasts as a trespasser, but must either drive them out himself, or allow a reasonable time for the drovers in charge of them to get them off the land. *Goodwin v. Cheveley*, 4 H. & N. 631; 28 L. J. Ex. 298; *see* 2 H. Black. 531; 1 Ld. Raym. 737; 1 M. & M. 112; 9 Bing. 384.

(C) *Malicious Injury to Fences.*

Penalty for malicious injury to fence.

By 24 & 25 Vic. c. 97, s. 25, "whosoever shall unlawfully and maliciously cut, break, throw down, or in anywise destroy any fence of any description whatsoever, or any wall, stile or gate, or any part thereof respectively, shall, on conviction thereof before a justice of the peace for the first time, forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the offences in this section before-mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour, for such term, not exceeding twelve months, as the convicting justice shall think fit."

(D) *Stealing part of Fence.*

Offence of stealing, &c. any live or dead fence, wooden fence, stile, or gate.

By 24 & 25 Vic. c. 96, s. 34, "whosoever shall steal or shall cut, break, or throw down with intent to steal, any part of any live or dead fence, or any wooden post, pale, wire, or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the said offences in this section before-mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour, for such term, not exceeding twelve months, as the convicting judge shall think fit."

Suspected persons in possession of wood, &c.

A penalty not exceeding two pounds, over and above the value of the part of the fence, is imposed for the unlawful possession of any part of a fence so stolen which exceeds one shilling in value. Sect. 35. *See post*, Larceny.

FEOFFMENT.[1]

[1] A feoffment, *feoffamentum*, is derived from the word *feoffare*, or *infeudare*, to give one a fief or feud; therefore, it was properly called *donatio feudi*, the gift of a feud; but by custom it came afterwards to signify a gift of a free inheritance, or *liberum tenementum*, to a man and his heirs, respect being had rather to the perpetuity of the estate granted, than to the tenure. Feoffment, 1 Inst. 9, a; Mod. Form. Diss. s. 4.

The proper and usual words of a feoffment are, "give, grant, and enfeoff;" but any other words of equal import will be sufficient. Thus, where a bargain and sale was made to J. S. and his heirs, by deed indented, but not enrolled, and the bargainor made livery of the land *secundum formam chartæ*, this was held a good feoffment. *Denton's case*, 2 And. 68; 1 Leon. 25; Smith, R. & P. 599.

The mere signing and sealing a deed of feoffment was in no instance sufficient to transfer an estate of freehold, unless the possession was formally delivered by the feoffor to the feoffee. This was called livery of seisin, without which a deed of feoffment only passed an estate at will. The common law requires the seisin or delivery of possession. By the Statute of Frauds a written instrument is expressly required; and now, by stat. 8 & 9 Vic. c. 106, s. 3, it is enacted, "that a feoffment made after the 1st October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed." The learning on this subject is therefore only valuable as elucidating the ancient law of real property, especially as the 2d sect. 8 & 9 Vic. provides, that, after that day, all corporeal hereditaments shall, as regards the conveyance of the immediate freehold, be deemed to be in grant as well as in livery. In American law "feoffment" is unknown. In Scotland it is described as a disposition with seisin.

Where the lands comprised in a feoffment are all situated in the same county, though in different vills or hundreds, livery of seisin of those within one vill, in the name of the whole, was good; but where lands lay in different counties, there must be a livery in each county. Litt. ss. 61, 418; Perk. 226, 227; Bro. Abr. Grant, 32. Livery of seisin is of two kinds; livery in deed, and livery in law. Livery in deed is the actual delivery of the possession; where the feoffer comes himself upon the land, and taking the ring of the door of the principal mansion, or a turf, or a twig, delivers the same to the feoffee in the name of seisin; or it may be by words only, without the delivery of anything; as if the feoffee be upon the land, or at the door of the house, and says to the feoffee, "I am content that you should enjoy this land according to the deed." 1 Inst. 48, a.

Livery in law is, where the feoffor is not

FERÆ Naturæ. *Wild Animals.* *See* Animals, vol. i. p. 352; *post*, Game.

FEROCIOUS Animals, Responsibility of Owner for Damage caused by. *See* Animals, vol. i. p. 352.

FERRY.[1] *See* Common Ferryman, vol. iii. p. 153; *post*, Way.

actually on the land or in the house, but being within sight of it, says to the feoffee, "I give you yonder house or land, go and enter into the same, and take possession of it accordingly." This sort of livery appears to have been made at first only at the courts baron, which were then held in the open air, on some spot in the manor, from whence a general view of the whole might be taken, and the *pares curiæ* could distinguish the land that was to be transferred. 1 Inst. 48, b. Livery in law did not, however, transfer the freehold, till an actual entry is made by the feoffee, because the possession is not delivered to him, but only a license or power given him by the feoffee to take possession. Therefore, if either the feoffor or feoffee die before an entry is made, under the livery thus given, it becomes void. *Parsons v. Perns*, 1 Mod. 91.

A memorandum that livery of seisin was given, is usually indorsed on all ancient feoffments; but courts of law and equity will presume livery of seisin to have been given, though not indorsed on the deed, where the possession has gone, according to the feoffment, for a length of time. Plowd. 149. *Jackson v. Jackson*, Fitz. 146; 1 Vern. 196. And a court of equity will supply the want of livery of seisin, where a feoffment appears to have been made for a good or a valuable consideration.

A feoffment cannot be made to commence *in futuro;* so that, if a person makes a feoffment to commence on a future day, and delivers seisin immediately, the livery is void, and nothing more than an estate at will passes to the feoffee.

An estate may, however, be created by feoffment to commence *in futuro*, by way of remainder. Litt. 60. As where a deed of feoffment was made to three persons, *habendum* to two of them for their lives, remainder to the third for his life, livery of seisin was made to all three *secundum formam chartæ*. The court was of opinion, that the livery was good to two in possession, and to the third in remainder. *Freeman v. West*, 2 Wils. R. 166.

All those who are capable of conveying their lands by deed may make a feoffment; and some persons might bind themselves to a certain degree by a feoffment, though not by any other kind of deed. Thus, if an idiot or a lunatic made a feoffment, and gave livery of seisin in person, it bound him, so that he could not by any process of law avoid it: the reason was, because the livery being formerly made before the *pares curiæ*, their solemn attestation of the change of possession could not be defeated by the person himself, it being presumed that they were competent judges of the feoffor's ability to make the feoffment. Litt. s. 406. But by the 8 & 9 Vic. c. 106, s. 4, it is enacted, that a feoffment shall not have any tortious operation.

If an infant make a feoffment, and give livery of seisin in person, it is not void, but only voidable; for there must be some act of notoriety to restore the possession to him, equal to that by which it was transferred. But if an infant, idiot, or lunatic execute a feoffment, and a power of attorney to give livery of seisin, and livery is given accordingly, the whole is void, because the power of attorney is void. Perk. s. 12; 4 Rep. 125, a. A feoffment by an infant, an idiot, or a lunatic, barred the lord of his escheat; for, though it might be avoided by the heir of the infant, the idiot, or the lunatic, because he is privy in blood, yet it could not be avoided by a person who is only privy in estate. 4 Rep. 124, a. A corporation, whether sole or aggregate, may convey by feoffment, and appoint an attorney to give livery.

A feoffment can only be made of corporeal hereditaments, of which the actual possession may be delivered to the feoffee; and, therefore, corporeal hereditaments are frequently spoken of in law by the name of "things that lie in livery." Hence, one joint-tenant cannot enfeoff his companion, for each of them being seised *per mil et per tout*, is in possession of the whole, so that one cannot make livery to the other. But one co-parcener or tenant in common may make a feoffment of his share of the land to his companion, because, for most purposes, these have distinct freeholds. 2 Inst. 244.

The operation of a feoffment is in some instances stronger than that of any other conveyance. Thus Lord Coke says, "a feoffment cleareth all disseisins, abatements, intrusions, and other wrongful or defeasible estates, where the entry of the feoffor is lawful; which neither fine, recovery, nor bargain and sale by deed indented and enrolled, doth." 1 Inst. 9, a. The most singular effect of a feoffment is, that it operates on the possession, without any regard to the estate or interest of the feoffor; so that, to make a feoffment good and valid, nothing is wanting but possession. Sect. 611.

A feoffment by a tenant in tail, who is actually seised by force of the entail, creates a discontinuance of the estate tail, by transferring to the feoffee not only the possession, but also the right of possession; so as to take away the entry of the issue in tail, as also of the persons in remainder, and of the reversioner, and to drive them to their real action. 1 Inst. 327, b.

A feoffment in fee, by a tenant for life, will create a forfeiture of his estate; for it transfers the fee-simple, and divests the estates in remainder, and the reversion. It is the same of a tenant for years. *See* 4 Cruise, Dig. 55.

[1] A ferry is a liberty by prescription, or

FICTIO Legis inique operatur alicui damnum vel injuriam 3 Rep. 36. *The application of a legal fiction would be unjust in a case where it would operate to the damage or injury of another.*[1]

FIERI FACIAS. *See* Levari Facias.

I. Nature of the Writ, and in what Cases it may be Issued.[2]

II. Of the Direction, Teste, and Indorsement of the Writ. *See* Execution, *ante*, p. 344.

III. Of the Renewal and Succession of the Writ. *See* Execution, *ante*, p. 344.

IV. Of the Execution of the Writ, p. 456.

(A) *Of the Seizure and Sale*, p. 456.

(*a*) *How Seizure effected*, p. 456.

(*b*) *What Property may be taken*, p. 457.

(1) *In General*, p. 457.

(2) *As to whose Goods may be taken*, p. 457.

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the queen's grant, to have a boat for passage upon a river for carriage of horses and men, for reasonable toll. *See* Terms de Ley, Sav. 14; and *ante*, vol. iii. p. 153. A ferry is in the nature of a common highway. *Payne v. Patrick*, 3 Mod. 294. And a boat must be provided by the grantee (*Payne v. Partridge*, 1 Show. 257), who cannot put up a bridge in the place of the ferry without license. (Id.) A custom that the ferryman shall take no toll from the inhabitants of A. is legal. Where there was such a custom the court said, the custom was good in nature of an easement, but that the custom consisted not in the right to pass, for that was common to all the king's subjects, but in right to pass toll-free; therefore the plaintiff could not maintain an action for not passing, for then any other subject might bring an action, which would occasion endless litigation. *Aliter* if toll had been exacted and paid by him, for that would have been a special damage; but without special damage a person can only indict, or file an information. *Payne v. Patrick, supra.* 3 Mod. 289; 1 Salk. 12; see Cro. Car. 132; 2 Jac. 157; Vaugh. 341; Mod. Ca. 307; 1 Leon. 142; 1 Inst. 113; 12 H. s. 5; Comb. 180; Holt, 6; 3 Mod. 289; Moore, 180; 5 Rep. 72. Guning on Tolls, 106. The owner need not have property in the soil, but the tolls cannot be leased by parol. Gun. Tolls, 111.

The owner of a ferry for carriages is bound to convey carriages and their contents (*Walker v. Jackson*, 10 Mee. & W. 161; 12 L. J. Ex. 165; Gun. 107), and cannot erect a bridge instead of keeping a boat. Gun. 108; Grant, Corp. 186–192. *Newton v. Cubitt, infra.*

The owner of the ferry was held responsible for an injury occasioned to a horse by the dangerous and improper state of the landing-stage, notwithstanding the horse at the time was under the control of its owner. *Willoughby v. Willoughby*, 12 C. B. 742.

In an action for disturbing plaintiff in the enjoyment of his ferry, by carrying passengers near thereto, the declaration was held good upon motion in arrest of judgment, notwithstanding it did not aver that the defendant intended either to defraud the plaintiff or to set up a new ferry. *Blacketer v. Gillett*, 9 C. B. 26; 19 L. J. C. P. 307.

As to what is an encroachment on a right of ferry, see *Tripp v. Frank*, 4 T. R. 666. *North & South Shields Ferry Co. v. Barker*, 2 Ex. 136. *Giles v. Groves*, 12 Q. B. 721; 6 D. & L. 146; 17 L. J. Q. B. 323.

If a ferry is destroyed by the land to which it is annexed being taken by a railway company, the owner is entitled, under the Lands Clauses Consolidation Act, to compensation in respect of the loss of the ferry. *Reg v. Great Northern Railway Co.* 14 Q. B. 25; 19 L. J. Q. B. 25. As to evading the use of a ferry, and the general law on the subject, see *Newton v. Cubitt*, 28 L. J. C. P. 176; 31 id. 246.

[1] "Fictions of law hold only in respect of the ends and purposes for which they were invented. When they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth." *Per Lord Mansfield: Morris v. Pugh*, 3 Burr. 1243. *See post*, In fictione juris subsistit æquitas.

[2] A *fieri facias* is a judicial writ of execution, which lies where the judgment is for debt or damages recovered in the queen's courts, by which writ the sheriff is commanded to levy the debt and damages of the goods and chattels of the defendant. *See* F. N. B. 152. This writ, though mentioned in the statute Hen. 2, and 13 Edw. 1, c. 18, is a writ of execution at common law, and is called a *fieri facias*, because the words of the writ directed to the sheriff are *quod fieri facias de bonis et catallis*, &c.; and from these words the writ takes its denomination. *See* Co. Litt. 270, b; *ante*, Execution, p. 344.

(3) *Goods Pawned or Let*, p. 458.
(4) *Goods Sold or Assigned*, p. 458.
(5) „ *Privileged*, p. 459.
(6) „ *of Bankrupts*, p. 459.
(B) *Payment of Queen's Taxes*, p. 459.
(C) „ *Arrears of Rent*, p. 459.
(D) *Priority of Writs*, p. 461.
(E) *Of the Sale*, p. 461.
V. Of the Rule to Return, p. 461.
VI. „ Return, p. 461.
VII. „ Venditioni Exponas, p. 462.
VIII. „ Distringas nuper Vicecomitem, p. 462.
IX. „ Remedy for Amount of Levy, p. 462.
X. Forms of Writ of Fi. Fa., p. 463.
XI. Must be Registered to Affect Purchaser, &c. of Realty, p. 463.

IV. Of the Execution of the Writ.

(A) *Of the Seizure and Sale.*[1]

(*a*) *How Seizure effected.*[2]

[1] The sheriff, on a *fieri facias*, may enter the house of the defendant, when the outer door is open, in order to take the goods of the defendant, *See* 5 Co. 92. So, on a *fieri facias* against the goods of an intestate, in the hands of his administratrix and her husband, the sheriff may enter the house of the husband to search for the goods of the intestate, though none be found therein; because that is the most natural place of custody for them. *Cooke v. Birt*, 5 Taunt. 765. So, if the defendant has goods in the house of a stranger, the sheriff may enter it on a *fieri facias*, for taking them in execution. But there is this difference between his entering the house of the defendant and a stranger; that, in the former case, his justification does not depend on his finding, or not finding the defendant's goods therein (id.; and *see* Palm. 52; 2 Lutw. 1434); but, in the latter case, he is not justified, unless it should turn out that the defendant has goods in the house which are liable to be taken in execution. 6 Taunt. 246; 1 Marsh. 565.

In executing a writ of *fieri facias* at the suit of a common person, the sheriff cannot regularly break open the outer door of a dwelling-house. *See* Gilb. Exec. 17; Lofft. 375; Camp. 1; Bac. Abr. tit. 2; Lofft. n. 3. It is even said that he cannot open a latch; and where the door was a little opened to see who was there, and the bailiffs rushed in with drawn swords, they were punished by the court for their misbehaviour. *See* Dalt. 350, Hob. This privilege of a man's house, however, extends only to the owner, and shall not protect the goods of any person conveyed thither to prevent a lawful execution; therefore, if a *fieri facias* be directed to the sheriff to levy the goods of A., and it happen that A.'s goods are in the house of B.; if, after request made by the sheriff to B. to deliver these goods, he refuse, the sheriff may well justify the breaking and entering his house. *See* 5 Co. 93, a. So, if the sheriff's bailiffs enter the house, the door being open, and the owner lock them in, the sheriff may justify breaking open the door for setting them at liberty; for if in this case he were obliged to stay till he could procure a *homine replegiendo*, it might be highly inconvenient. *See* Cro. Jac. 555; 2 Roll. Rep. 137; Palm. 52. It has been adjudged that the sheriff, on a *fieri facias*, may break open the door of a barn standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close. *See* 1 Stra. 186; 1 Keb. 698; Bac. Abr. Sheriff. An inner door, however, may be broken. *Rex v. Bird*, 2 Show. 87. And in such a case it seems admission need not be demanded. *Hutchinson v. Birch*, 4 Taunt. 619. A prior illegal entry to execute a *fi. fa.* does not vitiate a subsequent legal entry, if the first was abandoned. *Percival v. Stamp*, 9 Ex. 167. If forcibly expelled after a lawful entry, the sheriff may justify breaking open the door to gain admission (*Aga Karboolie Mahomed v. The Queen*, 4 Moore, 239), or to carry away goods where he has no other means of effecting his object. *Pugh v. Griffiths*, 7 Ad. & E. 838.

[2] A plea justifying under a *fi. fa.* must allege that the outer door was open. *Buckenhorn v. Francis*, 11 Moore, 40.

A seizure of part in the name of the whole is sufficient. *Cole v. Davies*, 1 Ld. Raym. 724. The sheriff, by the seizure, has such

(*b*) *What Property may be taken.*

(1) *In General.*[1]

(2) *As to whose Goods may be taken.*[2]

a property in the goods that he may maintain trover or trespass against the defendant, or a third person, for taking them away. 2 Saund. 47; 2 Ld. Raym. 1075; Gilb. Ex. 15; but *see* 1 M. & S. 711.

The officer in execution of the writ, having seized the goods, usually leaves an assistant in possession until an inventory of them be made, when he removes them; or, if the person on whose premises they are consents, sells them there. *Aitkenhead v. Blades*, 5 Taunt. 198.

No action lies for secreting goods in order to prevent their being seized under a *fi. fa. Brown v. London*, 1 Mod. 286; Freem. 14; Keb. 695; 1 Vent. 152; 1 Lev. 298.

The sheriff may withdraw without selling on the order of the plaintiff's attorney. *Levi v. Abbott*, 4 Ex. 588.

[1] The sheriff may seize all personal goods and chattels belonging to the defendant which can be sold (*Legge v. Evans*, 6 Mee. & W. 36), wearing apparel actually in use excepted. *Sunbolf v. Alford*, 3 id. 254. He may seize any money (*Harrison v. Paynter*, 6 id. 387. *Wood v. Wood*, 4 Q. B. 397. *Masters v. Stanley*, 8 Dowl. 169), bank-notes, cheques (*Courtoy v. Vincent*, 15 Beav. 486; 21 L. J. Ch. 291. *Watts v. Jeffreys*, 15 Jur. 435), bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose effects the *fi. fa.* is issued. 1 & 2 Vic. c. 110, s. 12. Money seized and in the hands of the sheriff is treated as money the proceeds of goods seized. *Collingridge v. Paxton*, 11 C. B. 683. The sheriff may also sell a lease or term of years (*Taylor v. Cole*, 3 T. R. 294), or an annuity for years (*Yorke v. Twyne*, Cro. Jac. 79), belonging to the defendant; but he cannot sell a mere equitable interest, such as an equity of redemption (*Scott v. Scholey*, 8 East, 467), nor things fixed to the freehold, which go to the heir and not to the executor (*Winn v. Ingilby*, 5 B. & A. 625; but he may sell utensils fixed by the defendant for the purposes of his trade (*Farrant v. Thompson*, id. 826), and fixtures which may be removed by the tenant. *Storer v. Hunter*, 3 B. & C. 368. *See post*, Fixtures, p. 474. He may seize corn and other produce raised by the industry of man, which are emblements, and go to the executor (*Allen v. Lloyd*, 2 Ir. L. Rep. N. S. 53); but things which yield no annual profit, or are produced without labour, are not emblements; they go to the heir and cannot be taken. "Reputed ownership" confers no right under an execution. *Dawson v. Wood*, 3 Taunt. 256. The question simply is, Were the goods at the time of the seizure the property of the debtor or not?

The surplus of the proceeds of property sold under a *fi. fa.* remaining in the hands of the sheriff after satisfying the execution creditors, is a debt due from the sheriff to the debtor, and cannot be taken in execution under a *fi. fa.* at the suit of a third party against the defendant in the former suit. *Harrison v. Paynter*, 6 Mee. & W. 387; 8 Dowl. P. C. 349.

The 56 Geo. 3, c. 50, s. 1, enacts, that "no sheriff or other officer in England or Wales shall, by virtue of any process of any court of law, carry off, or sell, or dispose of, for the purpose of being carried off, from any lands let to farm, any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or turnips, or any manure, compost, ashes, or seaweed, in any case whatsoever; nor any hay, grass or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, entered into and made for the benefit of the owner or landlord of any farm, such hay, grass or grasses, tares and vetches, roots or vegetables, ought not to be taken off or withholden from such lands, or which, by the tenor or effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements such sheriff or other officer shall have received a written notice, before he shall have proceeded to sale." And "no sheriff or other officer shall, by virtue of any process whatsoever, sell or dispose of any clover, rye-grass, or any artificial grass or grasses whatsoever, which shall be newly sown, and be growing under any crop of standing corn. Provided that this act shall not extend to any straw, turnips, or other articles, which the tenant may remove from the farm, consistently with some contract in writing." See *Wilmot v. Rose*, 23 L. T. (Q. B.) 76.

56 Geo 3

This act does not extend to a seizure under Crown process. *Rex v. Osbourne*, 6 Price, 94.

[2] Where the execution is against a husband, a term vested in him in right of his wife may be sold (*Farr v. Newman*, 4 T. R. 638); but not goods vested in trustees before marriage for her benefit, although in his possession. *Heselington v. Gill*, 3 T. R. 620, n. Goods purchased by the wife out of money paid to her by trustees under a settlement to her separate use may be seized, unless they were bought by her as agent of the trustees. *Carne v. Brice*, 7 Mee. & W. 183. The goods of a woman cohabiting with the defendant cannot be taken, though she passes for his wife (*Glasspoole v. Young*, 9 B. & C. 696); so, although A. cohabits with B., and assumes his name, and passes for his wife, and permits him to appear to be the owner of the furniture of the house in which they live, the furniture being her property is not liable to be taken in execution under an execution against B. *Edwards v. Bridges*, 2 Stark. Rep. 396.

Where goods are claimed by a party who has cohabited with the execution debtor, it is a question for the jury whether they have not been given up by her, and become the property of the defendant in the action. *Edwards v. Farebrother*, 2 M. & P. 293; 3 C. & P. 524: but see *Mace v. Caddell*, Cowp. 232.

The goods of a testator or intestate cannot in general be taken in execution for the personal debt of the executor or administrator, unless he has converted the goods. *Quick v. Staines*, 1 B. & P. 293. Where the *fi. fa.* is against one of two partners the sheriff may seize the goods of both, and sell the defendant's undivided moiety in them; in which case the seizure does not divest the other party of his property in the goods, but the vendee will, it is said, be tenant in common with him. *Johnson v. Evans*, 7 Scott, N. R. 1035; 1 D. & L. 935. *Heydon v. Heydon*, 1 Salk. 392. *Burton v. Green*, 3 C. & P. 306. *Holmes v. Mentz*, 4 Ad. & E. 127. *See post*, Partnership.

If the sheriff has any doubts as to whom the property belongs, he may summon a jury *de bene esse* to satisfy himself. *Wells v. Pickman*, 7 T. R. 177. *See* Interpleader. And the inquisition found by the jury may be given in evidence to show that the sheriff has not acted maliciously, and will mitigate the damages in trespass for taking the goods of a third person. *Glossop v. Pole*, 3 M. & S. 175. But it is not conclusive in any case, for inquests of office are always traversable. *Latkow v. Eamer*, 2 H. Black. 437. And as it is not a proceeding immediately from the court, they will not set aside such an inquisition. *Roberts v. Thomas*, 6 T. R. 88.

After seizure, if the goods are claimed by a third party, the sheriff may have recourse to an interpleader. *See ante*, Feigned Issue; *post*, Interpleader.

If the sheriff seize the goods of a stranger he is liable to an action. *Sanderson v. Baker*, 2 W. Black. 832.

[1] Goods pawned or gaged for a debt with the defendant, and goods demised or let to him (*Izod v. Lamb*, 1 C. & J. 35), may be seized, but cannot be sold absolutely. *Rogers v. Kennay*, 9 Q. B. 592; 15 L. J. Q. B. 381. *See* 13 Mee. & W. 481; 3 C. & P. 435; 1 Ad. & E. 372. *Dean v. Whittaker*, 1 C. & P. 347. They may be sold subject to the right of the pawnee or lessee. *Scott v. Scholey*, 8 East, 476. Goods held by a party in right of a lien cannot be taken in execution against him. *Legg v. Evans*, 6 Mee. & W. 36. Goods in the hands of a receiver appointed in a suit in the Court of Chancery cannot be taken in execution. *Russell v. East Anglican Railway Co.* 3 Macn. & G. 104; 20 L. J. Ch. 257.

[2] By the common law, if the defendant sold his goods after delivery of the writ to be executed the sale was void against the execution creditor; unless sold in market-overt. *Samuel v. Duke*, 6 Dowl. 536. But now, by 19 & 20 Vic. c. 97, s. 1, it is enacted, that "no writ of *fieri facias*, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide*, and for a valuable consideration, before the actual seizure or attachment thereof by virtue of such writ: provided that such person had not, at the time when he acquired such title, notice that such writ, or any other writ, by virtue of which the goods of such owner might be seized and attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner."

Property in the possession of the grantor after assignment by a bill of sale is subject to be taken in execution under process against his goods, unless the bill of sale has been registered in compliance with the provisions of the 17 & 18 Vic. c. 36, s. 1. *See* Bill of Sale, vol. ii. p. 499.

An assignment, though before the delivery of the writ to the sheriff, if made fraudulently to delay, hinder, or defraud creditors, is void as against them. 13 Eliz. c. 5. *Christopherson v. Burton*, 3 Ex. 160. *Gale v. Williamson*, 8 Mee. & W. 405.

Goods fraudulently sold or conveyed away may be seized, and the defendant's continuing in possession is evidence of fraud. *Paget v. Perchard*, 1 Esp. 206. See *Armstrong v. Baldock*, Gow. 33. For if a man sell goods, and still continue in possession as visible owner of them, such sale is fraudulent and void as against creditors. See *Prac. in Chan.* 286, 287. So, if a creditor by *fieri facias* seize the goods of his debtor, and suffer them to remain long in the debtor's hands, and another creditor obtain a subsequent judgment and execution, it has been determined that this is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable. *See* id.; 1 Ves. 245; 3 Taunt. 400. So, if a *fieri facias* be executed fraudulently, a second at the suit of a *bonâ fide* creditor shall be preferred. *Bradley v. Wyndham*, 1 Wils. 44. And if the party at whose suit a sequestration is issued is guilty of unnecessary delay, and lose priority thereby, the sheriff who, under a subsequent *fieri facias*, returns *nulla bona*, is liable for a false return. *Payne v. Drewe*, 4 East, 523. But a *fieri facias* issued upon a judgment confessed in order to defeat the execution of another creditor, is not fraudulent under the 13 Eliz. *Holbird v. Anderson*, 5 T. R. 235. For, if the defendant sell his goods *bonâ fide*, and for a valuable consideration, before the delivery of the writ to the sheriff, they cannot be taken in execution; and though he sell them fraudulently, yet if they be afterwards sold to another *bonâ*

(5) *Goods Privileged.*[1]
(6) „ *of Bankrupts.*[2]
(B) *Payment of Queen's Taxes.*[3]
(C) „ *Arrears of Rent.*[4]

fide, they are not liable to be taken in the hands of the second vendee. *See* Godb. 161. And where a debtor sued by his creditor executed an assignment of his effects for the benefit of all his creditors to defeat the former execution, it was held valid. *Pickstock v. Lyster*, 3 M. & S. 371. Even where the assigns had the right of directing the sale of the property sooner than the time mentioned in the deed. *Goss v. Neale*, 5 Moore, 19. So, where A. advanced money to liberate goods taken in execution, and took an assignment of them in trust, and A. conveyed the property, but the debtor remained in possession, they were held exempt. *Jeseph v. Ingram*, 8 Taunt. 838. And it has been said that goods of which the defendant is ostensible owner, with the real owner's consent, cannot be taken in execution. *Dawson v. Wood*, 3 id. 256. At any rate a *fieri facias* creditor, who has purchased goods at public auction, does not, by permitting the former proprietor to continue in possession, render them liable to be taken in execution again. *Watkins v. Birch*, 4 id. 823. *Wooham v. Baldock*, Gow. 35, n. See *Burling v. Paterson*, 9 C. & P. 570. A., expecting an execution, executed a deed assigning all his property to trustees for the benefit of all his creditors, after paying expenses, with a power to the trustees to retain money to pay the costs of an action which had been brought by J. S. against A. This deed was executed at 9 P.M. on the 25th of February. A writ of *fi. fa.* was delivered to a sheriff's officer on the 24th, and by him delivered to the under-sheriff at 10 P.M. on the 25th;—*Held*, that the deed was good, notwithstanding the proviso to retain, and that the goods could not be taken under the *fi. fa. Bowen v. Bramidge*, 6 C. & P. 140. An intestate died in the month of August; her next of kin took out letters of administration in the same month, and went and lived in her house till the month of November, when the goods of the intestate in the house were seized under a *fi. fa.* against the administrator, for a debt of his own:—*Held*, that an action lay against the sheriff by the administrator, in his representative capacity, for this seizure; but, *semble*, that if the administrator had remained in possession for a very long time, it would have been otherwise. *Gaskell v. Marshall*, 2 M. & M. 132; 5 C. & P. 31. Where a defendant, privileged from arrest, upon being taken on a *ca. sa.* paid the money into the hands of the sheriff of G., and afterwards obtained a judge's order for its being repaid him:—*Held*, that the money could not be taken under a *fi. fa.* in the hands of the sheriff of Middlesex, from the town agent of the sheriff of G., who had been directed to pay it over. *Masters v. Stanley*, 8 Dowl. 169.

Where the sheriff having seized goods under a *fi. fa.* at the suit of R., the latter took a bill of sale of them, and afterwards sold his interest for valuable consideration to the plaintiff, and the circumstance of the execution was notorious; but, by an arrangement with the original debtor, the latter still continued in possession. The court held, that the judge properly directed the jury, in an action brought against the sheriff, who had seized the same goods under a subsequent execution, to find for the plaintiff or defendant, according to their opinion that the first transaction was fair or fraudulent. *Latimer v. Batson*, 4 B. & C. 652; 7 D. & R. 146.

If the defendant, subsequent to the delivery of the writ to the sheriff, make an assignment of a leasehold estate, the judgment creditor need not bring a suit in equity to come at the estate by setting aside the assignment, but may proceed at law to sell the term; and the vendee, who is generally a friend of the plaintiff, will be entitled at law to the possession, notwithstanding such assignment. *See* 3 Atk. 739.

Where the writ under which goods are seized is founded on a judgment fraudulent as against creditors, the sheriff is bound to sell them under a subsequent writ founded on a *bonâ fide* debt (*Imray v. Magnay*, 11 Mee. & W. 267); and to re-seize them if he has assigned them under the prior execution. *Christopherson v. Burton*, 3 Ex. 160.

[1] *As to Privileged Goods.*—The goods of ambassadors and other public ministers of foreign states at this court are privileged. 7 Anne, c. 12, s. 3; vol. i. p. 315. So are the goods ecclesiastical of clergyman. *Walwyn v. Awberry*, 2 Mod. 257.

[2] Before the 12 & 13 Vic. c. 106, all executions after an act of bankruptcy committed by the debtor, followed by a commission or *fiat*, were void; but such executions are now rendered valid by the 133d section of that act, if *bonâ fide* executed by seizure and sale before the date of the *fiat* or filing of the petition; provided the person at whose suit or on whose account the execution is levied had not, at the time of so executing or levying such execution, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed. *See* Bankruptcy, vol. ii. pp. 232, 233, n. [1].

[3] The queen's taxes due at the time of the seizure must be paid by the sheriff to the collector before sale or removal. 43 Geo. 3, c. 99, s. 37.

[4] 8 Anne, c. 14, s. 1, enacts, that "no

goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises, at the time of the taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of this act; and the sheriff or other officer is thereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent as the execution money: Provided always, that nothing in this act contained shall extend, or be construed to extend, to let, hinder, or prejudice her majesty, her heirs or successors, in the levying, recovering, or seizing any debts, fines, penalties, or forfeitures, that are or shall be due, payable, or answerable to her said majesty," &c. As to growing crops seized being subject to the rent, *see* 14 & 15 Vic. c. 25, s. 2; and 1 Ad. & E. 641.

By the 7 & 8 Vic. c. 96, s. 67, if the premises be let at a weekly rent the landlord can claim only for four weeks' arrears; and if for any other term less than a year, then only for four such terms and times of payment.

The statute of Anne contemplates a tenancy subsisting at the time of the execution, and at a rent certain. *Riseley v. Ryle*, 11 Mee. & W. 16.

The landlord is entitled to one year's rent upon executions on judgments for the defendant as well as the plaintiff. *Henchett v. Kimpson*, 2 Wils. 140. But the statute does not extend to the Crown; and therefore, under an extent the landlord is not entitled to one year's rent before the *teste* of the writ. *Rex v. De Caux*, 2 Price, 17. *Rex v. Hill*, 6 id. 19. Before the removal of goods under a sequestration out of the Court of Chancery he is entitled to a year's rent. *See* 1 Swanst. 457.

The landlord is entitled to the entire rent, without any deduction of poundage. *Gore v. Gofton*, 1 Stra. 643. At least as far as the property will go in liquidation of it, and after the sheriff has deducted his costs up to the time of the landlord's notice. *Henchett v. Kimpson, supra.* The landlord may claim forehand rent if consistent with the lease (*Harrison v. Barry*, 7 Price, 690); and rent which became due the day the execution was put in, and even pending a replevin suit (*Ladbroke v. Wilmot*, Tidd, 1054); but not rent which accrued after and while the sheriff was in possession. *Hoskins v. Knight*, 1 M. & S. 245. And where there are two executions, the landlord cannot claim a year's rent on each. *Dod v. Saxby*, 2 Stra. 1024. So, the ground landlord cannot claim this privilege on an execution against the under-lessee (*Bennet's case*, id. 787); but the statute applies as between lessee and under-tenant. *Thurgood v. Richardson*, 7 Bing. 428.

The landlord is entitled to the full year's rent, without reference to any abatement allowed to the tenant. *Williams v. Lewsey*, 8 Bing. 28; 6 M. & P. 92. But the rule that the landlord is entitled to a year's rent under an execution, does not apply where the execution is issued by himself. *Taylor v. Lanyon*, 6 id. 536.

If an agreement for the assignment of a piece of ground on payment of a sum of 1260*l.* contain a clause, that the party agreeing to take the assignment shall pay and allow at the rate of 100*l.* per annum from the time of taking possession until the completion of the purchase, in equal half yearly payments, a sheriff, on a writ of *fi. fa.*, ought not under such clause to treat the 100*l.* as rent, and deduct it out of the proceeds of the execution. *Saunders v. Musgrave*, 2 C. & P. 294.

In an action by a landlord against the sheriff, the court refused to allow the proceeds of the sale to be paid into court with the costs of the action, though it was sworn that the sale was regularly conducted. *Groombridge v. Fletcher*, 2 Dowl. P. C. 353.

The landlord is entitled to his rent in priority to the execution creditor, although the goods of a third person, not liable to seizure, are taken. *Forster v. Cookson*, 1 Q. B. 419. And he is so entitled although the seizure be of growing crops. *Allen v. Lloyd*, 2 Ir. L. Rep. N. S. 53. If the goods are not sufficient to satisfy the arrears of rent, the sheriff should withdraw without selling, and he is safe in pursuing that course (*Cocker v. Musgrove*, 9 Q. B. 223. *Foster v. Hilton*, 1 Dowl. 35. *Calvert v. Joliffe*, 2 B. & Adol. 418); for rent need only be paid where the goods are removed. *White v. Binstead*, 13 C. B. 304. But until removal the goods are *in custodia legis*, and cannot be distrained on for rent. *Wharton v. Naylor*, 12 Q. B. 673. The practice is for the sheriff to take enough to satisfy both the landlord and the execution creditor, and to make the payment to each of them. *Wintle v. Freeman*, 11 Ad. & E. 548.

An outlawry in a civil suit is considered as an execution within the statute. *St. John's College, Oxford, v. Murcott*, 7 T. R. 259. But an adjudication in bankruptcy is not. *Lee v. Lopes*, 15 East, 230.

The sheriff is not, it seems, bound to retain the year's rent without notice from the landlord (*Waring v. Dewberry*, 1 Stra. 97. *Smith v. Russell*, 3 Taunt. 400); but if the sheriff be cognisant that rent is due to the landlord it is his duty to retain it, although no specific notice so to do has been given.

(D) *Priority of Writs.*[1]

(E) *Of the Sale.*[2]

V. Of the Rule to Return.[3]

VI. „ Return.[4]

Andrews v. Dixon, 3 B. & A. 645. The notice is binding, even though it be given after the removal of the goods from the premises, provided the goods or proceeds remain in the sheriff's hands. *Arnitt v. Garnett*, 3 B. & A. 440. *Colyer v. Speer*, 4 Moore, 773. If he find that the effects are not sufficient to satisfy a year's rent, of which he has received notice, his proper course is to withdraw. *Foster v. Hilton*, 1 Dowl. P. C. 35. Where the sheriff after notice does not satisfy the landlord's claim, he is subject to an action (*Henchett v. Kimpson*, 2 Wils. 140), or the court will direct the rent to be paid out of the money levied (*Darling v. Hill*, Ca. Temp. Hardw. 255); for it is his duty to levy for the rent in the first instance, and then for the execution. *Colyer v. Speer*, 4 Moore, 473; 2 B. & B. 67.

The action for removing property without satisfying the landlord's rent lies by an administrator (*Palgrave v. Windham*, 1 Stra. 212), or trustee of an outstanding unsatisfied term, in trust for mortgagees, and to attend the inheritance. *Colyer v. Speer*, *supra*. But where the landlord accepts an undertaking from the sheriff's officer to pay him a year's rent, and then suffers him to remove the goods, he cannot sue the sheriff upon 8 Anne, though the undertaking turn out to be invalid. *Rotherey v. Wood*, 3 Camp. 24.

In an action against the sheriff for taking goods without leaving a year's rent, the declaration need not state all the particulars of the demise, but if it does, they must be proved as laid. *Burton v. Wright*, 2 Dougl. 655. An existing tenancy must be proved. *Hodgson v. Gascoigne*, 5 B. & A. 88. At least an occupation of the tenant; and it is for the defendant to show that the rent has been paid. *Harrison v. Barry*, 7 Price, 690.

[1] If two writs of *fi. fa.* are delivered to the sheriff against the same person, he must execute that which was first delivered, though both were delivered on the same day. *Hutchinson v. Johnson*, 1 T. R. 729. The same rule applies to the delivery of a writ of *fi. fa.* and a warrant of execution against the goods under county-court process; that which was first delivered has priority. 19 & 20 Vic. c. 101, s. 47. If upon the delivery of the second he has seized goods under the first writ, he may be said immediately upon the delivery of such second writ to have seized goods under it also (*Chambers v. Colman*, 9 Dowl. 588). Hence, if the first be fraudulent, set aside, withdrawn or suspended, the second has priority. *Hunt v. Hooper*, 12 Mee. & W. 664. *Burr v. Freethy*, 1 Bing. 71. *Lovick v. Crowder*, 8 B. & C. 132.

Under an order not to execute a *fi. fa.* unless another comes in, the sheriff may execute the last first. *Pringle v. Isaac*, 11 Price, 445.

[2] The sheriff, if the debt and costs be not paid, must sell (*Herbert v. Merit*, Vent. 7. *Rex v. Bird*, 2 Show. 87) within a reasonable time. *Cooke v. Birt*, 5 Taunt. 765; 1 Marsh. 333. He cannot deliver the goods to the execution-creditor in satisfaction of his debt. *Moore v. Anderson*, Ca. Temp. Hard. 113. Formerly the execution-creditor might become the purchaser (*Petit v. Benson*, Comb. 452), but now by s. 76, 24 & 25 Vic. c. 134, the goods must be sold only by auction, unless the court shall otherwise direct. The sheriff is not justified in selling the goods to the highest bidder, greatly under their value, until, it seems, a *venditioni exponas* has issued. *Keightley v. Birch*, 3 Camp. 521. See *Phillips v. Bacon*, 9 East, 298, where the sheriff to whom the writ was delivered may sell, though he has gone out of office before the sale, for the person who begins an execution shall end it. *Clerk v. Withers*, 1 Salk. 323.

[3] It is not usual for the sheriff to return the writ until ruled to do so. Wats. Sheriff, 81, 2d ed. He may be ruled to make a return, not only by the plaintiff but also by the defendant, if he show special grounds for it. *Daniels v. Gompertz*, 3 Q. B. 322. *Williams v. Webb*, 2 Dowl. N. S. 904. *Edmunds v. Watson*, 7 Taunt. 5; 2 Marsh. 330. *See* Execution, p. 344.

The time for returning the writ will not be enlarged unless special cause be shown. *Wells v. Pickman*, 7 T. R. 174. *Thruston v. Thruston*, 1 Taunt. 120. As where the question is, whether an extent be not entitled to priority over a *fieri facias*. *Rex v. Sheriff of Devon*, 1 Chit. R. 643. If the sheriff does not return the writ when ruled he is subject to an attachment. *Rex v. Sheriff of Middlesex*, 1 H. Black. 543. *Smith v. Blyth*, 9 Price, 255. *See post*, Sheriff.

On motion, the court will not direct a specific return on the ground that the sheriff's officer has wasted the property seized. *Willett v. Sparrow*, 6 Taunt. 576; 2 Marsh. 293. Neither will it order the sheriff to grant an inspection of the writ in order to frame a declaration against him for not levying. *Rex v. Sheriff of Chester*, 1 Chit. R. 476. *See* further, *ante*, p. 344, Execution.

[4] The sheriff returns *fieri feci* generally, or *fieri feci* as to part, specifying their value, and *nulla bona* as to the residue. *Willett v. Sparrow*, 6 Taunt. 576. He returns *nulla bona* if there are no goods applicable to the writ (*Shattock v. Carden*, 6 Ex. 725), or if there has been no seizure, or the proceeds of a seizure have been exhausted in payment

VII. Of the Venditioni Exponas.[1]

VIII. „ Distringas nuper Vicecomitem.[2]

IX. „ Remedy for Amount of Levy.[3]

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of rent, or satisfaction of prior writ. *Cocker v. Musgrove*, 9 Q. B. 223. *Wintle v. Freeman*, 11 Ad. & E. 539. Or he returns that the goods, specifying their value, remain in his hands for want of buyers (*Chambers v. Coleman*, 9 Dowl. 588), or that error has been brought. *Cleghorn v. Desanges*, 3 Moore, 83.

Fieri feci is the most usual return, viz. that the sheriff has caused to be made of the defendant's goods the whole or part of the debt, &c., which he has ready to be paid to the plaintiff. No inference can be drawn from the return of *fieri feci* that the sheriff has paid the money over to the execution-creditor, in an action against such creditor for recovery of the money. *Cator v. Stokes*, 1 M. & S. 599.

The return of *nulla bona* is proper when the defendant has no goods or chattels in the bailiwick of the sheriff whereof he can cause the debt or damages to be levied. *See* Tidd, 1061, 8th ed. Though, if the return be not true, the plaintiff may maintain an action against the sheriff for a false return; in which action the sheriff cannot go into circumstantial evidence to impeach the judgment, on the ground of a collateral fraud. *See* 2 Stark. N. P. 218. And where the sheriff returns *nulla bona*, and there is a recovery against him for his false return, that vests no property of the goods in him or the plaintiff; but they remain in the defendant, and are liable to a subsequent execution for his debt. *See* 2 Black. 694; 3 T. R. 657. But an action on the case does not lie against a sheriff, who has not been ruled to return the writ, for neglecting to have the money in court according to the exigency of a *fieri facias*. *See* 3 T. R. 657, and *post*, Sheriff, under which head all the cases as to a false return will be collected and abridged.

If the sheriff return, that he has made his mandate to the bailiff of a liberty, who has given him no answer, the bailiff may be called upon by rule to return the mandate (see *Boothman v. Surrey*, 2 T. R. 5); and if he do not return it, he will be liable to an attachment; or if he return *nulla bona*, &c. the plaintiff may proceed thereon, in like manner as if the sheriff had returned it; and if the bailiff make an insufficient return he is liable to be amerced for it, and not the sheriff, by the statute 27 Hen. 8, c. 24. *See* 2 T. R. 12; Tidd, 1065, 8th ed.

Nulla bona cannot be returned where the sheriff is prevented from taking the goods by proceedings in error, since he ought to return the fact of the proceedings in error, *Cleghorn v. Desanges*, *supra*; Gow. 66.

A return that the sheriff seized the goods, and kept possession until he received from the attorney of the plaintiff an order to withdraw his goods (*Levi v. Abbott*, 4 Ex. 588), may be supported.

[1] Where the return is, that the goods remain in the sheriff's hands for want of buyers, a writ of *venditioni exponas* must be sued out to compel a sale of the goods. *Cameron v. Reynold*, Cowp. 406. If the seizure has been of goods to the amount of part only of the debt, there may be a *venditioni exponas* as to such part and a *fi. fa.* for the residue, in one writ. The sheriff is bound after the delivery of the *venditioni exponas* to sell the goods (*Keightley v. Birch*, 3 Camp. 521), but not at the value set upon them in his return to the *fi. fa.* (*Charter v. Peter*, Cro. Eliz. 598); and he cannot apply the proceeds in satisfaction of another writ. *Hughes v. Rees*, 4 Mee. & W. 468. *Dod v. Colman*, 9 Dowl. 916.

A *venditioni exponas* is not a process distinct from the *fi. fa.* but a part of it, being a direction to execute it in a particular manner. *Hughes v. Rees*, 4 Mee. & W. 468; 7 Dowl. 56.

[2] Where the sheriff, after he has returned that the goods remain in his hands for want of buyers, goes out of office, the plaintiff may sue out a *distringas nuper vicecomitem*, directed to the present sheriff, commanding him to distrain the late sheriff to sell the goods (*Clerk v. Withers*, 6 Mod. 290), and unless he do so he will forfeit issues to the amount of the debt; and if further costs have been incurred by reason of the delay, the court will, upon motion, increase issues to meet such costs. *Phillips v. Morgan*, 4 B. & A. 652. *Nowell v. Underwood*, 5 Dowl. 229.

[3] If the sheriff do not pay over the amount of the levy to the execution-creditor, the latter may, in case a return of *fieri feci* has been made, proceed against him for the amount by rule of court. *Wood v. Wood*, 5 Jur. 525. See *Stockdale v. Hansard*, 11 Ad. & E. 253; 3 Per. & D. 330. Or he may proceed against him by action (*Dale v. Birch*, 3 Camp. 347. *Speake v. Richards*, 2 Show. 281), to which action he cannot plead the Statute of Limitations. *Cockram v. Welbye*, 2 Show. 79. The usual course is for the sheriff to move to stay proceedings on payment of the money due. *Jeffries v. Sheppard*, 3 B. & A. 696. Where the sheriff returned that he had money in his hands, forgetting that he had paid it over under a commission of bankruptcy, to which one of the plaintiffs had impliedly assented, the court held that the sheriff was discharged. *Tomlinson v. Shynn*, 4 Moore, 505; 2 B. & B. 77. So the sheriff was holden discharged where the plaintiff had appointed a special bailiff to manage the sale under a *fieri facias*, though the sheriff returned that he had sold, &c. *Pallister v. Pallister*, 1 Chit. R. 614, n. Where the defendant's goods are taken to the amount intended to be levied, he is discharged; but

X. Forms of Writ of Fi. Fa.[1]

XI. Must be Registered to Affect Purchaser, &c. of Realty.[2]

FIERI FECI. *See ante*, p. 461.

FIGHT, Challenging to. *See* Challenge, vol. iii. p. 71.

FIGHTING, Killing by. *See* Murder.

FILIATION. *See* Affiliation, vol. i. p. 256.

FILING. *See* Affidavit, vol. i. p. 239 ; Bail, vol. ii. p. 74 ; Declaration, vol. iii. p. 570; *post*, Pleas; Replications.

FINES.[3]

where A. & B. are jointly and severally bound, and execution is had against A., and his goods are taken but not sold, it is no discharge. *Clerk v. Withers*, 2 Ld. Raym. 1072.

A defendant who pays money to the plaintiff's attorney in satisfaction of a *fieri facias*, which is by consent kept back from the sheriff, is not guilty of a contempt if he attaches the same money in the hands of the plaintiff's attorney. *Gwinness v. Brown*, 4 Taunt. 472.

[1] Forms of *fi. fa.* are prescribed by the schedule annexed to Reg. Gen. H. T. 16 Vic. They are to be used with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the nature of the case, may render necessary; but any variance therefrom, not being in matter of substance, does not affect their validity or regularity. Reg. Gen. H. T. 16 Vic.; Forms of Proceedings.

Writ of Fieri Facias on a Judgment for Plaintiff.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting.

We command you that [*if sued out of the Court of Exchequer*, say, "We command you that you omit not, by reason of any liberty of your county, but that you enter the same, &c."] of the goods and chattels of C. D. in your bailiwick, you cause to be made £ [*the amount of all the monies recovered by the judgment*], which A. B., lately in our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] recovered against him, whereof the said C. D. is convicted, together with interest upon the said sum, at the rate of four pounds per centum per annum, from the day of in the year of our Lord [*the day on which the judgment was entered up, or if entered up prior to the first of October in the year of our Lord* 1838, say, "From the first day of October, in the year of our Lord 1838," [*omitting the words*, on which day the judgment aforesaid was entered up], on which day the judgment aforesaid was entered up, and have that money, with such interest as aforesaid, before us [*or* in the Common Pleas, before our justices; *or* in the Exchequer, before the Barons of our Exchequer, *as the case may be*] at Westminster, immediately after the execution hereof, to be rendered to the said A. B.; and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [*or* in the Common Pleas, to our justices; *or* in the Exchequer, to the Barons of our Exchequer, *as the case may be*] at Westminster, immediately after the execution hereof, and have you there then this writ.

Witness at Westminster, the day of in the year of our Lord

[2] The 23 & 24 Vic. c. 38, s. 1, requires writs of execution to affect a purchaser or mortgagee (as to judgments entered up after the 23d July, 1860) of freehold, copyhold, or customary or leasehold, to be registered and sued out in manner there provided.

[3] Where a statute imposes a fine certain upon any conviction, the court cannot mitigate it; but if the party come in before the conviction, and submit himself to the court, they may assess a less fine, for he is not convicted, and perhaps never might be convicted. *See* 3 Salk. 33. A fine may be mitigated the same term it is imposed, being under the power of the court during that time, but not afterwards. *Ex-parte Reading*, T. Raym. 376, n.

In the case of assault, proving *son assault* goes in mitigation of the fine. *Reg. v. Templeman*, 1 Salk. 55. Though a fine be certain, the Court of Exchequer may mitigate it, for it is a court of equity, and they have a privy seal for it. *Anon.* 3 id. 33. So, the Queen's Bench may mitigate if the sessions impose an excessive fine. *Anon.* 1 Vent. 336. See *Rex v. Loveden*, 8 T. R. 615.

The king or queen cannot be fined. *See* Co. Litt. 127; 8 Co. 61; F. N. B. 31. So, an infant, it seems, cannot be fined. *See* Co. Litt. 127; 8 Co. 61; 3 Bulst. 276; Palm. 518; Roll. Abr. 214; Cro. Car. 161; Bac. Abr. Fines and Amerciaments, 516.

By the common law, fines vest in the king or lord of the manor. *See* Bract. 129; 4 Leon. c. 393. Therefore the king or lord of the manor may maintain debt for a fine. *See* Cro. Abr. 581; Savil, 93; Ras. Ent. 151; 2 H. 4, 24, b; 10 H. 6, 7; Raym. 68; 3 Mod. 240; Comb. 151; 3 Lev. 261; 1 Mod. 10; Keb. 955; Dougl. 730, n.

FINES[1] and Common Recoveries.[2]

[1] A fine (*finis*) was an amicable composition or agreement and termination of a suit, either actual or fictitious, whereby the lands which formed the subject of such suit were acknowledged to be, and thereby became the property of one of the parties to whom the fine was levied. In its origin it was founded on an actual suit commenced at law for the recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual that fictitious actions were commenced for the sake of obtaining the same security. 2 Bl. Com. 349.

By stat. 3 & 4 Wm 4, c. 74, s. 2, fines and recoveries are abolished. It enacts, that "after the 31st day of December, 1833, no fines shall be levied, or common recovery suffered, of lands of any tenure, except where parties intending to levy a fine or suffer a common recovery shall, on or before the 31st day of December, 1833, have sued out a writ of *dedimus*, or any other writ, in the regular proceedings, of such fine and recovery; and any fine or common recovery which shall be levied or suffered contrary to this provision shall be absolutely void."

By sect. 5, fines or common recoveries, levied or suffered in unlawful or unauthorised courts, are not to be invalid in consequence of their having been levied or suffered therein.

By sect. 7, "if it shall be apparent from the deed declaring the uses of any fine already levied, or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then, and in every such case, the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission." *See* also sect. 8.

By stat. 11 & 12 Vic. c. 70, s. 1, after reciting that, notwithstanding all fines levied in the Court of Common Pleas at Westminster were levied with proclamations, yet unnecessary trouble and expense were occasionally incurred by parties being required to procure evidence of such proclamations having been in fact made, it is enacted, that "all fines heretofore levied in the said Court of Common Pleas shall be conclusively deemed to have been levied with proclamations.'

And by sect. 3 it is provided, "that this act shall not extend to any fine heretofore levied of or concerning any lands, tenements, or hereditaments which, at the time of the passing of this act, shall be actually possessed or enjoyed by any person or persons under a title adverse to, or inconsistent with the operations of such fine, if levied with proclamations; but in all such cases it shall be necessary for all parties alleging that such fine was levied with proclamations, to prove such allegation in the same manner as if this act had not been made."

Further, by the 5 Vic. s. 2, c. 32, intituled, "An Act for the better Recording Fines and Recoveries in Wales and Cheshire," fines in the abolished courts of those districts are made good, notwithstanding certain omissions or neglects in regard to them.

[2] A common recovery is an action, either actual or fictitious, not compromised, but carried on through every regular stage of proceeding, by means of which lands which were the subject of the action were recovered against the tenant of the freehold, and all persons were bound as by an actual adjudication of the right, and an actual fee-simple was thereby vested in the recoveror. Smith's R. & P. P. 842; Sm. *Succinct View of the Operation of Fines and Recoveries.* The mode of suffering a recovery with a single voucher was this—the person to whom the land was intended to be conveyed, the demandant, or recoveror, brought an action against the person who was to suffer the recovery (the tenant or recoveree), by suing out a writ called a *præcipe quod reddat* against him. The latter then vouched or called another person to defend the title, upon the alleged ground of such other person having conveyed the land to him with a warranty. The person so vouched, who was generally the crier of the court, and was called the common vouchee, made default, and thereupon judgment was given for the demandant to recover the lands against the tenant, and the tenant had judgment to recover of the vouchee lands of equal value in recompense for the lands so warranted by him; but, of course, he recovered nothing, as the common vouchee had no lands of his own. It was more usual, however, to have a recovery with double voucher, at the least. And in the case of a double voucher, an estate of freehold was first conveyed to some other person against whom the *præcipe* was brought, and then he vouched the tenant in tail, who vouched over the common vouchee. 2 Bl. Com. 358; Sm. R. & P. P. 842.

By sect. 5, recoveries shall not be deemed invalid in consequence of having been suffered in unlawful or unauthorised courts. *See supra.*

By sect. 8, "if it shall be apparent from the deed making the tenant to the writ of entry, or other writ for suffering a common recovery already suffered, or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such re-

FINES and Recoveries Act; Acknowledgment by Married Woman under. *See post*, Husband and Wife.

FIRE.[1]

covery, or any misdescription or omission of lands intended to have been passed by such recovery, then, and in every such case, the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission."

By sect. 10, "no common recovery already suffered, or hereafter to be suffered, shall be invalid in consequence of the neglect to enrol, in due time, a bargain and sale, purporting to make the tenant to the writ of entry, or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly enrolled."

By sect. 11 it is enacted, that "no common recovery already suffered, or hereafter to be suffered, shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry, or other writ for suffering such recovery, provided the person who was the owner of, or had power to dispose of an estate in possession, not being less than an estate for a life or lives, in the whole of the rent and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits, after payment of any charges thereout, and whether any surplus, after payment of such charges, shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; and an estate shall be deemed to be an estate in possession, notwithstanding there shall be subsisting prior thereto any lease for lives, or years absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved.

But by sect. 12, a recovery shall not be rendered valid by the act. 1. Where and so far as the same shall be, or shall have been reversed. 2. Nor where any person who would have been barred by it if valid, shall, before the passing of the act, have had dealings with the lands on the faith of the same being invalid. 3. Nor as to lands of which any person shall, at the time of the passing of the act, have been in possession in respect of any estate which the recovery, if valid, would have barred. 4. Nor if any court of competent jurisdiction shall have refused to amend it. *See* also 5 Vic. s. 2, c. 32, "For the better Recording Fines and Recoveries in Wales and Cheshire."

[1] Formerly an action lay for an *accidental* fire. *Turbervil v. Stamp*, 12 Mod. 152. *Littleton v. Cole*, 5 id. 181. *Allen v. Stephenson*, 1 Lutw. 36. *Cudlipp v. Rundall*, 4 Mod. 9. *Pantam v. Isham*, 1 Salk. 19. But by the 6 Anne, c. 31, the right of action in such a case was taken away, and now made perpetual by the 14 Geo. 3, c. 78, which, however, imposes the penalty of 100*l.*, or eighteen months' imprisonment, on servants firing houses by negligence; and also directs that, on the breaking out of any fire, all the constables and beadles shall repair to the place with their staves to protect property, and be assisting in putting out the fire, and causing people to work. And by the same statute, ss. 76, 77, 78, rewards for prompt assistance are—to the first engine, not exceeding 30*s.*; the second, not exceeding 20*s.*; and the third, 10*s.*; to be paid by the churchwardens or overseers, but not without the approbation of an alderman or justice of the peace. And the churchwardens are to be repaid by the inhabitant if the fire begins in a chimney. The statute has been held not to apply to the destruction of adjoining premises by a fire occasioned through negligence. *Filliter v. Phippard*, 11 Q. B. 347. *Reg. v. Coombe*, 13 id. 179. *Lord Canterbury v. Reg.* 1 Phil. 318; 12 L. J. Ch. 284. *See* 1 Hill on Torts, 120–122; Add. on Torts, 128–133, 136.

Where the fire originated in the spontaneous combustion of a rick of hay, and it appeared that the defendant, although warned of the condition of the stack previously to the accident, not only expressed indifference, but, by his conduct in cutting a hole in the hay-rick, conduced to its combustion, and cottages on the adjoining land were thereby burned, it was held to be a question for the jury whether the defendant had conducted himself with such a degree of care and caution as might be looked for in a prudent man; and if not, he was responsible for the destruction of the cottages. *Vaughan v. Menlove*, 3 Bing. N. C. 468; 4 Scott, 251. *See* 3 Lev. 356.

The statute has been held not to apply to a case where the fire originated from sparks emitted by a locomotive of the defendant's. *Vaughan v. Taff Vale Railway Co.* 3 H. & N. 743; 28 L. J. Ex. 41. And upon the same principle, that if a person lights, or causes his servant to light fires on his land, for the purpose of burning weeds and rubbish, and, by the improper or negligent conduct of the defendant or his servants, the fire spreads to and destroys the hedges and woods, or corn-fields of the adjoining landed proprietor, the lighter of the fire will be responsible for the damage; because it cannot be said that a fire thus designedly kindled "accidentally began." *Filliter v. Phippard, supra. Turbervil v. Stamp*, 1 Salk. 13.

FIRE INSURANCE. *See post*, Insurance.

FIRE-PLUG.[1]

FIREWORKS. *See post*, Gunpowder.

(A) *Sale of.*

(B) *Injury by.*[3]

The place must be licensed,[2] and they must not be sold to any person apparently under sixteen years of age.

23 & 24 Vic. c. 139, s. 8. "It shall not be lawful for any person to sell or offer, or expose to sale, any fireworks, without such license as hereinafter mentioned; and no such fireworks shall be sold to any person apparently under sixteen years of age; and any person offending against this enactment shall, for every such offence, forfeit any sum not exceeding 5*l.*"

(C) *Throwing in Public Place.*

By sect. 9, "if any person throw, cast, or fire, or aid and assist in throwing, casting, and firing any squib, serpent, rocket, or other firework, in or into any thoroughfare or public place, he shall, for every such offence, forfeit any sum not exceeding 5*l.*"

FIRST-FRUITS.[4]

FISH and FISHERIES.

I. Relative to the Definition and Nature of, p. 467.

II. „ the King's Right to Fish, p. 467.

III. „ Fisheries, p. 467.

(A) *Public*, p. 467.

(*a*) *In distant Seas*, p. 468.

Railway companies, being empowered by act of parliament to use locomotive engines, are not responsible for a fire accidentally caused by the emission of sparks from the engine, provided there has not been any negligence, either in the construction of the engine or in the mode of feeding or driving it, or otherwise. *Vaughan v. Taff Vale Railway Co.* 5 H. & N. 679; *see* 3 Man. & G. 515.

The imposition of the penalty upon a servant who negligently causes a fire (by the 6 Anne, c. 31, s. 3, *supra*), does not exempt the master from responsibility. *Vaughan v. Menlove*, *supra*. As to destruction of private property to prevent the spread of a fire, *see* 1 Hill on Torts, 148, n. If a prison take fire the sheriff will be excused for the escape of prisoners. Bull. N. P. 66.

[1] By the 14 Geo. 3, c. 78, s. 75, churchwardens in London, and within the bills of mortality, are to fix fire-cocks, &c. at proper distances in streets, and keep a large engine and hand-engine for extinguishing fire, and ladders and fire-escapes, under the penalty of 10*l.* And by the same statute the first turncock is entitled to a reward of 10*s.*, to be paid by the churchwardens, &c. *See* sect. 74. Money insured on houses: how to be applied, *see* sect. 83; and 5 B. & A. 1.

[2] The license is granted by the justices at general quarter sessions, or at petty sessions, or the council of the borough. 23 & 24 Vic. c. 139, s. 11; 24 & 25 Vic. c. 130, ss. 1, 2.

[3] If a person mixes things together which apart are innocent, but which are liable to explode on coming into contact, he is responsible if an explosion should ensue. *Per Tindal, C. J.*, 4 Scott, 252. As to the explosion of gas, see *Holden v. the Liverpool New Gas Co.* 3 C. B. 14; 15 L. J. C. P. 304.

A schoolmaster who suffers an infant pupil to use fireworks will be responsible for all consequences. *King v. Ford*, 1 Stark. N. P. 421. In an action for price of fireworks sold to defendant the statute must be specially pleaded. *Fenwick v. Laycock*, 1 Q. B. 414.

[4] The profits, after avoidance of every spiritual living for the first year, according to the valuation thereof in the *Valor Beneficiorum*, commonly called the King's Book. The Crown took these first-fruits until Queen Anne's time, who restored to the church what had at first been taken from it, not by remitting the tenths and first-fruits entirely, but by applying these superfluities of the larger benefices to make up the deficiencies of the smaller: for this purpose she granted a charter, confirmed by 2 Anne, c. 11, whereby all the revenue of the first-fruits and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings under 50*l.* a-year, which has been further regulated by subsequent statutes. *See* 5 Anne, c. 24; 6 Anne, c. 27; 1 Geo. 1, c. 10; 45 Geo. 3, c. 84. In Ireland, similar benefits are secured under the Board of First-Fruits by the Irish acts. *See* 2 Geo. 1, c. 15; 8 Geo. 1, c. 12; 10 Geo. 1, c. 7; 1

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I. Relative to the Definition and Nature of.[1]
II. „ the King's Right to Fish.[2]
III. „ Fisheries.
(A) *Public.*

Geo. 2, c. 18; 9 Geo. 2, c. 12; 27 Geo. 2, c. 18; 12 Geo. 3, c. 16; 25 Geo. 3, c. 63; 29 Geo. 3, c. 26; 43 Geo. 3, c. 106; 46 Geo. 3, c. 60; 48 Geo. 3, c. 65; 1 & 2 Wm. 4, c. 45; 1 & 2 Vic. c. 20, 23, s. 34; c. 106, s. 72; c. 119; c. 107, s. 10; 2 & 3 Vic. c. 49; 3 & 4 Vic. c. 20; c. 113, s. 76; 4 & 5 Vic. c. 39, s. 4; 6 & 7 Vic. c. 37.

[1] Fisheries are public or private. The former are either fisheries in distant seas, in which all nations have a right to fish, and some of which are encouraged by act of parliament, or they are fisheries within the four seas, or within public navigable rivers, in which all British subjects have a right to fish in exclusion of other nations, subject in some particular instances to modifications by acts of parliament, or the prescriptive rights of individuals. Private fisheries are those in which some particular persons are entitled to an exclusive right of fishing. *See* Chit. G. L. 239.

[2] The queen has no general property in fish, except whales and sturgeons, which it is said belong to the Crown. *See* Bract. 3 lib. c. 3, s. 5; Brit. 266; 7 Co. 16. But to give the queen a right to such fish, they must be taken within the seas, parcel of the dominions and crown of England, or in creeks or arms thereof; for if taken in the wide seas, or out of the precinct of the seas subject to the crown of England, they belong to the taker. *See* Y. B. 39 Edw. 3; 1 Taunt. 241.

(*a*) *In distant Seas.*[1]

(*b*) *In the Four Seas and Navigable Rivers.*[2]

(*c*) *Restrictions respecting.*

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[1] The right of all nations to take fish in the sea may be restrained or regulated by treaty or custom. *Fennings v. Granville*, 1 Taunt. 241.

Where the plaintiff, while fishing for pilchards, had nearly encompassed the fish with a net, but the defendant, by rowing his boat to the opening, disturbed the fish and prevented the capture. The plaintiff brought trespass, and issue being joined on the plaintiff's possession of the fish, and on the fish being his, it was held that he was not entitled to recover, no special custom of the fishery being proved. *Young v. Hitchins*, 6 Q. B. 606.

By several statutes, companies and societies have been established and invested with certain privileges, with a view to encourage fisheries in distant seas, and bounties are given on the importation of fish. *See* Chit. G. L., Appendix, pp. 523, 619, 620, 633, 666. And, by the courtesy of nations, boats employed in the fisheries are exempt from capture. *See* 1 Roll. Rep. 19. The 50 Geo. 3, c. 108, exempts persons employed in the public fisheries in deep waters from liability to be impressed. The lobster fishery has been held to be within the act. *Payne v. Thorogood's case*, 1 M. & S. 223.

[2] Of common right, all persons may fish in the sea and navigable rivers. In *Carter v. Murcot*, 4 Burr. 2162, the general immunity, by virtue of which all nations may fish in the sea, is confined to those seas which have not been appropriated by a particular state, or are not within a certain distance from its shores; for although, by the law of nations, the sea is in general open to all mankind, the right of fishing in ports and rivers, or even on the coasts of an independent state, could never have been considered or intended to be admitted as a universal right; nor could a foreign power send vessels to navigate within the limits of such maritime districts, or take fresh running water on the shore, without permission expressed or implied; neither can the interests of maritime states admit a promiscuous liberty to strangers to fish or navigate within their seas, since it might affect both their personal security and personal sustentation. *See* Vattel, 128, 129; 2 Wooddeson, 443. Those parts of the open waters which encompass the four sides of the British islands, and are therefore known by the name of the British seas, have long been acknowledged by most nations as her lawful possessions, and protected from the intrusion of other states. *See* Selden, 182; Martens, 161; Molloy, 113; Com. Dig. Prerogative, B. 1, D. 50; Chitty's *Game Laws*, 243.

A prescription to fish in the sea is idle and void. By common right all persons may search for and take shell-fish on the shore of the sea. *Bagott v. Orr*, 2 B. & P. 472.

In an action for disturbing plaintiff's fishery in the river Tweed, it appeared that the defendant's ship was moored against a rock on the bank of the river, and that plaintiff was prevented by the situation of the ship from taking so many fish as he would otherwise have done. *Per Wood, B.*: "A navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please. Nevertheless, if they abuse that right so as to work a private injury, they are liable to an action. The question is, whether the right has been abused. However, the plaintiff's privilege must be subservient to the right of the public. It would be of very mischievous consequences if the owner of a fishery could prescribe to the public how and where they are to moor in a navigable river. The question consequently is, whether the defendant acted wantonly and maliciously for the purpose of injuring the fishery of the plaintiff? If so he is entitled to a verdict." *Anon.* 1 Camp. 517.

Every subject of common right may fish with lawful nets, &c. in a navigable river, as well as in the sea, and the king's grant cannot bar them thereof; but the Crown only has a right to royal fish. *Warren v. Matthews*, 6 Mod. R. 73.

Fishermen may by custom justify going on land adjoining the sea, to fish in the sea. *See* Bro. Abr. Custom, pl. 46; Fitz. Barre, 93; 3 Edw. 4, 19; 5 B. & A. 268. And a custom for fishermen to dry their nets on the land of another is, it seems, legal. *Fitch v. Rawling*, 2 H. Black. 395. By the common law no right exists in the public of erecting on the sea-shore any building for drying their nets. *Blundell v. Catterall*, 5 B. & A. 295.

Where the declaration stated the plaintiff's possession of a fishery in the river C. and of oysters and oyster brood lying in the bed of the river, and charged that the defendant, by negligent navigation of his vessel at times of the tide, unseasonable as he well knew, placed her so that she struck against and settled upon the bed of the river, and destroyed large quantities of oysters and oyster brood. The court held that a tidal navigable river is a highway at all times and in all states of the tide, and is not suspended during such periods of the tide as leave the channel too shallow to float vessels; that the right of the Crown in arms of the sea and public navigable rivers is subject to the public right of passage, and any grantee of the Crown must take subject to such right. *Mayor of Colchester v. Brooke*, 7 Q. B. 339; 15 L. J. Q. B. 59.

(1) *With respect to Salmon Fishing.*

(*a*) *Prohibitions as to the Modes of Fishing.*[1]

(*b*) *Regulations with respect to Dams and Weirs.*[2]

(*c*) *Prohibition of the Destruction of Unseasonable Fish.*[3]

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[1] By the 24 & 25 Vic. c. 109, previous acts relating to salmon fishing are repealed, and provision is made for regulating salmon fisheries in England. By this statute penalties are inflicted on persons who permit poisonous matters to flow into rivers to the destruction of salmon, who for the purpose of catching salmon use a light or a spear, or fish with fish roe, or buy or sell salmon roe as bait, or use a net for salmon having a mesh of less dimensions than two inches in extension from knot to knot (the measurement to be made on each side of the square) or eight inches measured round each mesh when wet. It prohibits the placing of a fixed engine of any description for catching salmon in any inland or tidal waters; and for the purpose of this enactment a net secured by anchors, or otherwise temporarily fixed to the soil, is deemed to be a fixed engine; but it does not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of the act by any person by virtue of any grant, charter, or immemorial usage; and it does not apply to fishing-weirs or fishing mill-dams. 24 & 25 Vic. c. 19, ss. 5–11.

By the 1 Eliz. c. 17, s. 3, it was enacted that no person should take or fish, "but only with a net or trammel, whereof every mesh or mask shall be two inches and a-half broad." The court held the meaning to be, that every space between the threads of the net should be two inches and a-half square at the least. 27 L. J. M. C. 172; 4 Jur. N. S. 710.

[2] By sect. 12 of 24 & 25 Vic. c. 119, the following regulations shall be observed with respect to dams:—1. No dam, except such fishing-weirs and fishing mill-dams as are lawfully in use at the time of the passing of this act, by virtue of a grant, or charter, or immemorial usage, shall be used for the purpose of catching or facilitating the catching of salmon. 1. Any person catching or attempting to catch salmon in contravention of this section shall incur a penalty not exceeding 5*l.* for each offence, and a penalty of 1*l.* for each salmon which he catches. 2. All traps, nets, and contrivances used in or in connexion with the dam for the purpose of catching salmon shall be forfeited. 3. All salmon caught in contravention of the above prohibition shall be forfeited. And no fishing-weir, although lawfully in use as aforesaid, shall be used for the purpose of catching salmon, unless it shall have therein such free gap as is hereinafter mentioned; and no fishing mill-dam, although lawfully in use as aforesaid, shall be used for the purpose of catching salmon, unless it have attached thereto a fish-pass of such form and dimensions as shall be approved of by the Home Office, nor unless such fish-pass has constantly running through it such a flow of water as will enable salmon to pass up and down such pass, but so, nevertheless, that such pass shall not be larger or deeper than requisite for the above purposes.

No person shall catch or attempt to catch, except by rod and line, any salmon in the head-race or tail-race of any mill, or within fifty yards below any dam, unless such mill or dam has attached thereto a fish-pass of such form and dimensions as shall be approved by the Home Office, and such fish-pass shall have constantly running through it such a flow of water as will enable salmon to pass up and down it; and if any person acts in contravention of the foregoing provision,—1. He shall incur a penalty not exceeding 2*l.* for each offence, and a further penalty not exceeding 1*l.* for every salmon so caught. 2. He shall forfeit all salmon caught in contravention of this enactment, and all nets or other instruments used or placed for catching the same."

By sect. 13, "where salmon or the young of salmon are led aside out of a main stream by means of any artificial channel used for the purpose of supplying towns with water, or for supplying any navigable canal, the company or persons having the control over such artificial channel shall, within six months after the commencement of this act, put up and shall maintain at their own costs and charges a grating or gratings across such channel, for the purpose of preventing the descent of the salmon or the young of salmon, and such grating or gratings shall be placed in such form and manner as may be approved by one of the inspectors in this act mentioned. A penalty of 5*l.* a-day is incurred in case of neglect to put up the grating; and of 1*l.* for every day a failure to maintain the grating is continued. But no such grating shall be so placed as to interfere with the passage of boats on any navigable canal."

As to the construction of fish passes through dams by the owners of fisheries, *see* sects. 23–26. And with respect to the restrictions as to fishing-weirs, *see* sects. 27–30.

[3] By sect 14 of the 24 & 25 Vic. c. 109, "no person shall do any of the following things:—1. Wilfully take any unclean or unseasonable salmon. 2. Buy, sell, or expose for sale or have in his possession any unclean or unseasonable salmon, or any part thereof. And any person acting in contravention of this section shall incur the following penalties; that is to say—1. He shall forfeit any fish taken, bought, sold, or exposed for sale or in his possession. 2. He shall incur a penalty not exceeding 5*l.*

(*d*) *Restrictions as to Times of Fishing.*[1]

(*e*) *Legal Proceedings.*

Recovery of penalties.

24 & 25 Vic. c. 109, s. 35. "All penalties imposed by this act, and all costs or expenses by this act directed to be recovered in a summary manner, may be recovered within six months after the commission of the offence before two justices, in manner directed by an act (11 & 12 Vic. c. 43) intituled, 'An Act to Facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales, with respect to Summary Convictions and Orders,' or of any act amending the same; and all monies received in respect of penalties recovered under the act shall be paid as follows; (that is to say,) such portion, not exceeding one-half, as the court may see fit, to the person on whose complaint the penalty is recovered, and the remainder in manner directed by the said act, 11 & 12 Vic. c. 43; and all forfeiture shall be disposed of as the court may direct, and the proceeds, if any, shall be applied in manner in which the monies received in respect of penalties are hereby directed to be applied."[2]

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in respect of each fish taken, sold, or exposed for sale or in his possession. But this section shall not apply — 1, to any person who take such fish accidentally, and forthwith returns the same to the water with the least possible injury; 2. to any person who takes or is in possession of such fish for artificial propagation or other scientific purpose."

By sect. 15, "no person shall do the following things; that is to say,—1. Wilfully take or destroy the young of salmon. 2. Buy, sell, or expose for sale, or have in his possession, the young of salmon. 3. Place any device for the purpose of obstructing the young of salmon. 4. Wilfully injure the young of salmon. 5. Wilfully disturb any spawning-bed, or any bank or shallow on which the spawn of salmon may be. And any person acting in contravention of this section will incur the following penalties; that is to say: — 1. He shall forfeit all the young of salmon found in his possession. 2. He shall forfeit all rods, lines, nets, devices, and instruments used in committing any of the above offences. 3. He shall for each offence pay a penalty not exceeding 5*l*. But nothing herein contained shall apply to any person who may obtain such young of salmon for artificial propagation or other scientific purposes; and nothing herein contained shall prejudice the right of any owner to take materials from any stream."

By sect. 16, "if any person wilfully disturbs or attempts to catch salmon when spawning, or when on or near their spawning-beds, he shall for each offence incur a penalty not exceeding 5*l*.; but this section shall not apply to any person who may catch or attempt to catch salmon for the purposes of artificial propagation or other scientific purposes."

[1] By 24 & 25 Vic. c. 109, s. 17, "no person shall fish for, catch, or attempt to catch or kill, salmon between the days hereinafter mentioned (which interval is herein referred to as "the close season"); that is to say, between the 1st of September and the 1st of February following, both inclusive; except only that it shall be lawful to fish with a rod and line betwen the 1st of September and the 1st of November following, both inclusive; and any person acting in contravention of this section shall forfeit any salmon caught by him, and shall in addition thereto incur a penalty not exceeding 5*l*., and a further penalty not exceeding 2*l*. in respect of each salmon so caught." The close season in particular rivers may be varied by order of the Home Office, on the application of the justices of the county. Sect. 18. A penalty is incurred by buying, selling, or exposing for sale any salmon betwen the 3d of September and the 3d of February. Sect 19. All in scales, hecks, tops, and rails of cruives, boxes, or cribs, &c., and all other obstructions to the free passage of fish in or through the cruives, cribs, and boxes within any fishery, must be removed within thirty-six hours after the commencement of the close season. Sect. 20.

By sect. 22, "the proprietor or occupier of every fishery shall, between twelve o'clock at noon on Saturday and six o'clock on the Monday morning following, maintain a clear opening of not less than four feet in width from the bottom to the top, through all cribs, boxes, or cruives used for taking salmon within his fishery, so that a free passage of that width is effectually secured for the passage of fish up and down through each box, crib, or cruive, whether used for the purpose of fishing or not, and shall for the purpose of maintaining such opening remove the meshes and rails of all such boxes, cribs, and cruives; and any person acting in contravention of this section shall incur the following penalties: — 1. He shall for each offence pay a sum not exceeding 5*l*., and a further penalty not exceeding 1*l*. for each fish so taken. 2. He shall forfeit every fish caught in contravention of this section." *See* also sect. 21.

[2] By the 36th section, "where any offence under this act is committed in or upon any waters forming the boundary between any two counties, districts of quarter sessions

(2) *With respect to Oyster Fishing.*[1]
(3) „ *Fishing in the Thames and Medway.*[2]
(4) „ „ *in the Severn and other Rivers.*[3]

(B) *With respect to Private Fisheries.*

(*a*) *Common of Fishery and Free Fishery.*[4]
(*b*) *Several Fishery.*[5]

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or petty sessions, such offender may be prosecuted before any justice or justices of the peace in either of such counties or districts."

And sect. 37 enacts, "that any offence committed under this act on the sea-coast or at sea, beyond the ordinary jurisdiction of any justice of the peace, shall be deemed to have been committed within the body of any county abutting on such sea-coast, or adjoining such sea, and may be tried and punished accordingly."

Sect. 38. "Nothing in this act contained shall prejudice the legal right of any conservators, directors, commissioners, undertakers, persons, or body of persons corporate or incorporate, to dredge, scour, cleanse, or improve any navigable river, canal, or other inland navigation."

[1] Where the defendant in trespass, *quare clausum fregit*, justifies an entry for the purpose of taking such spawn in the *locus in quo*, being a public navigable tide river, the plea must show that he took it under circumstances that made the taking legal within the provisions of the several acts for its preservation. *Maldon (Mayor, &c.) v. Woolvet*, 12 Ad. & E. 13.

A corporation which had an immemorial right to the oyster fishery in a navigable river to be managed by certain functionaries and courts of the corporation, became, in 1740, by the ouster of several of its members, unable to continue itself, or to carry on the management of the fishery. In 1763, the incorporation was re-incorporated by charter under the old name; and the charter ratified, confirmed, and restored to it all fisheries, &c.:—*Held*, that there having been no actual dissolution, the fishery had never come to the Crown, and would therefore be in the corporation as it existed under the new charter. *Colchester (Mayor, &c.) v. Brooke*, 7 Q. B. 339; 10 Jur. 610; 15 L. J. Q. B. 173.

Oyster-spat is within the prohibition of the 13 Rich. 2, st. 1, c. 19. *Mayor of Maldon v. Woolvet*, 4 Per & D. 26. See *Colchester (Mayor, &c.) v. Brooke*, 7 Q. B. 339; 15 L. J. Q. B. 173.

[2] The 17 Rich. 2, after reciting that it had been granted to the citizens of London that they might remake and take away all the weirs in the waters of the Thames and Medway, and that they shall have the punishment thereof pertaining to the king, enacts, "that the mayor or warden of London for the time being shall have the conservation of the statutes therein mentioned, and which prohibit the taking of salmon at particular times of the year, and the taking the fry of fish at all times, and that they shall make thereof due execution in the said waters of the Thames, from the bridge of Staines to London, and from thence over the same water, and in the said water of Medway, so far as it is granted to the said citizens as is aforesaid." The conservancy of the river above Staines Bridge appears to be in the Crown. 3 Burr. 1768; 1 Black. 569. The 9 Anne, c. 26, authorises the court of assistants of the company of fishermen of the river Thames to make such bye-laws for the regulation of the company as they shall think fit."

[3] The 1 Geo. 1, st. 2, c. 18, s. 14, reciting that the general provisions for the preservation of fish had proved ineffectual in respect to certain rivers, enacts that, "if any person shall be guilty of using nets, injuring the spawn or fry of salmon, taking unsizable salmon, or erecting of banks, or putting nets across the river, &c., he shall forfeit 5*l.* besides the fish taken and the nets used, half to the informer and half to the poor of the parish, recoverable before a justice of the peace, who may cause the banks, &c. to be demolished. And persons buying, selling, or sending from these rivers any salmon less than six pounds weight, forfeit 5*l.*, recoverable by the same means, with a proviso enabling the owners of ancient weirs or locks to repair and rebuild them." *See* 30 Car. 2, c. 29; 4 Anne, c. 21; 43 Geo. 3, c. 61; 44 Geo. 3, c. 45; 1 Geo. 1, c. 18; 11 Geo. 3, c. 27; 15 Geo. 3, c. 46; 45 Geo. 3, c. 29.

[4] Mr. Justice Blackstone observes, that a common of fishery differs from a free fishery, because the free fishery is an exclusive right: the common of fishery is not so; and, therefore, in a free fishery, a man has a property in the fish before they are caught, but in a common of fishery not till afterwards. 2 Bl. Com. 39. But Mr. Hargraves (Co. Litt. 127, b. n. 7), says, that a free fishery and a common of fishery are the same; and Mr. Schultes, in his *Essay on Aquatic Rights*, pp. 60, 62, states it as his opinion, that, upon a general view, there are only, in fact, two sorts of fisheries: first, free or common; and, secondly, several fishery, or fishery in gross; and that a free fishery, or common of fishery, are convertible terms, and synonymous with each other with regard to their privileges. See *Smith v. Kemp*, 2 Salk. 637. *Seymore v. Courtney*, 5 Burr. 2815.

A fishery lying only in grant, an agreement not under seal cannot operate as a demisee. *Duke of Somerset v. Fogwell*, 5 B. & C. 875.

[5] A several fishery is where a person has an exclusive right of fishery, either in his own soil or the soil of another. Fitz. Abr. Barre, pl. 27, cited M. 20 Hen. 4. He who has a several fishery is not necessarily the

(*c*) *In what Place it may be.*[1]

IV. Suits and Proceedings connected with.

(A) *Declaration.*[2]

owner of the soil (Hargrave's note, Co. Litt. 122, a, n. 7); but as the exclusive right of fishing is an incident to the ownership of the soil, it will be presumed, until the contrary be shown, that such right exists in the owner of the soil. Hence, to an action of trespass for an injury to a right of several fishery, it is a good plea that the soil and freehold belong to the defendant. 17 E. 3, 4, 6, b; 18 E. 4, b: *per Paston, J.*, 18 Hen. 6, 30, a; Fitz. Abr. Barre, pl. 20, S. C. To this, however, the plaintiff may reply title to the several fishery, either by prescription or grant, thereby rebutting the presumption of the right of several fishery being still vested in the owner of the soil.

If a person be seised of a river (1 Inst. 4 B), and by deed grant a several fishery in the same, and make livery of seisin *secundum formam chartæ*, the soil does not pass; and if the river become dry, the grantor may take the benefit of the soil, for a particular right only passed to the grantee. A prescriptive right to a several fishery in a navigable river may exist. *See* 1 Camp. N. P. 309. A right of fishery is devisable, and may be abandoned as to parts, while another part is preserved. Hence, an exclusive right to dredge for oysters may subsist as appurtenant to a manor, although it be lawful for all the king's subjects to catch floating fish therein. *See* Selw. N. C. 797, 5th ed.

[1] It seems that a private right of fishing in the sea cannot be created at the present day by grant, even from the Crown, since a grant to support it must be as old as the reign of Henry 2, and therefore beyond the time of legal memory, as the Crown was restrained by King John's great charter, and by other charters, from making fresh grants of exclusive rights of fishery affecting the public privilege. *See* 2 Bl. Com. 59; Chit. Preg. Crown, 143. But a private right of fishery may exist in a public navigable river, harbour, or creek, in which the tide flows and reflows. *Carter v. Murcot*, 4 Burr. 2163; *Vivian v. Blake*, 11 East, 263. In Lord Fitzwalters (1 Mod. 106; 3 Keb. 242), *Lord Hale* said:—"In case of a private river, the lord having the soil is good evidence to prove that he hath the right of fishing, and it puts the proof upon them that claim *liberam piscariam*. But in case of a river that flows and reflows, and is an arm of the sea, then *primâ facie* it is common to all: but if any will appropriate a privilege to himself, the proof lieth on his side; for, in case of an action of trespass brought for fishing there, it is *primâ facie* a good justification to say, that the *locus in quo* is *brachium maris in quo unus quisque subjectus domini regis habet et habere debet liberam piscariam.*" See *Colchester (Mayor, &c.) v. Brooke*, 7 Q. B. 339; 15 L. J. Q. B. 173.

There is a material distinction between rivers navigable and not navigable with regard to the presumed right of ownership in the fishery. In every navigable river, as high as the sea flows and reflows, we have seen that it is a presumption of law that all the king's subjects have the right to fish; but in rivers not navigable, the presumption is directly reversed, and, *primâ facie*, the owners of the adjacent soil are, of common right, entitled to it; so that the owners of the one side have, of common right, the property of the soil, and, consequently, the right of fishing *usque filum aquæ*, or to the middle of the waters; and the owners of the other side have a similar right in that part of the water to which their land is adjacent, and if a man be owner of the lands on both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length.

In rivers not navigable, as well in public ways, the presumption is, that the owners of the land, *ex utraque parte*, are the owners of the soil over which the river flows, and of the fishery therein. But this presumption may be rebutted in both cases, by showing acts of exclusive ownership over the whole river or way. Com. Dig. Chemin. In the *Banne case*, Davies, Rep. 58, a case was cited where, in an assize of nuisance, the plaintiff complained that, by the raising of a dam, he was disturbed of his fishery, and an exception was taken to the count that no freehold was thereby assigned to which a piscary was appendant; it was held, that piscary is a freehold in itself, in which there is no occasion to show to what freehold it is appendant. It may, however, be observed that, in the ancient as well as modern entries, a several and free fishery are frequently prescribed for as appendant to a manor, messuage, &c.; and a common of fishery can only be claimed in right of some real estate. Rast. Ent. 686. The following case relative to the construction of a grant of fishery, &c., has been decided in *Scratton v. Brown*, 4 B. & C. 485. See *Rex v. Lord Yarborough*, 3 id. 91, where it was established that land formed by the sea by slow, gradual, and imperceptible accretion, *primâ facie* belongs to the Crown, or the grantee of the Crown. If the soil becomes dry, each landowner is entitled to the fish left on his own soil. *Snape v. Dobbs*, 8 Moore, 23.

[2] A fishery is a tenement, and trespass will lie for injury to it. *Rex v. Old Alresford*, 1 T. R. 358.

Trespass, therefore, lies for breaking and entering the several fishery of A. on the soil of B., and disturbing the fish. *Holford v. Bailey*, 13 Q. B. 426: in error, 18 L. J. Q. B. 109.

Where by agreement in writing the plain-

(B) *Pleas.*[1]

(C) *Evidence.*[2]

(D) *Costs.*[3]

(E) *Criminal Proceedings connected with.*

(a) Destroying Fish-Ponds with Intent.

Breaking down fish-ponds with intent.[4]

24 & 25 Vic. c. 97, s. 32. "Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, flood-gate, or sluice, of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish; or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent to destroy any of the fish that may then be, or that may thereafter be, put therein, or shall unlawfully and maliciously cut through, break down, or otherwise destroy, the dam or flood-gate of any mill-pond, reservoir, or pool, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and if a male under the age of sixteen years, with or without whipping."

(b) Taking Fish in Water situate in Land belonging to a Dwelling-house, or in a Private Fishery.

Taking fish in water situate in land belonging to a dwelling-house, or in a private fishery.

By 24 & 25 Vic. c. 96, s. 24, "whosoever shall unlawfully or wilfully take or destroy any fish, in any water which shall run through or be in any land belonging or adjoining to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor; and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water, not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any

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tiff let to the defendant at a yearly rent the right of fishing in a certain river, with rod and line only, and the defendant used the fishery; it was held that he might recover the rent under an *indebitatus* count for use and occupation of the fishery. *Holford v. Pritchard*, 3 Ex. 793; 18 L. J. Ex. 315.

[1] A plea of common of fishery generally is bad. *Bennett v. Coster*, 2 Moore, 83; 8 Taunt. 183. Thus in Hard. Rep. 407, in a case in trespass, *quare clausum fregit*, the defendant justified because he had a right of fishing there by prescription, but did not set forth what kind of fishing he claimed, whether free, several, or common of fishing, nor whether he had it as appertaining to a manor, messuage, &c., or not, but made it a mere personal thing; and for that reason the plea was held bad by the court, for there is a difference between an easement or liberty only, and an interest.

[2] Ownership of the soil is *primâ facie* evidence of a right of fishery. Where a river is not navigable, the presumption is that the soil is the property of the owners on each side to the middle of the river. 4 Burr. 2162. But in the case of a navigable river, the presumption is that the soil is vested in the Crown. Yet a subject may claim a prescriptive right to a several fishery in an arm of the sea, even against the Crown. 4 T. R. 439. Proof of the very act of fishing in the *locus in quo* is evidence of the right, although it be not proved that fish were actually caught. 1 Wms. Saund. 46, b. So, a verdict for the defendant in a former action, for diverting water from his mill, is evidence, but not conclusive, for the defendant in a second action. 2 B. & A. 662. And a verdict for the plaintiff, in an action for obstructing his barges in a navigable river, is strong, but not conclusive, evidence in an action for a similar obstruction. 5 Taunt. 705.

[3] *See* Costs, vol. iii. p. 287.

[4] Where the defendant had taken fish in a river than ran through an inclosed park, but it appeared that no means had been taken to keep the fish within that part of the river which ran through the park, but that they could pass down or up the river beyond the limits of the park at their pleasure; the judges held that this was not a case within the statute, as the fish could not be said to be *bred, kept, or preserved*, in that part of the river which was within the park. 2 Russell on Crimes, 1199. See *Hughes v. Buckland*, 15 Mee. & W. 346.

As to proceedings to enfore penalties for offences against the act 24 & 25 Vic. c. 109, relating to salmon, *see ante*, p. 470.

private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money not exceeding 5*l.* as to the justice shall seem meet: Provided that nothing hereinbefore contained shall extend to any person angling between the last hour before sunrise and the expiration of the first hour after sunset; but whosoever shall, by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding 5*l.*, and if in any such water as last mentioned he shall, on the like conviction, forfeit and pay any sum not exceeding 2*l.* as to the justice shall seem meet; and if the boundary of any parish, township, or ville, shall happen to be in or by the side of any such water as in this section before-mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or ville, named in the indictment or information, or in any parish, township, or ville adjoining thereto."[1]

(*c*) *Stealing or Dredging for Oysters in Oyster Fishery.*

Stealing or dredging for oysters in oyster fishery.

By sect. 26, "whosoever shall steal any oysters or oyster brood from any oyster-bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and whosoever shall unlawfully or wilfully use by dredge, or any net, instrument, or engine whatsoever, within the limits of any oyster-bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall unlawfully and wilfully with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three months, with or without hard labour, and with or without solitary confinement; and it shall be sufficient in any indictment to describe, either by name or otherwise, the bed, laying, or fishery, in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or ville: Provided that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine adapted for taking floating fish only."[2]

FIXTURES.[3]

See Distress, *ante*, p. 78; Execution, *ante*, p. 344.

I. Relative to what are considered as, p. 475.

II. „ the particular Persons Entitled to, as between.

(A) *Ecclesiastical Persons*, p. 476.

(B) *Heir and Executor*, p. 476.

[1] By the 25th section of the same act, "if any person shall at any time be found fishing against the provisions of this act, the owners of the ground, water, or fishery where such offender shall be so found, his servant or any person authorised by him, may demand from such offender any rod, line, hook-net, or other implement for taking or destroying fish which shall then be in his possession; and in case such offender shall not immediately deliver up the same, may seize and take the same from him for the use of such owner: provided that any person angling against the provisions of this act between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, from whom any implement used by anglers shall be taken, or by whom the same shall be so delivered up, shall, by the taking or delivering thereof, be exempted from the payment of any damages or penalty for such angling."

[2] *See* for similar clauses 5 & 6 Vic. c. 106, ss. 11, 12; 8 & 9 Vic. c. 108, s. 18; 13 & 14 Vic. c. 88, s. 42.

[3] *See* Amos on Fixtures; Grady, id. As to reputed ownership, *see* vol. ii. p. 236, n.

(C) *Landlord and Tenant*, p. 477.

(*a*) *Of Things set up for Ornament or Convenience*, p. 477.

(*b*) „ *Trading Purposes*, p. 478.

(*c*) „ *Agricultural Purposes*, p. 479.

(*d*) „ *partly for Agricultural and partly for Commercial Purposes*, p. 480.

(*e*) *As to the Time when a Tenant must Remove Fixtures*, p. 480.

(*f*) *As to the Tenant's Right as affected by the Terms of the Tenancy*, p. 481.

(D) *Tenants for Life and in Tail, and the Remainderman and Reversioner*, p. 481.

III. Transfer of, p. 482.

(A) *By Devise*, p. 482.

(B) „ *Mortgage*, p. 482.

(C) „ *Sale or Conveyance of the Realty*, p. 482.

IV. Remedies connected with, p. 483.

(A) *In Actions of Contract*, p. 483.

(B) „ *Tort*, p. 483.

(*a*) *Trespass*, p. 483.

(*b*) *Trover*, p. 483.

(C) *Of the Action of Waste*, p. 484.

V. Of Larceny of Fixtures, p. 484.

I. Relative to what are considered as Fixtures.[1]

[1] The term "fixtures," in its common acceptation, comprehends hangings, bells, stoves, and other ornaments and furniture; but in its more extended sense, applies to those chattels which have been annexed to the freehold or land, and which may be afterwards severed and removed by the party who has affixed them, or his personal representative, against the will of the owner of the freehold. With respect, however, to what shall be deemed fixtures of the latter description, it becomes necessary to consider:—1st. It is essential, in order to constitute a fixture, that the article should be let into, or united to the land, or to substances previously connected therewith. It is not enough that it has been laid upon the land and brought into contact with it; the definition requires something more than mere juxtaposition, as that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground. 2dly. With respect to the severing and removing an article annexed to the land, it is a circumstance of ordinary occurrence, that persons having the present interest and possession of land, whether as tenants for life, for years, or in fee, make annexations to the freehold exclusively for their own convenience or profit, either by placing an erection on the soil itself, or by affixing some personal chattel to a house, or other building, that has been already annexed to the soil. Now, in respect of many of these annexations, if the individuals who put them up, or their personal representatives, were afterwards to detach and remove them from the freehold, they would be subject, according to the general rule of law, to an action of waste, and perhaps trespass, at the suit of the reversioner, or the heir succeeding to the estate. But there are certain species of annexations that are excepted out of this general rule. With respect to these, the right of property in them is not, as in other cases, abandoned to the landowner by their being affixed to the freehold, but they may be again separated from the land, and taken away, against the will of those persons who would have become entitled to them by reason of their ownership in the soil. It is of the right to remove annexations of this description that it is proposed to treat under the present head.

The word "fixtures" does not necessarily mean things fixed to the realty; and, therefore, in an action of trover for goods, chattels and fixtures, where damages were as-

II. Relative to the particular Persons Entitled to, as between
(A) *Ecclesiastical Persons.*[1]
(B) *Heir and Executor.*[2]

sessed generally on the whole declaration: — *Held*, that it must be intended, after verdict, that the jury had not awarded damages in respect of fixtures attached to the freehold. *Sheen v. Rickie*, 5 Mee. & W. 175. *Wood v. Hewitt*, 8 Q. B. 903; 15 L. J. Q. B. 267. *Mant v. Collins*, id. 248.

It is a proper test as to whether chattels are fixtures or not, whether they can be removed or not without substantial injury to the freehold (*Avery v. Chesslyn*, 3 Ad. & E. 75; 5 Nev. & M. 372) which is a question for the jury.

Spinning machines which were fixed by screws, some into the wooden floor, and some into lead which had been poured in a melted state into holes in the stone for the purpose of receiving the screws, were held to be distrainable for rent, never having become part of the freehold. *Hellawell v. Eastwood*, 6 Ex. 298; 20 L. J. Ex. 154.

It has been doubted whether a lock put upon the outer door of a dwelling-house becomes a fixture, or remains a chattel. *Lane v. Dixon*, 3 C. B. 776; 16 L. J. C. P. 129.

[1] The questions generally in dispute between ecclesiastical persons relate to matters of ornament or convenience erected in the parsonage-house, &c. by the resident incumbent; and with respect to things of this description it is laid down in Burn's *Ecclesiastical Law*, p. 304, that if an incumbent enter upon a parsonage-house in which there are hangings, grates, iron backs to chimneys, and such-like, not put there by the last incumbent, but which have gone from successor to successor, the executor of the last incumbent shall not have them, but it seems they shall continue in the nature of heir-looms; but if the last incumbent fixed them there only for his own convenience, it seems they shall be deemed as furniture or household goods, and shall go to his executor. The ornaments of a bishop's chapel are considered by the law as in manner fixed to the realty, and in the nature of heir-looms; and, on the vacancy of a see, they pass to the succeeding bishop, and do not belong to the executors of the deceased party, as in the case of other chattels, the property of a sole corporation. *See* the *Bishop of Carlisle's case*, Year Book, 21 Edw. 3, 48. *Corven's case*, 12 Rep. 106. Where an incumbent voluntarily determines his own interest, either by accepting a benefice or by resignation, it may be concluded that he would not be allowed afterwards to remove his fixtures. On the same principle that he is not, in such a case, entitled to emblements. 2 B. & A. 470. Perhaps, however, it may be thought, that the right of removal would not be altogether abandoned until the possession of the fixtures is actually relinquished in conformity with the doctrine laid down in *Penton v. Robart*, 2 East, 88.

In *Martin v. Roe*, 7 E. & B. 237, a rector erected in the rectory garden two hot-houses, detached from the parsonage-house: they consisted of low brick walls, on which mortar was spread, and bedded into this mortar wooden frames and glass-work — the glass-work sliding up and down on pullies, and not fixed. After his death his executors removed the frames and glass-work, doing no damage, except what was unavoidable, to the mortar. The succeeding rector afterwards took possession of them, and the court held that the executors might maintain an action to recover their value, inasmuch as, first, the character of the building would have justified the rector in removing the whole of it in his lifetime, without rendering his executors liable for dilapidations; and secondly, the frames and glass-work being removable without injury to the freehold, passed as personal chattels to the executors, and were removable by them within a reasonable time. *Martin v. Roe*, 7 E. & B. 237; 26 L. J. Q. B. 129; Grady, 176.

[2] On the ground of their being essential to the value and enjoyment of the inheritance, it was held that salt-pans affixed in salt-works went to the heir and not to the executor, notwithstanding they might have been removed without injury to the building. "The salt-spring," said *Lord Mansfield*, "is a valuable inheritance, but no profit arises from it unless there is a salt-work, which consists of a building, &c. for the purpose of containing the pans, &c. which are fixed in the ground. The inheritance cannot be enjoyed without them; they are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance. He could never mean to give them to the executor, and put him to the expense of taking them away, without any advantage to him, who could only have the old materials, or a contribution from the heir in lieu of them. But the heir gains 8*l.* per week by them. On the reason of the thing, therefore, and the intention of the testator, they must go to the heir. It would have been a different question if the spring had been let, and the tenant had been at the expense of erecting these salt-works. He might very well have said, I leave the estate no worse than I found it. That, as I stated before, would be for the encouragement and convenience of trade, and the benefit of the estate. For these reasons we are all of opinion that the salt-pans must go to the heir." 1 H. Black. 263. *See* 3 East, 54.

If the *corpus* of machinery goes to the heir as part of the freehold, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir. *Fisher v. Dixon*, 1 Clark & Fin. 312; 9 Jur. 883; Grady, 11.

(C) *Landlord and Tenant.*

(*a*) *Of Things set up for Ornament or Convenience.*

LEE v. RISDON, 7 Taunt. 191.

A chattel, by being attached by the tenant to the freehold, becomes part of it.[1]

Per Gibb, C. J. "The right between landlord and tenant does not altogether depend upon this principle, that the articles continue in the state of chattels; many of these articles, though originally goods and chattels, yet, when affixed by a tenant to the freehold, cease to be goods and chattels by becoming part of the freehold; and though it is in his power to reduce them to the state of goods and chattels again by severing them during his term, yet until they are severed they are a part of the freehold: as wainscots screwed to the wall, trees in a nursery-ground, which when severed are chattels, but standing, are part of the freehold, certain grates, and the like. And unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it."

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[1] The general rule is, that where a lessee having annexed a personal chattel to the freehold, afterwards takes it away, it is waste. In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favour of matters of ornament, as ornamental chimneypieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. Of all these it is to be observed, that they are exceptions only, and therefore thought to be fairly considered, not to be extended; and, with respect to one subject in particular, viz. wainscot, Lord Hardwicke treated it as a very strong case. *Per Cur.: Buckland v. Butterfield*, 2 B. & B. 54; 4 Moore, 440.

A conservatory erected on a brick foundation, affixed to and communicating with rooms in a dwelling-house by windows and doors, cannot be removed by the tenant. *Buckland v. Butterfield, supra.* Where a tenant of a house who had covenanted to keep in repair the premises, and all erections, buildings, and improvements erected on the same during the term, and to yield up the same at the end of the term, erected a verandah upon the premises demised to him, the lower part of which was attached to posts fixed in the ground, *Abbott, C. J.*, held, that he could not remove any part of it. The ground, however, of the decision in this case was, that the building came within the terms of a particular covenant in the tenant's lease. *Penry v. Brown*, 2 Stark. N. P. 403. So a wooden barn, resting by its own weight, may be removed (*Wansbrough v. Maton*, 6 Mee. & W. 367; 4 Ad. & E. 884); but box planted by a tenant in a garden cannot be removed. *Empson v. Soden*, 1 Nev. & M. 720; 4 B. & Adol. 655.

Where the plaintiff demised salt-springs to the defendant, who was to erect salt-works on the premises, and pay a rent in proportion to the number of works erected, the defendant covenanting to leave the works in goods repair at the end of the term, the court held that iron salt-pans, placed by the defendant on a frame of brick, and used in the boiling of salt, were parcel of such works, and that the defendant was not entitled to remove them. *Earl of Mansfield v. Blackborne*, 6 Bing. N. S. 427; 8 Scott, 720.

It has been held that the tenant was entitled to remove stoves, coppers, mash-tubs, waterbutts, and blinds. *Colegrave v. Dias Santos*, 1 B. & C. 77. A cupboard standing on the ground and supported by holdfasts is removable. *Rex v. Inhabitants of St. Dunstan*, 4 B. & C. 686. A pump slightly affixed may be removed by the tenant. *Grymes v. Boweren*, 6 Bing. 437; 4 M. & P. 143.

So, an outgoing tenant may remove an ornamental chimneypiece put up by himself during his tenancy, but not a chimneypiece which is not ornamental. An outgoing tenant has no right to remove pillars of brick and mortar built on a dairy floor to hold pans, although such pillars are not let into the ground. *Leach v. Thomas*, 7 C. & P. 327. See *West v. Blakeway*, 3 Scott, N. S. 199, 218.

Where premises are recovered in ejectment under a clause of re-entry, steam-engines, &c. pass to the lessor. *Minshall v. Lloyd*, 2 Mee. & W. 450.

Furnaces are removable. Though this case was decided between the executor and the heir of the deceased, owner of the inheritance, it may, nevertheless, be regarded as an authority in favour of a tenant, because it seems to be established, that a tenant would be entitled to at least the same privilege against his landlord that an executor enjoys against the heir. Agreeably, therefore, to the decision in *Squier v. Mayer*, 2 Freem. 249, the furnace and hangings are matters which a tenant may remove, if he himself affixed them to the demised premises. So hangings, pictures, pier-glasses, chimney-glasses, &c. (*see* 1 P. Wms. 194), tapestry, iron backs to chimneys (*see* 2 Stra. 1141), wainscot, marble chimneypieces, and fixed beds (*see* 1 Atk. 477; Amb. 113), may be removed by the tenant. From these authorities a rule has been decided, that a tenant is entitled to take away certain things which he has, at his own expense, affixed to the demised premises, for the purpose of ornament and furniture; and the principle on which this rule is founded appears to be, that as annexations of this nature must

(*b*) *Of Things set up for Trading Purposes.*[1]

generally be designed for temporary purposes only, it would greatly incommode tenants in the enjoyment of their estates if, by every slight attachment to the freehold, the property should immediately be changed, and pass over to the reversioners. Hence it is obvious that the tenant's right of removal, in respect of this class of annexations, depends upon very different reasons from those which prevail in the case of fixtures put up for trade and manufactures.

It has been laid down, that where a chattel has been annexed by its owner to another's freehold, but may, without injury to the freehold, be severed, it is not necessarily to be inferred from the annexation that such chattel became the property of the freeholder; and whether it becomes so in a particular case or not may be a question on the evidence, and the jury may infer, from use or other circumstances, an agreement when the chattel was annexed that the original owner should have liberty to take it away again. *Wood v. Hewitt*, 8 Q. B. 913; 15 L. J. Q. B. 247. *Mant v. Collins*, id. 248; 10 Jur. 390. And in another case it was said that it is a question of evidence depending on circumstances and the intention of the parties, whether A.'s chattel fixed on B.'s soil became part of the soil, or remains the chattel of A. *Lancaster v. Eve*, 5 C. B. (N. S.) 717; 28 L. J. C. P. 235.

A covenant to yield up at the expiration of the tenancy all erections and improvements erected, made, or set up during the term, is broken by the removal of the sashes and framework of a green-house erected during the term, the framework of which was laid upon walls built for the purpose of receiving it, and embedded in mortar therein. *West v. Blakeway*, 9 Dowl. 846; 3 Scott, N. R. 199; 2 Man. & G. 729.

The mere removal and sale by a tenant, during the term, of fixtures which he does not immediately replace, but which may be replaced before the end of the term, is not in itself a breach of his covenant to repair and uphold the demised premises, and deliver up the same at the end of the term, together with all things affixed thereto. *Doe d. Burrell v. Davis*, 15 Jur. 155, C. P.

The acceptance of a demise of a house containing fixtures, does not raise an implied contract to pay for such fixtures. *Goff v. Harris*, 5 Man. & G. 573.

Where the owner of fixtures allowed them in his presence to be represented as belonging to another:—*Held*, that he could not maintain an action against the purchaser (*Gregg v. Wells*, 10 Ad. & E. 90; 2 Per. & D. 296), the court saying that the case came within the rule laid down in *Pickard v. Sears*, 6 Ad. & E. 469, that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

As to whether a tenant may, after he has partially raised a building on the land, before completion take down the building, see *Smith v. Render*, 27 L. J. Ex. 83.

[1] As a general rule, things which a tenant has fixed to the freehold for the purposes of trade or manufacture, may be taken away by him whenever the removal is not contrary to any prevailing practice, where the articles can be removed without causing material injury to the estate, and where, in themselves, they were of a perfect chattel nature before they were put up; at least have, in substance, that character, independently of their union with the soil; or, in other words, where they may be removed without being entirely demolished, or losing their essential character or value. If an erection, put up in relation to trade, can be screwed without violating any one of these conditions, it may very safely be affirmed, that whatever be its magnitude, or construction, or mode of annexation, it is a fixture which a tenant is privileged to remove. It is not, however, meant to be inferred that because, in any particular instance, these circumstances do not all concur, that therefore an article cannot be removed by the tenant. On the contrary, it is not inconsistent with some of the decisions to say, that things may be removable, although these requisites are not completely fulfilled. And, indeed, when the liberality with which the courts have generally been disposed to construe the indulgence in favour of trade is considered, it is not improbable that they would extend the privilege even to cases where not one of these conditions is found to be satisfied.

In the case of *Lawton v. Lawton*, 3 Atk. 13, it was determined that a fire-engine, or steam-engine, erected by the tenant, might be removed by him. So of vessels and pipes in brewhouses, cider-mills, salt-pans (*see* 1 H. Black. 259; 3 Atk. 16), vats, coppers, and the like. 1 Salk. 368. So lime-kilns seem removable (2 B. & C. 608), and Dutch barns. 3 Esp. 11.

A varnish-house, having a brick foundation let into the ground, upon which a superstructure of wood, brought from another place where the tenant had carried on his business, was held removable. *Penton v. Robart*, 2 East, 88; 4 Esp. 33. So it was held at *nisi prius* that a tenant would be entitled to take away a wooden stable which stood upon blocks and rollers, and also a shed which he had built on brick-work, and posts and rails he had put up. *Fitzherbert v. Shaw*, 1 H. Black. 259. And *Lord Ellenborough* laid it down as a general rule, that a building which is accessory to a removable utensil, is equally removable with the thing to which it is incident. *Elwes v. Maw*, 3 East, 38. *Whitehead v. Bennett*, 27 L. J. Ch. 474.

(*c*) *Of Things set up for Agricultural Purposes.*

If the tenant obtain the consent of the landlord in writing to the erection of farm-buildings, &c., he will be entitled to remove them.[1]

By 14 & 15 Vic. c. 25, "if any tenant of a farm or land shall, after the passing of this act, with consent in writing of the landlord for the time being, at his own cost and expense erect any farm-building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes or for the purpose of trade and agriculture (which shall not have been erected or put up in pursuance of some agreement in that behalf), then all such buildings, engines, and machinery, shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same, or any part thereof, may be built in, or permanently affixed to the soil, so as the tenant making such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition as the same were in before the erection of anything so removed: Provided nevertheless that no tenant shall under the provision last aforesaid be entitled to remove any such matter or thing as aforesaid, without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same."

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[1] The exemption in favour of trade fixtures, which allows the tenant to remove them during the term, notwithstanding but for the purpose they would have been irremovable, does not, it seems, apply so strongly to annexations for agricultural uses. *See* Grady, 3, 8, 50.

In *Elwes v. Maw*, 3 East, 38, an action in the nature of waste was brought by a landlord against his late tenant, who had held under a term for twenty-one years a farm, consisting of a messuage, lands, outhouses, barns, &c. thereto belonging, and who, as the case reserved stated, during the term, and about fifteen years before its expiration, erected at his own expense a beast-house, carpenter's shop, a fowl-house, a cart-house, a pump-house, and fold-yard. The buildings were of brick and mortar, and tiled, and the foundations of them were about a foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front, and supported by brick pillars; the fold-yard wall was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them. The case further stated that these erections were necessary and convenient for the occupation of the farm, which could not be well managed without them; and the question for the opinion of the court was, whether the defendant had a right to take away these erections. The court held that they were irremovable by the tenant. "No adjudged case," they said, "has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself, who built them during his term. As to the case of *Penton v. Robart*, 2 East, 88, it was the case of a varnish-house, with a brick foundation let into the ground, of which the woodwork had been removed from another place, where the defendant had carried on his trade with it. It was a building for the purpose of trade, and the tenant was entitled to the same indulgence in that case which in the cases already considered had been allowed to other buildings for the purposes of trade, as furnaces, vats, coppers, engines, and the like. And though *Lord Kenyon*, after putting the case upon the ground of the leaning, which obtains in modern times in favour of the interests of trade, upon which ground it might be properly supported, goes further, and extends the indulgence of the law to the erection of green and hot-houses by nurserymen, and indeed by implication to buildings by all other tenants of land; there certainly exists no decided case, and I believe no recognised opinion or practice, on either side of Westminster Hall, to warrant the present extension. The *nisi prius* case of *Dean v. Allaly* (*see* 2 Esp. 2; and Woodfall's L. & T. 207) is a case of the erection and removal by the tenant of two sheds called Dutch barns, which were, I will assume, unquestionably fixtures. *Lord Kenyon* says, the law will make the most favourable construction for the tenant, where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advan-

(*d*) *Of Things set up partly for Agricultural and partly for Commercial Purposes.*[1]

(*e*) *As to when a Tenant may Remove Fixtures.*

REX v. PULLEN, 1 Salk. 368.

Must remove them during the term.[2]

Holt, C. J. "During the term the tenant may well remove those fixtures which he is entitled to; but after the term they become a gift in law in reversion, and are not removable: in fact, the tenant would be deemed a trespasser."

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tage. It has been so held in the case of the cider-mills, and other cases, and I shall not narrow the law, but hold erections of this sort made for the benefit of trade, or constructed as the present, to be removable at the end of the term. Lord Kenyon here uniformly mentions the benefit of trade, as if it were a building subservient to some purposes of trade, and never mentions agriculture, for the purposes of which it was erected. He certainly seems, however, to have thought, that buildings erected by tenants for the purposes of farming, were, or rather ought to be, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always put and recognised as a known allowed exception from the general rule which obtains as to other buildings, and the circumstance of its being so treated and considered establishes the existence of the general rule, to which it is considered as an exception. To hold otherwise, and to extend the rule in favour of tenants in the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants."

[1] This distinction has been upheld. The decisions alluded to are those of *Lord Hardwicke*, respecting the fire-engines in collieries (3 Atk. 13; Amb. 113); and the case before Comyn, C. B., respecting cider-mills. 3 Atk. 14. In the working of a colliery the enjoyment of the profits of land is mutually concerned; nevertheless, *Lord Hardwicke* considered that the getting and vending the coals so far partook of the nature of a trade, that the engines employed in the collieries might be deemed trading erections. The case of the cider-mill appears to rest on the same principle: for it was said, that although the mill was put up in part for the enjoyment of the real estate, yet, as the making of cider was a species of trade, the mill might be considered to fall within the general exception in favour of trade fixtures. These decisions, therefore, in conjunction with the case of *Lawton v. Salmon*, 1 H. Black. 260, n, in which the same principle seems to have been recognised between landlord and tenant, point out a class of trade fixtures of a peculiar description. They are what *Lord Hardwicke* calls mixed cases, between enjoying the profits of land and carrying on a species of trade (3 Atk. 16); and in this respect they are distinguishable from those fixtures that are non-subservient to trades which have no relation to the profits of the demised land. It appears that gardeners and nurserymen are entitled to sell and remove trees, shrubs, and the other produce of their grounds, planted by them with an express view to sale (2 East, 91: 7 Taunt. 191); and see *Heath, J.'s* remarks, in 4 Taunt. 316. It was held, however, at *nisi prius*, under *Lord Ellenborough's* direction, that a tenant of garden ground could not plough up strawberry-beds, in full bearing, at the conclusion of his term, although he had purchased them of a preceding tenant, and although it was proved to be the general practice to appraise and pay for these plants as between outgoing and incoming tenants. 1 Camp. 227. In this case, however, it was considered that the ploughing up of the plants was an injury maliciously done to the reversion; because the plants were not removed by the tenant for sale in his ordinary occupation, but were destroyed without any reasonable object. If a mere private individual, or a person who occupies land as a farmer, and does not profess to be a nurseryman or gardener, raises young fruit-trees on the demised land for the purpose of planting in his gardens or orchards, he is not, it seems, entitled to sell or remove them at the end of his term: *per Heath, J.*, 4 Taunt. 316; and *see* Com. Dig. Waste, D. 3. With respect to the right of nurserymen and gardeners to remove hothouses, green-houses, and other similar erections, put up at their own expense, it was expressly said by *Lord Kenyon*, in the case of *Penton v. Robart*, 2 East, 91, that they might take away such things at the end of their term. But *Lord Kenyon's* opinion upon this subject was subsequently disapproved of by *Lord Ellenborough* (3 East, 56); also, the remarks of *Dallas, C. J.* (2 B. & B. 58; also, in 4 B. Moore, 440); and *Lawrence, J.'s* observations in 3 East, 45, n. And there is no reported case in which the question has been expressly decided.

Where, previous to the erection, the consent in writing of the landlord for the proposed erection has been obtained, the tenant may remove it, unless the landlord prefer to take it upon the expiration of the lease at a valuation. 14 & 15 Vic. c. 25, s. 3, *supra* in text.

[2] From the earliest recognition of the ten-

(*f*) *As to Tenant's Right as affected by the Terms of the Tenancy.*[1]

(D) *Tenants for Life and in Tail, and the Remainderman and Reversioner.*[2]

ant's right, it was always considered that he was bound to use his privilege in removing fixtures during the continuance of his term; for if he neglected to avail himself of his right within this period, the law presumed that he voluntarily relinquished his claim in favour of his landlord. *Kingsmill*, J., in 21 Hen. 7, c. 26, is to the same effect. In *Penton v. Robart*, 2 East, 88, it was said that the right continued notwithstanding the determination of the tenant's interest, if he were still in actual occupation; but it will be found that, in the authorities subsequent to the case of *Penton v. Robart*, the rule as to the time of removal is laid down exactly as it was in the previous decisions. Thus, in *Lee v. Risdon*, 7 Taunt. 191, *Gibbs, C. J.*, in explaining the nature of the tenant's interests in fixtures, describes it as existing only during the continuance of his estate; for he says, "Although it is in his power to reduce them to the state of goods and chattels again by severing them during the term, yet, until they are severed, they are parts of the freehold; and unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it." And this observation of the learned judge is cited and approved of by *Abbott, C. J.*, in the case of *Colegrave v. Dias Santos*, 2 B. & C. 79. *See* also by *Lord Ellenborough*, in 3 East, 50; 2 B. & A. 167; and *Buckland v. Butterfield*, 2 B. & B. 54; 4 B. Moore, 440.

The right of a tenant, therefore, to remove his fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant. Where, therefore, the term, pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and the lessor entered upon the premises in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee, still continuing in possession, removed and sold a fixture put up by the lessee for the purposes of trade, and the jury found that it was not removed within a reasonable time after the entry of the lessor: — *Held*, that they had no right so to remove it, and that the lessor might recover it in trover; and *semble*, such would have been the case even without such finding of the jury. *Weeton v. Woodcock*, 7 Mee. & W. 14. *See* 4 Mee. & W. 415; 5 B. & Ad. 730; 26 L. J. Q. B. 100.

An outgoing tenant has no right to enter for the purpose of severing and removing fixtures after the expiration of his term, and while the premises are in the occupation of a succeeding tenant. *Leader v. Homewood*, 5 C. B. (N. S.) 546; 27 L. J. C. P. 316. *See* id. Chanc. 124; and 4 C. B. (N. S.) 120; 28 L. J. C. P. 297.

A tenant from year to year disclaimed his landlord's title; upon which the landlord demanded possession, and served him with a declaration in ejectment on the 8th of February. On the 19th February the parties signed the following agreement: — "In consideration of Mr. B. (the tenant) not appearing to this action, I hereby agree not to issue a writ of possession until after the 25th March next." The court held the meaning of this agreement to be, that the premises should be given up on the 25th March, in the same condition as they were in on the 19th February, and that the tenant was precluded from removing in the interval his fixtures which he had put up during his term. *Heap v. Barton*, 12 C. B. 274; 21 L. J. C. P. 153. *See* Grady on Fix. 180.

[1] A tenant's right to remove fixtures may be controlled and regulated by the terms of the lease or agreement entered into between himself and his landlord. See *Fitzherbert v. Shaw*, 1 H. Black. 258; Grady, Fix. 78.

Where no absurdity or general inconvenience would result from the transaction, *modus et conventio vincunt legem*. A tenant, therefore, in consequence of the conditions under which he holds, may be placed in a totally different situation from that in which he has hitherto been regarded. 2 Bulst. 113. Hence a covenant by a lessee to yield up at the end of the term all erections and buildings then erected or thereafter to be erected, includes buildings subsequently erected for the purposes of trade, if they be let into the soil, but not if they rest on the blocks or pattens. *Dean v. Allalley*, 2 Esp. 11. *See* 2 Smith's L. C. 116.

[2] With regard to these persons, it is insisted on the one hand, that when personal chattels are annexed to the freehold by the tenant for life or in tail, they become part of the inheritance, and of consequence pass to the succeeding owner of the land; whilst on the other hand it is contended, that such annexations continue in the nature of chattels, and are to be deemed a part of the personal estate of the deceased tenant, or, to speak more correctly, that the executors are entitled to sever them from the freehold and to reduce them to a state of personalty in increase of assets. In the case of *Santon v. Lawton*, before *Lord Chancellor Hardwicke* (3 Atk. 13), it was determined that a steam-engine erected in a colliery by a tenant for life should be considered personalty, and go as assets to his executors, and that the remainderman should not take it as part of the real estate. And it has been held that a cider-mill let into the ground may be deemed part of the personal estate of a tenant for life, or in tail. 1 H. Black. 259. The right of the personal representative of tenant for life, or in tail, to take away matters of ornament or convenience, is to be inferred from the circumstance that fixtures of this description have

III. Transfer of.

(A) *By Devise.*[1]

(B) „ *Mortgage.*[2]

(C) „ *Sale or Conveyance of the Realty.*[3]

been allowed to form part of the personal estate of a deceased tenant in fee.

[1] Where a testator has a devisable interest in a house, &c., he may devise the incidents and things that are annexed to it, either together with, or in separation from, the house. On the other hand, if the estate itself is not devisable, the things that are annexed to it are in general not the subject of a devise; and therefore a tenant for life or in tail cannot devise the doors, windows, or wainscot of a house, nor personal chattels that are affixed to premises, and which form part of them, but such a devise is void. Shep. Touch. 342, 22. But even in this case the testator may devise such fixtures as are severable from the freehold, and which would go to his personal representative, because they are not incident to the inheritance. Grady, Fix. 127.

[2] With respect to the transfer of fixtures by way of mortgage, there does not appear to be any reason why fixtures should not be included under general terms in mortgage conveyances as well as in conveyances of any other description. As to the supposed distinction between mortgage and other conveyances, *see* Dougl. 438; 7 T. R. 306; 1 B. & B. 238; Grady, Fix. 122, 123.

Under a mortgage of an iron rolling-mill, with certain specified machinery, and all engines, machinery, fixtures, and things which might thereafter be fixed or fastened in or upon the premises, whether in addition to or substitution of the fixtures, machinery, articles, and things; it was held that entirely new machinery, as well as additions to existing machinery, passed to the mortgagee. *Metropolitan Counties Insurance Society v. Brown*, 28 L. J. Ch. 581; 5 Jur. N. S. 378.

A mortgagee of tenant's fixtures has a right or interest in the land, which the tenant who has mortgaged cannot defeat by a subsequent surrender of his lease to his landlord; and if he does so surrender, the mortgagee has a right to enter and sever such fixtures, and may maintain an action against an incoming tenant who has prevented him from exercising that right, in which action he may recover the value of the fixtures so severed. *London and Westminster Loan and Discount Co. v. Drake*, 28 L. J. C. P. 297; 5 Jur. N. S. 1407. As to mortgagor putting trade fixtures after mortgage, *see* 29 L. J. C. P.

Where leases were deposited by way of equitable mortgage, accompanied by a memorandum of deposit, tenant's fixtures were held to be included in the security, although they were not mentioned in the memorandum. *Ex-parte Cornell*, 12 Jur. 411; see *ex-parte Togart*, 1 De Gex, 531. *Ex-parte Bentley*, 2 Mont. D. & D. 591.

[3] Of course, fixtures removable may be sold like other property. But it often becomes a question whether they have been transferred by the conveyance or demise of the property to which they are attached. It has been laid down in very early times, that when personal chattels are annexed to the freehold, they are made incident to the freehold, and will be included in a conveyance of the land in general terms. This doctrine has been recognised by the courts in several modern determinations. In the case of *Ryall v. Rolle*, 1 Atk. 175, *Parker, C. B.*, said, that by a mortgage of the freehold, fixed utensils would pass to the mortgagee. *Steward v. Lambe*, 1 B. & B. 507. *Thresher v. the East London Water-works Co.* 2 B. & C. 609. The court seems to have been of opinion, that if a tenant takes premises under a renewed lease, containing the terms land, buildings, erections, &c., such general words will comprise fixtures which have been put up pending a former lease, and that, consequently, the tenant will be precluded from setting up any claim to remove the fixtures, whatever may have been his right antecedently to the new lease. The most important question that occurs upon the subject is, whether agreements which relate to the transfer of fixtures can be considered to fall within the provisions of the Statute of Frauds, although this question must be supposed frequently to arise as well upon original demises between landlords and tenants, as upon assignments between outgoing and incoming tenants, and upon sales under executions, yet there does not appear to be any instance in which it has been hitherto the subject of legal discussion, except in *Hallen v. Runder*, 1 C., M. & R. 266. Where, a short time before the expiration of the lease of a house, the landlord agreed with his tenant to purchase his fixtures at a valuation, the lease expired, and the tenant having quitted possession of the premises without severing the fixtures, sent the key to the landlord. The broker appointed by the latter afterwards appraised the fixtures at more than 10*l.*, and signed the valuation:—*Held*, that the plaintiff having, at the defendant's request, waived his right to remove his fixtures, the matter bargained for was not an interest in land within the 29 Car. 2, c. 3, s. 4, and that the amount ascertained by the broker might be recovered on *indebitatus assumpsit*, for fixtures and effects bargained and sold, without having a note, &c. in writing. See *Parker v. Staniland*, 11 East, 362. *Mayfield v. Wadsley*, 3 B. & C. 360: also 1 B. & P. 397; 2 B. & B. 99; 4 Moore, 73; 5 Mee. & W. 175.

In *Wiltshear v. Cottrell*, 1 E. & B. 674, 22 L. J. Q. B. 177, plaintiff purchased a farm from the devisees in trust of the father of the defendant, and the premises were

IV. Relative to the Remedies connected with.

(A) *In Actions of Contract.*[1]

(B) „ *Tort.*[2]

(*a*) *Trespass.*

(*b*) *Trover.*[3]

conveyed by a deed, to which defendant was a party as one of the devisees. Plaintiff demised the premies to M. immediately after the conveyance, and the defendant, who was in occupation of the farm at the time of the conveyance under a lease from the devisees, removed some rick-staddles, a threshing-machine, and a granary, from the premises after the demise to M. The deed conveyed the land and all fixtures. The articles in question had been put on the land by defendant's father. The court held, first, that everything attached to the land having passed by the deed, defendant had no right to remove the articles as fixtures removable by an outgoing agricultural tenant. *Wiltshear v. Cottrell, supra.*

A transfer of fixtures is at least the transfer of the right of severance, and whether a memorandum of the sale of fixtures transfers any interest in the chattels themselves or not, it is a conveyance within the words of the Stamp Act, which include the "transfer of any right," and as fixtures are not goods, wares, and merchandise, it is not within the exemption. *Horsfall v. Key*, 2 Ex. 778; 17 L. J. Ex. 266.

A reversionary interest in trade fixtures will pass to a purchaser under a parol agreement. *Petrie v. Dawson*, 2 C. & Kir. 138.

As to what agreement will pass an immediate interest in fixtures, see *Thompson v. Pettit*, 10 Q. B. 191; 16 L. J. Q. B. 163.

[1] It was held, where the plaintiff sued to recover the agreed valuation as between incoming and outgoing tenant of certain grates and other fixtures, that he could not succeed upon a count for goods sold and delivered, inasmuch as they did not answer that description, being fixed to the freehold. *Nutt v. Butler*, 5 Esp. 176. *Lee v. Risden*, 7 Taunt. 188; 2 Marsh. 495. *Neale v. Viney*, 1 Camp. 471. But the appraised value of fixtures may, under such circumstances, be recovered under an account stated. *Salmon v. Watson*, 4 Moore, 73. *See ante, Hallen v. Runder.*

But where the declaration was in trespass, and alleged that the defendant took divers goods, chattels, and effects, it was held that under these words fixtures might be recovered. *Pitt v. Shew*, 4 B. & A. 206.

[2] It would seem that a tenant, after the severance of articles to which he is not entitled as fixtures, could not in general maintain trespass against his landlord for removing them. 2 Camp. 491. But see *Pitt v. Shew, supra.* In *Turrante v. Thompson*, 2 D. & R. 1, it was laid down that the property of fixed articles demised with the premises reverts to the landlord on severance.

It may be questionable whether an action of trespass *de bonis asportatis* for the removal of fixtures after their severance could be maintained in a case where the severance and removal are one continued and entire act. In *Udal v. Udal*, Aleyn, 82, the court agreed, that if a lessee for years cut down timber trees, and let them lie, and after carry them away, so that the taking and carrying away be not as one continued act, but that there be some time for the distinct property of a divided chattel to settle in the lessor, that an action of trespass *vi et armis* would lie in such case against the lessee, but not where they were taken and carried away at the same time. If this principle be correct (*see* Bull. N. P. 84; Vin. Abr. Trees, A. G.; 2 Roll. Abr. 119; Com. Dig. Biens, H. 1) it would seem to apply equally to the case of fixtures; the question, however, does not appear to have undergone much discussion. 2 Chit. 636; 2 Bing. 136. But some further remarks will be found upon it in the ensuing division respecting the action of trover, to which the authorities more immediately relate. With respect to the form of declaring in an action of trespass for injuries to fixtures, if the plaintiff has both an interest in the land and also the right of property in the severed chattel, the declaration should contain a count *quare clausum fregit, &c.*, with an *asportavit* count in the usual form. In the latter count the articles must be treated as of a personal and chattel nature; but in the former it seems advisable, in order to meet objections upon this point, to describe the property in terms applicable to it only in a fixed state. *See*, however, *Pitt v. Shew*, 4 B. & Ald. 206. As to the form of pleading it may be observed, that the plea of the general issue will not, in ordinary cases, raise the question between the parties respecting the right of property in fixtures, because in trespass, whether to real or personal property, the defendant cannot, under the general issue, give in evidence a title in himself or those under whom he claims.

An auctioneer who has been put into possession of fixtures attached to the freehold for the purpose of selling them, and by the conditions of sale the purchaser is to be bound to detach and remove them, has not such a possession as will entitle him to support trespass *de bonis asportatis* for their wrongful removal. *Davis v. Danks*, 3 Ex. 435; 18 L. J. Ex. 213.

[3] As trover is not maintainable except for the conversion of personal chattels, it cannot be brought for the recovery of fixtures so long as they are annexed to, and remain parcel of, the realty. Accordingly it has been held, that trover would not lie

(C) *Of the Action of Waste.*[1]

V. Larceny of Fixtures.

Stealing or severing, with intent to steal, any fixture, is felony, punishable as simple larceny.

By 24 & 25 Vic. c. 96, s. 31, "whosoever shall steal, or shall rip, cut, sever, or break, with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, or of both respectively, fixed in or to any building whatsoever, or anything made of metal, fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial-ground, shall be liable to be punished as in the case of simple larceny; and in the case of anything fixed in any such square, street, or place as aforesaid, it shall not be necessary to allege the same to be the property of any person."

See post, Larceny.

FLOTSAM, Jetsam, and Lagan.[2]

for fixtures which a tenant had left annexed to the freehold, with the leave of his landlord, after he had quitted possession, for the purpose of enabling him to make terms with the incoming tenant as to the purchase of the fixtures. *Ruffy v. Henderson*, 21 L. J. Q. B. 49; 16 Jur. 84. See *Mackintosh v. Trotter*, 3 Mee. & W. 184; *Lord Hardwicke*, in *Quincey's case*, 1 Atk. 478; and in *Lee v. Risdon*, 7 Taunt. 191, *Gibbs, C. J.*, observes, that it was never heard of that trover could be brought by a tenant for his fixtures after the expiration of his term. *Davis v. Jones*, 2 B. & A. 165. *See* 2 B. & C. 59; Cro. Jac. 129; and the remarks of *Lord Ellenborough* in 9 East, 237. However, in trover, it will not be intended that the property in demand connected with the freehold, unless that fact expressly appears. And in the case of landlord and tenant, when certain mill-machinery had been demised with the mill for a term, and the tenant, without permission of his landlord, severed the machinery from the mill, which was afterwards seized and sold under an execution against the tenant, it was holden that the property in the machinery instantly vested in the landlord, when separated by the wrongful act of the tenant, and, therefore, that the landlord was entitled to bring trover for it, even during the continuance of the tenant's term. 3 B. & Ad. 826; 3 Stark. 131.

And if a landlord in a distress for rent in arrear sever fixtures from the freehold, and dispose of them, he is liable in trover, and the articles may be described in the declaration as goods and chattels; and the plaintiff does not thereby waive his right of maintaining that the distress is illegal, because fixtures cannot be distrained for rent in arrear. *Dalton v. Whittem*, 3 Q. B. 961; 3 Gale & D. 260; 12 L. J. Q. B. 55.

"Fixtures" cannot be recovered under the word "goods" (*Hallen v. Runder*, 1 C., M. & R. 266); but may be under fixtures and effects bargained and sold. (Id.)

Under a count in trover to recover damages for wrongfully removing fixtures under a distress, the plaintiff is entitled to recover the value of the fixtures removed from the premises, and sold as chattels merely. *Clarke v. Holford*, 2 C. & Kir. 540.

[1] An action of waste may be resorted to in many instances for the purpose of determining whether the removal of articles annexed to the freehold is warranted by the law of fixtures or not. It is the appropriate remedy in such cases for the reversioner against a tenant in possession, whether for life or for years. The proceeding is founded on the injury occasioned to the plaintiff's reversionary interest by the wrongful act of the party in immediate possession of the land; and hence it is inapplicable to all those cases in which an executor lays claim to remove articles as fixtures which have been put up by his testator, whose interest in the land is determined by his death; because in such cases there exists no privity of estate between the parties. Vin. Abr. Waste, K.; 2 Inst. 145, 303, 305; 1 Taunt. 183.

The action of waste may be adopted, notwithstanding a covenant to repair; for although the landlord by the special covenant acquires a new remedy, he does not on that account lose his old. *Kenlyside v. Thornton*, 2 Black. Rep. 1111. It has, however, been supposed that the authority of this decision has been impeached in later cases. *Jones v. Hill*, 1 Moore, 160.

[2] "Flotsam," says *Lord Coke*, "is when a ship has sunk or otherwise perished, and the goods float upon the sea. Jetsam is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards, notwithstanding the ship perish. Lagan, or ligan, is when the goods are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again." 5 Co. Rep. 106, b. Hale de Jur. Mar. pars 1, c. 7.

FORCIBLE ENTRY and DETAINER.

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I. What Amounts to.[1]

II. By whom Committed.[2]

III. With Reference to the Possession or Property on which it may be Committed.[3]

By the Interpretation Clause of the Merchant Shipping Act, 17 & 18 Vic. c. 104, s. 3, the word "wreck" includes jestsam, flotsam, lagan; and derelict, found in or on the shores of the sea or by tidal water.

[1] *Forcible entry* is committed by violently taking or keeping possession of lands and tenements, with menaces, arms, and force, and without the authority of the law, whereby he who hath right of entry is barred or hindered. *See* 4 Bl. Com. 148.

Any one who had a right of entry into lands, &c. might have regained possession by force, but this liberty being much abused to the breach of the public peace, it was found necessary that it should be restrained by stat. *See* 5 Ric. 2, c. 7; 31 Eliz. c. 11; 21 Jac. 1, c. 25. But it seems that no entry shall be judged forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such-like damage, which is not personal. *See* 1 Hale, P. C. c. 64, s. 27.

Forcible detainer is where a man who enters peaceably afterwards detains his possession by force; and the same circumstances of violence or terror which will make an entry forcible, will also make a detainer forcible. *See* 1 Hawk. P. C. c. 64, s. 30. But it is not a forcible detainer if a lessee at will, after the determination of the will, denies possession to the lessor when he demands it, or shuts the door against the lessor when he would enter; or if he keeps out a commoner by force upon his own land. Com. Dig. Forcible Detainer, B.; 1 Russ. C. & M. 289.

In order to justify justices in convicting under the 15 Ric. 2, c. 2, and 8 Hen. 6, c. 9, it must be proved before them that there was both an unlawful entry on the premises and a forcible detainer. *Attwood v. Joliffe*, 3 New. S. C. 116.

[2] It is clear that it may be committed by a single person as well as by many. 1 Hale, P. C. c. 64, s. 29. But nevertheless, all those who accompany a man when he makes a forcible entry shall be adjudged to enter with him, whether they actually come upon the land or not. *See* id. s. 22. Hence, a man who breaks open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within these statutes. But a joint tenant, or tenant in common, may offend against them, either by forcibly ejecting or forcibly holding out his companion. *See* Bac. Abr. Forcible Entry. So, where a man has been in possession of land for a great length of time, by a defeasible title, and a claim is made by him who has a right of entry, the wrongful possessor, continuing his occupation, will be punishable for a forcible entry and detainer; because all his estate was defeated by the claim, and his continuance in possession afterwards amounts, in the judgment of the law, to a new entry. *See* Dalt. J. 77.

A wife separated from her husband may be guilty of a forcible entry into his dwelling-house, and other persons also, if they assist her in the force, although her entry in itself be lawful. *R. v. Smith*, 1 M. & Rob. 156; 5 C. & P. 201.

[3] A forcible entry cannot be committed on a mere easement, such as a way (*Rex v. Holmes*, 1 Mod. 73), a common, or office. *See* 2 Burn's J. Forcible Entry; 1 Hale, P. C. c. 64, s. 31. But the statutes apply to force done to ecclesiastical possessions, as churches, vicarage-houses, &c., as much as if it were done to a temporal inheritance. And it has been laid down as a general rule, that a person may be indicted for a forcible

IV. Of the Action for.[1]
V. „ Indictment for.[2]

entry into any such incorporeal hereditament for which a writ of entry will lie either by the common law or by statute, as for tithes, &c. But it seems that a man cannot be convicted upon view by force of 15 Ric. 2, c. 2, of a forcible detainer of any incorporeal inheritance wherein he cannot be said to have a precedent forcible entry. *See* 1 Hawk. C. P. c. 64, s. 31.

A landlord who breaks open the door of his own house, in the occupation of a tenant who refuses to quit at the expiration of his term, at a time when no person was in the house, was held not to be guilty of a forcible entry. *Turner v. Meymott*, 1 Bing. 158.

[1] By stat. 8 Hen. 6, c. 9, s. 6, if any person be put out or disseised of any lands or tenements in a forcible manner, or put out peaceably, and after holden out with strong hand, the party grieved shall have assize of novel disseisin, or writ of trespass, against the disseisor; and if he recovers, he shall have treble damages, and the defendant, moreover, shall make fine and ransom to the king. But this action being at the suit of the party, and only for the right, is only where the entry of the defendant was not lawful; for where a man entereth with force where his entry is lawful, he shall not be punished by way of action, but yet he may be indicted upon the statute, for the indictment is for the force and for the king, and he shall make fine to the king, although his right is never so good. *See* Dalt. J. 129. See *Browne v. Dawson*, 12 Ad. & E. 629. *Davison v. Wilson*, 11 Q. B. 890; 17 L. J. Q. B. 196. *Newton v. Harland*, 1 Scott, N. R. 492.

A plea of three years' "quiet enjoyment" is a bar. *Hardesty v. Goodenough*, 7 Mod. 138. *Rex v. Burgess*, T. Raym. 84. The court has refused to relieve against a forcible entry on motion. *Sutton's case*, 6 Mod. 91.

The stat. 8 Hen. 6, s. 6, extends only to parties having freehold interest. *Cole v. Eagle*, 8 B. & C. 409.

In trespass on 8 Hen. 6, c. 9, for a forcible entry and detainer:—*Held*, that if persons either take or keep possession of house or land with such number of persons and show of force as is calculated to deter the rightful owner from sending them away and resuming his own possession, that is sufficient in point of law to constitute a forcible entry or a forcible detainer. *Milner v. M'Clean*, 2 C. & P. 17.

[2] The indictment need not state the offence to have been committed both *manu forti* (6 Mod. 96; Sayer, 227), and *vi et armis*, but the former will suffice, as it includes the latter (Cro. Eliz. 461); it is the words, "with a strong hand," that distinguish the indictable offence from the civil trespass. If the word "disseised" is inserted, it is not also necessary to use the terms "expelled" or "unlawfully," for the last is superfluous, and the first is implied in the word disseised; but unless the word disseised be used, the indictment at common law should contain the word expelled. 8 T. R. 357; Cro. Jac. 32. *See* Arch. Crim. Pl. 736, 15 ed.

No particular technical words are necessary in such an indictment, but it should appear by the indictment that such force and violence had been used as constituted a public breach of the peace. *Per Lawrence, J.: Rex v. Wilson*, 8 T. R. 362. The place must be described with certainty, and it must allege what estate the party had, as whether it was freehold, for life, for year, or at will. *Taylor v. Griffiths*, 7 Mod. 116. *Rex v. Depuke*, 11 id. 273. *Rex v. Holmes*, 1 id. 73.

And therefore, if it merely charges that the defendant forcibly entered a certain tenement, which may signify anything which may be held, and even an incorporeal hereditament, it will be defective. 1 Sess. Ca. 357; 1 East, 441; 2 Stra. 891. So, to allege that the defendant entered two closes of meadow or pasture, a house, a rod of land, or certain lands belonging to a house, is bad, for the same certainty is required as in a declaration in ejectment. Hawk. b. 1, c. 64, s. 37. *See* Sayer, Rep. 142. *See* 8 Dowl. P. C. 128.

The indictment must state that the party expelled had possession. *Anon.* 1 Sess. Ca. 359. *Rex v. Taylor*, 7 Mod. 123. *Rex v. Wilson*, 8 T. R. 357. *See* Hawk. b. 1, c. 64, s. 38; Arch. Crim. Pl. 738.

But it seems clear that an entry must be shown, as the act would not apply if the party had been always in possession. Hawk. b. 1, c. 64, s. 40. It seems to have been left doubtful whether an indictment stating that the defendant entered and disseised, without saying whether the entry was peaceable or violent, is good (Cro. Eliz. 915); though, on principle, it seems to be defective, as charging no specific offence. It is clear that repugnancy in stating the charge will vitiate, as if on an indictment on 8 Hen. 6, setting forth that the defendants peaceably entered, and then and there, with force and arms, disseised the prosecutor, or if it set forth a disseisin of land then and still being the freehold of the party grieved, for it appears he always remained in possession, in which case there can be no disseisin. Alleyn, 50. 2 Roll. Rep. 311.

The party grieved, if he will lose the benefit of his treble damages and costs, may be aided and have the assistance of the justices at the general sessions by way of indictment, and on the statute of 8 Hen. 6, which being found there, he shall be restored to his possession by a writ of restitution, granted out of the same court to the sheriff.

By 8 Hen. 6, c, 9, for a more speedy remedy, the party grieved may complain to

(A) *Plea to Indictment.*[1]

(B) *Evidence upon.*[2]

(C) *Punishment.*[3]

(D) *Restitution.*[4]

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any one justice, or to a mayor, sheriff, or bailiff within their liberties. But although one justice alone may proceed in such cases, yet it may be advisable for him to take to his assistance one or two more justices.

A conviction for a forcible detainer must show an unlawful entry (*Rex v. Oakley*, 4 B. & Adol. 308; 1 Nev. & M. 58), and not merely an unlawful ejection. *Rex v. Wilson*, 5 Nev. & M. 164.

[1] To obtain time, a plea traversing the force, or pleading three years' possession, may be pleaded. 1 Ld. Raym. 440. But when the proceedings are removed by *certiorari* into Q. B., defendant must plead *instanter*.

[2] *Upon an indictment at common law*, the evidence of the forcible entry must be stronger than is required to support an indictment on the statutes; that is to say, there must be proofs of such a force as constitutes a public breach of the peace. *Rex v. Wilson*, 8 T. R. 357.

On an indictment under stat. 3 *Ric.* 2, c. 8, the prosecutor must prove, first, that he was seised in fee of the premises in question at the time of the forcible entry; and proof that he was in the actual occupation of the premises, or in the reception of the rents and profits, is sufficient *primâ facie* evidence of his seisin. See *Jayne v. Price*, 5 Taunt. 326; 1 Marsh. 68. This presumption, however, may be rebutted, either by direct evidence of his having a less estate, or by evidence of circumstances from which the jury may presume it. *See* id. Secondly, the prosecutor must prove the forcible entry, an entry with strong hand, or with multitude of people, being the offence described in the statute.

On an indictment under 21 *Jac.* 1, c. 15, proving the estate the prosecutor had in the premises, together with that stated in the previous division, will suffice.

On an indictment under 8 *Hen.* 6, c. 19, or 21 Jac. 1, c. 15, the prosecutor must show the seisin, or possession, as in the two former cases, and prove an entry, whether peaceable or not is immaterial. Proof of the expulsion, which, *ex vi termini*, implies force, is not material, as the gist of the offence is the forcible detainer merely. Holding the premises from the prosecutor by force, however, must be proved, and the same entry or violence which will make an entry forcible will also make a detainer forcible. 1 Hawk. c. 64, s. 30; 1 Russ. 417. But merely refusing to go out of the house (1 Hawk. c. 64, s. 30), or a tenant at will denying possession to his lessor, or a person keeping out of his land by force a person claiming common upon it (Com. Dig. Forcible Det. 2), is not a forcible holding within the meaning of the statutes.

[3] By 5 Ric. 2, c. 8, the offender is to be punished by imprisonment and ransom, at the king's will; or if a forcible entry or detainer shall be made by three persons or more, it is also a riot, and may be proceeded against as such if no injury hath been made of the force.

[4] The same justice or justices before whom an indictment of forcible entry or detainer shall be found may award restitution; but no other justices except those before whom the inquest was found can award restitution, unless the indictment be removed by *certiorari* into the Court of Queen's Bench, and that court, by the plenitude of its power, can restore, because that is supposed to be implied by the statute, on the ground that, whenever an inferior jurisdiction is erected, the superior jurisdiction must have authority to put it in execution.

By the proviso in the statute of 8 Hen. 6, c. 9, and also by 31 Eliz. c. 11, that any one indicted upon these statutes may allege quiet possession for three whole years to stay the award of restitution; in the construction of which it has been holden that such possession must have continued, without interruption, during three whole years next before the indictment.

The same justices who have awarded a restitution on an indictment of forcible entry, &c., or any two or one of them, may afterwards supersede such restitution upon an insufficiency in the indictment appearing unto them.

The Court of Queen's Bench has such a discretionary power over these matters, from an equitable construction of the statutes, that if a restitution shall appear to have been illegally awarded or executed, that court may set it aside, and grant a restitution to the defendant.

But a defendant cannot in any case whatsoever, *ex rigore juris*, demand a restitution, either upon the quashing of the indictment or a verdict found for him on a traverse thereof, &c., for the power of granting a restitution is vested in the Queen's Bench only by an equitable construction of the general words of the statutes, and is not expressly given by these statutes, and is never made use of by that court but when, upon consideration of the whole circumstances of the case, the defendant shall appear to have some right of the tenements, the possession whereof he lost by the restitution granted to the prosecutor. *See* 3 Bac. Abr. Forcible Entry; 1 Hawk. P. C. 64.

A judge at the assizes may, in his discre-

FOREIGN ATTACHMENT.[1] *See* 20 & 21 Vic. c. 157, Amending Practice in Mayor's Court.

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I. Of the Nature of in General.[2]

tion, refuse to award restitution after an indictment for forcible entry and detainer, and the Court of Queen's Bench will not review his decision. *Rex v. Harland*, 8 Ad. & E. 826; 1 Per. & D. 93; 2 M. & Rob. 141.

The court will not interfere with the discretion of the judge as to granting restitution. *Rex v. Harland*, 1 Per. & D. 93; 2 M. C. C. 141.

In order to authorise a justice to award restitution pursuant to an inquisition taken under the 8 Hen. 6, c. 9, for a forcible entry, the inquisition should set forth the estate possessed by the party in the property disputed. *Reg v. Bowser*, 8 Dowl. P. C. 128. *Rex v. Harland, supra.* And where the conviction is quashed, restitution must be awarded. *Rex v. Wilson*, 6 Nev. & M. 625; 1 Ad. & E. 627.

[1] As to the attachment of debts upon a judgment in the superior courts, *see* Attachment, vol. i. p. 575.

[2] See Locke's *Law and Practice*, and Brandon on the Law of Foreign Attachment. Foreign attachment is a process sanctioned by and dependent upon custom. *Blacquiere v. Hawkins*, Dougl. 379. Similar customs prevail in Bristol, Exeter, Lancaster, Scotland, France, and America. (Id.)

The object of the proceeding is to enable the creditor to attach the money debts or goods of his debtor in the hands of a third person, and so to deprive the owner of all control over the subject of the attachment until he appears to answer the claim of his creditors, or until the debt is satisfied. The Lord Mayor's Court is now alone resorted to for the purpose of attachment.

The proceedings, as carried on in the Mayor's Court of London, are in the form of an action supposed to be commenced by summons against the debtor, on the return of which a suggestion is supposed to be made by the plaintiff to the court, that some third person within the city has goods of the defendant in his possession, or owes him debts, by which goods or debts the plaintiff prays that the defendant may be attached until he appears to answer the action brought against him. In point of fact, the first proceeding is an affidavit of the debt, made by the plaintiff or creditor, upon which an entry of the supposed action is made in the action-book kept in the Mayor's Court office, and then the plaintiff's attorney proceeds immediately against the third party, or garnishee, as he is called, by attachment and summons.

The commencement of the proceedings by attachment is for the creditor (the plaintiff) to enter an action and make an affidavit of his debt, which must be filed at the office and entered on the record, such action, accompanied by an affidavit, being held to be the foundation of the process.

The affidavit, except in the cases hereinafter mentioned, must be made before the registrar or his deputy, and if it be insufficient it may be rejected; the plaintiff being at liberty, nevertheless, to apply to the judge for leave to issue an attachment thereon.

It is the practice of the court to take the affidavit of the plaintiff's clerk, attorney, or agent, but such affidavit must be positive as to the debt, though the plaintiff himself be an executor only, and had he made the affidavit, need not have sworn positively. The affidavit must be intituled, "In the Mayor's Court, London." Locke on Attachments, 3.

II. Of the Court out of which it Issues.[1]

III. „ Persons Entitled to, and against Whom it may Issue.[2]

Immediately after the action is entered, and the affidavit sworn, the attachment may be made; and this is done by the serjeant-at-mace serving the garnishee personally with notice of attachment, and to effect this the rules of the court prescribe the following course:—The plaintiff's attorney must prepare the notice of attachment, and after the same is sealed by the registrar, leave it with the serjeant-at-mace for service. Immediately after the serjeant-at-mace has served the attachment he must make a return thereof in the registrar's book, with the garnishee's names and time of service.

On the service of the notice of attachment by the serjeant-at-mace upon the garnishee, all monies, goods, and effects which are then in, or which may come into his hands between the date of the service and plea pleaded, are by such services of the notice of attachment made liable to the plaintiff's demand.

It frequently happens that the debtor is not to be found; in which case, if the creditor be desirous of getting possession of the property of the debtor, he must first proceed to an outlawry. This process, however, is not only extremely dilatory, but very expensive. It is, moreover, uncertain, especially in regard to goods, as they might, and probably would, be removed pending the proceedings.

The Mayor's Court of London is a court of record. In it actions of every nature may be instituted and proceeded in to judgment and execution, the same as in the courts of Westminster, provided the causes of such actions arise within the limits of the city. All such actions, however, or the records of them, were liable to be removed by *habeas corpus* or *certiorari* to the courts above; so that, strictly speaking, the Mayor's Court could not, unless with the consent of both plaintiff and defendant, proceed in any cause.

But now, by the 20 & 21 Vic. c. 157, s. 16, it is enacted, that "no cause depending in the Mayor's Court, in which the debt or damages sought to be recovered shall not exceed 50*l.*, shall be removed by any defendant, before judgment thereon, into any superior court, except in pursuance of a judge's order, as hereinafter mentioned, unless the defendant, with two sufficient sureties, such as the Mayor's Court shall allow, shall first be bound to the plaintiff in the cause by recognisance, to be acknowledged in the Mayor's Court, in a sufficient sum for the payment of the debt or damages, and costs, in case judgment shall pass against the defendant in the superior court, or in case the cause shall be brought back by *procedendo* in the Mayor's Court: Provided always, that a judge of the superior courts may, in the exercise of his discretion, order a writ of *certiorari* to issue to remove any such cause depending in the Mayor's Court into the superior court, without such recognisance as aforesaid, and such cause may be removed into such superior court accordingly."

And by the 18th section, "no foreign attachment shall be removed from the Mayor's Court at any time after the same shall be set down for trial, except by the express order of one of the judges of the superior courts, and then upon such terms as to bail, costs, and payment of money, as such judge, on summons, shall think fit: Provided that a summons only, without any order of the judge thereon, shall not stay the trial of the attachment in the Mayor's Court."

It was held, before the above statute, that if one of several defendants remove a foreign attachment by *certiorari*, he must put in bail for his co-defendants. *Keat v. Goldstein*, 1 M. & R. 305; 7 B. & C. 525.

[1] The attachment issues out of the Mayor's Court of the city of London. The judges, strictly speaking, are the lord mayor and the aldermen for the time being, before whom all the proceedings of the court are recorded to take place; but the recorder always officiates as, and is, in fact, the sole judge of the court. The Mayor's Court, like the Court of Exchequer, comprises two distinct courts, viz. a court of law and a court of equity; but the causes, &c., in both are set down promiscuously, and heard in turn, on the same day, before the recorder.

The jury consists of twelve, as in ordinary cases; are returned by the aldermen of the several wards at the wardmote inquest every Christmas, by indenture under seal, and the wards are arranged into twelve divisions, the jurymen whereof serve for the twelve months of the year. Upon the return of the several wards, the town-clerk enters the names in a book kept by him for that purpose, a copy whereof he furnishes to the officers of the court. But in cases of importance the court will, on motion, award a special jury of merchants to try the issue.

The office of registrar of this court combines in itself, with a trifling exception or two, the duties which are performed by all the various officers of the four courts at Westminster. On the equity side he files all bills, answers, demurrers, and other proceedings. He takes the minutes of, draws, passes, and enters the decrees and orders of the courts. He also taxes the costs.

[2] The custom, as it was claimed to exist, has been considerably modified in extent by a recent case. The custom claimed was this:—"That if a plaintiff sues a defendant, and that if some third person, who is indebted to the defendant, is found within the jurisdiction, then, although the plaintiff's cause of action against the defendant did not arise in the city of London, though neither of them is, in any sense, a citizen or resident within the city, and although the

IV. Of the Demand for which it may be Issued.[1]

V. „ Property Attachable under it.[2]

debt of the third person in no way arose in the city, and although that person is in no sense a citizen or resident in the city, although his visit there is purely casual, or he is only passing through it, but 'being found there,' then, without any notice, or attempt at notice, to the defendant by any one, the debt due from the third person to the defendant may be attached in that person's hand. Thus, any one owing money to another, if he casually enter the city, is subject, first, to a warning to pay, though his creditor has not sued him, or desired him to pay; and, on his next visit, he is subject to an execution for the amount of the debt he owes, which amount, when obtained, is handed over to the third person's creditor, without any proof of the debt. His swearing to it is no necessary part of the custom; it is handed over without any proof of the debt, on giving a pledge to restore it to such creditor if he appears within a year and a day and disproves the debt."

"It seems," said *Pollock, C.B.*, "unnecessary to do more than to state this custom to show its invalidity. It seems to violate every principle of justice, and every rational rule of jurisprudence and procedure, for it is impossible to hold that this local court, like other local courts, has jurisdiction in ordinary cases of action brought in it, only when the cause of action arose within the jurisdiction, yet that when its extraordinary procedure is resorted to (which is, in theory, only in aid of the ordinary), and to compel a defendant to appear, its jurisdiction is practically without limit as to locality. If the defendant should appear after the attachment, the suit may be defeated by the cause of action not arising within the jurisdiction; while, if the proceeding can be carried through without his knowledge, that matter is wholly unimportant. Such a jurisdiction, as claimed, is wholly repugnant to the idea of a local court." And the court held a plea setting up the custom to the effect stated above to be bad and invalid. *Cox v. the Mayor and Aldermen of London*, 6 L. T. (N. S.) 497.

The process of foreign attachment can, it has been said, be resorted to only where the cause of action against the original defendant arises within the jurisdiction of the court out of which the attachment issues. *De Haber v. Queen of Portugal*, 17 Q. B. 171; 20 L. J. Q. B. 488.

Where the Lord Mayor's Court has no jurisdiction over the person of a defendant against whom a plaint has been entered, the awarding process of foreign attachment against a person having funds in his hands belonging to the defendant, as a means of compelling an appearance, is an excess of jurisdiction for which a prohibition will lie. Where, therefore, a plaint was entered in the Lord Mayor's Court against the Queen of Portugal, "as reigning sovereign and supreme head of the nation of Portugal," to recover a debt alleged to be due from the Portuguese Government, and a foreign attachment had issued according to the custom of the city of London, the court made absolute a rule to restrain proceedings in the action, and in the attachment. (Id.)

It has, however, been held to be no objection to a return to a writ of *certiorari* that the return omitted to state that the garnishee resided within the jurisdiction of the Mayor's Court. *Day v. Paupière*, 13 Q. B. 802; 7 D. & L. 12; 18 L. J. Q. B. 270.

[1] An attachment may be issued for all claims or demands which will sustain an action at law. Therefore, equitable debts are not sufficient to ground an attachment upon, as a legacy which is recoverable only in the Spiritual Court, or in a court of equity. Dividends due to a creditor from the assignees under a commission of bankruptcy, trust property for the creditor, cannot sue for these at law. The debt must also be due, or it cannot sustain an attachment. Although in cases of attachment it be not necessary that either the creditor or debtor should reside within the city of London, yet, to render the judgment therein completely effectual, it is requisite that the cause of action should arise within the city. Thus, if the demand be for goods sold, the delivery must be within the city, for the contract is not complete till delivery. If for work and labour, it must be performed within the city. If for money lent or paid by the creditor, to or for the use of the debtor, such lending or paying must be within the city. But it should be observed, that in case of payment of money by one for the use of another, it must be at the request or by the authority of the person for whose use such payment is made, otherwise no debt exists, for the payer has paid it in his own wrong. If the demand be for money had and received by the debtor, for the use of the creditor, the receipt must be within the city.

[2] Any property which has come into the garnishee's hands before plea pleaded, may be attached (*M'Daniel v. Hughes*, 3 East, 367), such as money, jewels, chests, and boxes locked, and the contents; money due from the garnishee to the defendant, and book debts of every description. In debt upon bond, the penalty must be attached, but judgment goes not for the sum due.

Money on bond or simple contract, payable at a future day; but though the plaintiff may proceed to judgment, he cannot have execution till the money be due.

Exchequer bills.

Money in the hands of an attorney; for he shall not have his privilege against foreign attachment.

Goods or money belonging or due to the estate of a testator or intestate, in an action against the executor or administrator for a debt due by the deceased. And here it may

be observed, the reason is, that although an action of debt cannot, by the law of the land, be brought against an executor or administrator, yet, by the custom of London, it may; and all attachments are grounded on actions of debt. But the custom does not authorise a creditor to arrest either an executor or administrator; therefore, the attachment, which is equivalent to an arrest, may be dissolved by common bail. Nevertheless, should the plaintiff, by the friendship of the garnishee, or otherwise, obtain judgment, it is valid and irreversible. And here the objection that a simple contract creditor may thus be preferred to a specialty creditor, the same as an executor or administrator, may, at common law, give the same preference by voluntarily confessing a judgment to the former.

Debts due by persons residing out of the city; but they must be served within it; and if a plaintiff can prevail upon the owner of goods to bring them into the city, they may be attached: but care must be taken to serve the real responsible owner, rather than he who has them in actual possession; as, in the case of goods passing through the city, where the carrier is answerable for their safe delivery, he, and not the driver or porter, must be served with the attachment.

And, in general, for all debts, goods, and effects for which, by the custom, debt or detinue will lie, or for which an action of *assumpsit*, trover, debt, or detinue may be brought in the courts above, an attachment may be sustained.

The goods and debts of a corporation may be attached. —— *v. Hamburgh Co.* 1 Mod. 212. But money payable under the master's allocatur, or rule of court, cannot be attached. *Coppell v. Smith*, 4 T. R. 312.

Nor salaries and wages, whether payable by government, corporate bodies, or individuals.

Nor rent.

Nor debts upon record; that is, judgments recovered, statutes, or recognisances. Debts and other property, for the recovery of which an action has been commenced in the courts at Westminster.

Nor money in the sheriff's hands, levied under an execution.

The custom of foreign attachment does not apply to debts, the beneficial interest of which is vested in a person other than the defendant sued in the Mayor's Court, whereof the garnishee has notice, and such debts are not attachable under the custom. *Westoby v. Day*, 2 E. & B. 605; 22 L. J. Q. B. 418.

It seems that a party cannot attach money in the hands of himself and partner. *Nonell v. Hullet*, 4 B. & A. 646.

It has been said that debts arising out of the jurisdiction of the Mayor's Court are not attachable, but that a prohibition will lie, unless the garnishee be permanently resident within the city. But it is the daily practice of the court to attach, indiscriminately, debts of this description; and the law is certain as to simple contract debts, for they follow the person, and may, of course, be attached.

Money due on bond taken by an executor for a debt due to his testator in an action against the former for the recovery of such debt.

Property of an intestate in an action against the ordinary.

Money awarded upon a reference from the upper courts.

Money due from a client to his attorney for costs on the master's *allocatur*, upon an order obtained by the client for taxing the bill.

Goods of which the garnishee has got possession by trespass or wrong.

Joint property for a separate debt.

Separate property for a joint debt cannot be attached.

So, goods in the hands of a carrier. Leon. 189. But it is the practice of the court to attach such goods, and its legality has not of late been questioned.

Legacies, dividends due to a creditor from the assignees under a commission of bankruptcy; and, in general, all such debts and other property, for the recovery whereof an action at law will not lie, but wherein recourse must be had to the courts of equity or the ecclesiastical courts. But in regard to these equitable debts, it may reasonably be questioned whether the general rule of exempting from attachment all debts for which, at law, no action can be maintained, should not be applied with some degree of limitation.

Finally, all debts, and other property, for which an action of debt or detinue would not lie in the Mayor's Court, or *assumpsit*, trover, debt, or detinue in the courts above; such as, for instance, damages which the debtor is entitled to recover for assault, slander, or trespass, which are clearly not attachable. So, property in the hands of Government and its agents, as the public funds and dividends due thereon, cannot be attached. Bodies corporate, as the Bank and East India Company, property is not attachable; and the same rule applies as to the monies of individuals, which the Bank holds in the same manner as private bankers; though, of course, money in the hands of a private banker may be attached.

The debtor or defendant himself cannot; but this rule admits of an exception in case he absconds, and leaves his dwelling-house, or warehouse, with property, and no person therein. Such property is attachable under and by the name of a sequestration.

The garnishee is entitled to lien and set-off.

Places on and in which property of no sort is attachable: the river Thames, the London Docks, and all places not within the city, except in the case of debts due from persons resident without the city, in such cases where they can be served within it.

VI. When Issuable if Defendant be in Custody.[1]
VII. Affidavit of Demand.[2]
VIII. Entry of Attachment, and Notice of.[3]
IX. Withdrawing the Attachment.[4]
X. Proceedings against the Garnishee.[5]

[1] If the defendant be in custody, the attachment is, of course, nullified; or if he be in custody in an action in the Mayor's Court, he would, of course, render in the action grounding the attachment. And if he be in custody in any action in the courts of Westminster he may have his *habeas corpus*, upon which he may put in any two persons as bail in the court above, who can immediately afterwards surrender him in their discharge, and the attachment would thus be dissolved.

[2] The creditor, or any one for him, who can swear or affirm positively to his demand, must go to the Lord Mayor's Court Office, and make affidavit or affirmation of the amount of the debt, and that it is justly due.

[3] Immediately after the action is entered the attachment may be made, which is done by the officer's personal service upon the garnishee of a notice properly filled up.

[4] It is not unfrequently the case that, as soon as the defendant finds his property completely locked up from him, that he applies to the plaintiff to come to some arrangement, which may be that the plaintiff shall take a part of the attached property in or towards satisfaction of his demand, and the defendant the rest. This being agreed upon, the plaintiff signs the withdrawment of the attachment, whereupon a certificate of the withdrawment of the attachment is given to him to deliver to the garnishee, which is equivalent to a dissolution, and is a sufficient authority to the garnishee to deliver over the property to the defendant or his order. He accordingly delivers to the plaintiff, at the defendant's request, the proportion agreed upon, and the remainder to the defendant.

[5] Although the defendant's property is now effectually secured in the garnishee's hands, to answer, as far as it may extend, the plaintiff's demand, yet the proceedings against the garnishee must be considered as not yet begun, for the attachment is strictly a proceeding against the defendant to compel his appearance, and he is accordingly supposed to be afterwards called upon at four subsequent court days to appear, which, however, is never done; but the plaintiff must, notwithstanding, wait the four days before he can commence his process against the garnishee. Thus, if the attachment be made on the 1st of October, 1862, the plaintiff cannot summon the garnishee till the 6th, and to do this, that day, as well as all the intervening, must be court days. But previously to summoning the garnishee to appear, the plaintiff has got a discretion to exercise. If the garnishee has not sufficient property belonging to the defendant in his hands to answer the plaintiff's demand, and it be probable that other property will shortly be received by the garnishee, the plaintiff will, of course, suspend his proceedings. But if the property already in hand is ample, or, that not being the case, if there be no probability of any more coming to hand, it is advisable the plaintiff should proceed with all expedition. The garnishee cannot, however be summoned to appear until the nature and particulars of the property be ascertained, when summoned. The garnishee is driven to his alternative of appearing or letting judgment go against him. If he determine to appear, he must apply to one of the attornies of the court to do it for him before two o'clock in the afternoon of the day on which he is required to appear, or judgment may be signed against him for want of appearance. As soon as the summons is served, the plaintiff's attorney, in order to be provided against either of these alternatives, prepares his record, which is sure to be wanted, whether the garnishee appears or not. The record of the proceedings is made on a roll of parchment. In the upper courts, the rolls on which the pleadings are recorded are unstamped, and copies of the pleadings of each are delivered to the other on unstamped paper; whereas, in this court, the roll, or parchment, is stamped, and handed forwards and backwards between the opposing attornies as long as the various pleadings require it, by which considerable expense is saved to the client.

The proceedings may now be considered as having arrived at the close of the second stage, as, from this point, branch two different ways; the one, in case of non-appearance by the garnishee, or appearance and neglect to plead, leads to instant judgment and execution against the garnishee in favour of the plaintiff; the other presumes the garnishee to appear and plead, and this leads to trial, which, in case of a verdict for the plaintiff, is also followed by immediate judgment and execution. Final judgment and execution may, however, in the case of goods, be retarded by the garnishee refusing to produce them.

So far as regards the original defendant, a return of *nihil* to a summons issued against him will support the subsequent proceedings by foreign attachment against his debtor (*M'Daniel v. Hughes*, 3 East, 367), though the creditor of the garnishee must be summoned or have notice, which must appear on the face of the record in the court below. *Fisher v. Lane*, 3 Wils. 297. The garnishee in a foreign attachment cannot compel the plaintiff to prove his debt; nor is the garnishee bound to dispute the plaintiff's debt. *M'Daniel v. Hughes*, *supra*. And money obtained of the garnishee under a foreign attachment is not, unless execution be executed, a compulsory payment,

XI. Judgment by Default.[1]

XII. Trial, Verdict, Judgment, and Execution.[2]

XIII. Of the other Collateral and Incidental Proceedings.[3]

XIV. Of Pleading the Foreign Attachment in the Superior Courts.[4]

so as to effect a discharge of a debt due from the garnishee to the defendant in the Lord Mayor's Court. *Wetter v. Rucker*, 1 B. & B. 491.

[1] The garnishee has time allowed for his appearance, until two o'clock in the afternoon of the day on which, by the summons, he is appointed to appear. The plaintiff's attorney, therefore, at that hour searches in the action-book, in the margin of the entry, to see whether an appearance be entered or not: if none be entered he is entitled to sign judgment against the garnishee, which is done by carrying the roll to the deputy-register, who signs judgment accordingly. The entry of the non-appearance of the garnishee is made beneath that of the officer's return to the summons, and the entry of the judgment immediately follows. If the judgment be of monies attached, it is final, and execution is immediately had; but if of goods, it is judgment of appraisement, and interlocutory only; and before final judgment can be signed, and execution had thereon, the value of the goods must be ascertained. As soon as judgment is signed, execution may be had against the garnishee.

[2] The garnishee, instead of suffering judgment to go by default, for want of plea or of appearance, may defend the attachment, which he does by putting in a plea to that part of the record which charges him with having, and detaining, the monies or goods, or both, of the defendant; or, rather, he pleads to the *scire facias* against him to appear, and show cause why the plaintiff should not have judgment of such monies. This plea is a flat denial of the charge, and is called the general issue: however, there are several other pleas which the garnishee may plead when the garnishee puts himself upon the country. Plaintiff subjoins the *similiter*. The plaintiff and garnishee are at issue. No notice of trial is given, but four days before the day on which the Recorder has appointed a court to be holden, the cause is set down with the register. The witnesses should be subpœnaed, and on the day of trial the cause is called on in its turn, and upon the verdict being given, the deputy-register takes it down in writing, and he, or the attorney for him, afterwards enters it upon the record, which entry is called the *postea*, being the first word thereof when the proceedings were in Latin. The deputy-register then signs judgment thereon, which, if for monies, is final; if for goods, interlocutory only, being judgment of appraisement. The verdict is here presumed to be for the plaintiff. The rest of the proceedings, such as relate to the appraisement, execution, &c. are the same as in judgment by default. Brandon, 98.

Where a foreign attachment had been sued out of the court of the Lord Mayor against a railway company by their corporate name, the company being only provisionally registered, and money in the hands of their bankers was attached thereunder, but no further proceedings taken, the court refused to stay proceedings in an action subsequently brought thereon against three provisional committeemen of the company, for the same debt which was sought to be recovered under the attachment. *Denton v. Maitland*, 11 Jur. 42.

[3] Judgment, either by default or upon verdict, is, in all cases where monies are attached, final in the first instance; yet in the case of goods it is otherwise. The judgment in case of goods, whether by default or upon verdict, is invariably judgment of appraisement; so that final judgment cannot be had until such appraisement made, when execution goes for the goods, or their value. But it may happen that the garnishee, previously to the judgment of appraisement, may have disposed of the goods, or removed them out of the city, whereupon the officer returns upon the precept of appraisement, that the garnishee has eloigned or removed the goods. This is called a return of *elongavit*, which was the significant word of the return when the proceedings were in Latin. The cause may, upon this return, be set down for the next court day, when the plaintiff must bring forward evidence to prove the value of the goods, which the jury will ascertain, and execution may then issue against the garnishee for the amount. It is not, of course, necessary in this case for the plaintiff to prove the goods to be the property of the defendant, as that has been already done, either expressly by the verdict, or impliedly by the garnishee's having let judgment go by default. So that the assessment of damages upon an *elongavit* is exactly similar to the assessment of damages on a judgment by default in *assumpsit*.

[4] The circumstance that the debt, the subject-matter of the action, has been attached under the process of foreign attachment, may be given in evidence under the general issue. *Palmer v. Hooke*, 1 Ld. Raym. 727. See *M'Daniel v. Hughes*, 3 East, 367. If pleaded, the plea need not aver the custom that the plaintiff below must swear to the debt, or that he did swear to the debt, nor that the debt arose within the jurisdiction of the court below. *Banks v. Self*, 5 Taunt. 233: but see *Cox v. Mayor & Aldermen of London*, 6 L. T. (N. S.) 497. But if a plea of recovery and execution in foreign attachment state the grounds on which the Mayor's court had jurisdiction over the original demand, such demand must be shown to be one of that description (*Morris v. Ludlam*, 2 H. Black. 362); and the plea must also show that the money is in the hands of a person other than the plaintiff, inasmuch as the person owing the money to the defendant must, within the custom, be a different person from the plaintiff. *Nonnell v. Hallett*, 4 B. & A. 646. And

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to a plea of foreign attachment to a debt on bond, it must be averred that the money was parcel of the sum mentioned in the condition. *Johnson v. West*, 11 Mod. 410.

It was ruled by *Holt, C. J.*, upon evidence at a trial at *nisi prius*, that if in *indebitatus assumpsit* for goods sold and delivered, upon *non assumpsit* pleaded, the defendant gives in evidence that the debt was attached by foreign attachment in London, upon a plaint levied by J. S. (to whom the plaintiff was indebted) against the plaintiff, &c., the defendant will be driven to prove that the plaintiff was indebted to J. S., because the plaintiff has no notice of the foreign attachment, and therefore it may be only a contrivance by the defendant and J. S. to bar the plaintiff of his present action. *Palmer v. Hooke*, 1 Ld. Raym. 727. See *M'Daniel v. Hughes*, 3 East, 367.

The garnishee may plead that the cause of action did not arise within the jurisdiction. *Cook v. License*, 1 Ld. Raym. 347. See *Andrews v. Clerke*, Carth. 25; Comb. 109.

The plea of foreign attachment must state that the garnishee was within the jurisdiction of the Lord Mayor's court at the time of the attachment. *Crosby v. Hetherington*, 5 Scott, N. R. 637; 4 Man. & G. 923.

Where the plea alleged that a plaint had been levied against the plaintiff in the Lord Mayor's court before action, but contained no allegation that a *sci. fa.* issued to warn the defendant, who was the alleged garnishee previously to the commencement of the action, it was held, notwithstanding, to be good. *Webb v. Hurrell*, 4 D. & L. 824; 4 C. B. 287.

In an action for a debt by W. against D., D. pleaded that the debt had been attached in the hands of D. as garnishee in a plaint in the Lord Mayor's court of London by C. against W. *Replication*, that the debt sued for in the Lord Mayor's court did not arise or accrue within the jurisdiction thereof. This was held on demurrer a bad replication, for if the garnishee, after a regular judgment and execution against him, having paid the debt, might be compelled to pay it a second time, on proof in the subsequent suit that the suit did not arise within the jurisdiction of the Mayor's court, great hardship and injustice would be often occasioned to the garnishee, who may be entirely ignorant of the origin of the debt sued for, who has no means of contesting the debt, except by appearing and putting in bail to the original action, and who may be wholly unable to prove that the debt arose out of the jurisdiction of the Mayor's court, although the fact be so. See *per Lord Campbell, C. J.: Westoby v. Day*, 2 E. & B. 605. *See* Story's *Confl. of Laws.*

[1] If, in any case, the rights of foreigners out of their own country are governed by their own laws, it is not by force of those laws themselves, but by the laws of the country in which they may be, adopting those laws as part of their own law, for the purpose of regulating such rights. *Caldwell v. Vanlessengen*, 9 Hare, 425; 16 Jur. 115; 21 L. J. Ch. 97.

24 Vic. c. 11, provides for ascertaining the law of any foreign country or state, with the government of which her majesty may enter into a convention for the purpose of mutually ascertaining the law of such foreign country or state, when pleaded in actions depending in the courts of this country.

1st. Superior courts within her majesty's dominions may remit a case with queries to a court of any foreign state with which her majesty may have made a convention for that purpose, for ascertainment of law of such state.

2d. Court in which action depends to apply such opinion to the facts set forth in case.

3d. Courts in her majesty's dominions may pronounce opinion in case remitted by a foreign court.

4th. Interpretation of terms.

The defendants having manufactured a large quantity of printed paper to represent the public money of the kingdom of Hungary, in order to use it when opportunity should occur for purposes hostile to the sovereign ruling power of that kingdom, they were restrained at the suit of the Emperor of Austria, as King of Hungary, and decreed to deliver up the paper to be cancelled, and restrained by perpetual injunction from manufacturing such paper. *Emperor of Austria v. Kossuth*, 2 Giff. 628; 7 Jur. N. S. 483; 30 L. J. Ch. 690; 4 L. T. (N. S.) 274; affirmed on appeal, 7 Jur. N. S. 639; 30 L. J. Ch. 690; 9 W. R. 712; 4 L. T. (N. S.) 474, A. C.

The law of Austria is recognised by the law of England, and money being the medium of commerce, a foreign sovereign at peace with the Crown of England suing in the Court of Chancery to protect his prerogative right of issuing coin or paper money, will have his right protected from invasion.

A foreign kingdom is one under the dominion of a foreign prince: so that Ireland, or any other place subject to the Crown of England, cannot be called foreign, though to some purposes they are distinct from the realm of England, and Ireland is "in parts beyond the seas" within the meaning of that expression in an act of parliament. *Battersby v. Kirk*, 2 Bing. N. S. 584. *Lane v. Bennett*, 1 Mee. & W. 71.

Indictments for murder or manslaughter, or for being accessory to murder or manslaughter, committed on land out of the United Kingdom by British subjects, whether within the queen's dominions or without, the venue may be laid and the offender may be tried in any county or place in England or Ireland in which he shall be apprehended or be in custody. 24 & 25 Vic. c. 100, s. 9. Under this statute a British subject, who in a foreign country committed murder on a foreigner, would be triable in England. *Reg. v. Azzopardi*, 2 M. C. C. 228; 1 C. & Kir. 203. But it does not extend to offences committed by foreigners out of the realm, notwithstanding they are committed on Englishmen, and on board an English ship. *R. v. Depardo*,

I. A Contract is Expounded according to the Law of the Country in which it was Made, p. 495.

II. But the Proceedings to Enforce the Contract are Governed by the Lex Loci Fori, p. 497.

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I. A Contract is Expounded according to the Law of the Country in which it was Made.[1]

1 Taunt. 26; 7 C. & P. 458. See *R. v. Serva*, 1 Den. C. C. 104; 2 C. & Kir. 53. But it comprehends all countries, though within the dominion of a foreign power. *R. v. Sawyer*, R. & R. 294. *See* 1 F. & F. 240; 42 Geo. 3, c. 85; and 5 M. & S. 403. As to offences committed on the high seas, *see* 7 Geo. 4, c. 64, s. 27; 7 & 8 Vic. c. 211; 18 & 19 id. c. 91; 24 & 25 id. c. 96; 1 Den. C. C. 101.

[1] In cases of contracts entered into in a foreign country, and sued on here, it is a general rule that the law of the country where it was made is to be considered in expounding the contract. *Robinson v. Bland*, 1 W. Black. 256. *Trimby v. Vignier*, 1 Bing. N. C. 151. See *Fergusson v. Fyffe*, 8 Clark & Fin. 131. Thus where the action was for money paid for the use of an infant but not for necessaries, and it appeared that the cause of action accrued in Scotland, and that the defendant was under age, but it did not appear from the evidence what was the law of Scotland with respect to the defendant's liability; *Lord Eldon* said, "I hold myself not warranted in saying that such a contract is void by the law of Scotland because it is void by the law of England. The law of the country where the contract arose must govern the contract, and what that law is should be given in evidence to me as a fact. No such evidence has been given, and I cannot take the fact of what that law is without evidence." *Male v. Roberts*, 3 Esp. 163.

When a contract, entered into in one country, is sought to be enforced in another country, it must not only be valid according to the law of the country where it was made, but also according to the law of the country in which it is sought to be enforced. *Hope v. Hope*, 26 L. J. Ch. 417.

So much of the law of the country where the contract is made as affects the rights and merits of the contract, all that relates *ad litis decisionem*, is adopted from the foreign country, so much of the law as affects the remedy only; all that relates *ad litis ordinationem*, is taken from the *lex loci* of that country where the action is brought. *Per Tindal, C. J.: Huber v. Steiner*, 2 Scott, 304. *De la Vega v. Vianna*, 1 B. & Adol. 284.

The interpretation and legal obligation of a bill of exchange or promissory note are regulated by the law of the country where the amount of the bill or note becomes payable by force of the contract, so that on a foreign bill the liability of the acceptor, and the rate of interest payable where no rule is expressed on the face of the bill, will be determined by the law of the country where the bill is payable; but the obligation of the drawer, who binds himself to pay in case the acceptor does not, will be governed by the law of the place where the bill was drawn, and not by the law of the place where it was to be paid by the drawee. In the case of a bill drawn in France and accepted in England, if you sue the drawer upon the bill the contract will be governed by the law of France, where the bill was drawn; if you sue the acceptor it will be governed by the law of England, where the acceptor's contract to pay was made. *Cammell v. Sewell*, 29 L. J. Ex. 350.

An action will not lie in the courts of this country to enforce an oral agreement made in France, and valid there, which, if made here, could not, by reason of the Statute of Frauds, have been sued upon. *Leroux v. Brown*, 12 C. B. 801; 22 L. J. C. P. 1.

Where a promissory note was made in France by the defendant, a French subject, and then domiciled in France; the payee of the note indorsed it in blank, which mode of indorsement is, by the sects. 137, 138, of the Code de Commerce, invalid, and passes no property. The holder, an English subject, and the defendant, the drawer, then residing and carrying on business in London. The court held, that the plaintiff's right to recover was to be decided, not by the law of England, but by that of France; and as the law of the latter country, under the circumstances, would give the plaintiff no right of action, neither could he maintain one in the courts of this country. *Trimby v. Vignier*, 1 Bing. N. C. 151; 4 M. & Scott, 695. So where it appeared in an action on an unstamped Jamaica agreement, that by the law of that island "the contract required a stamp, and was void for want of it," the court held that the action in this country could not be maintained. *Alves v. Hodgson*, 7 T. R. 241; 2 Esp. 528. See *Clegg v. Levy*, 3 Camp. 166. But, except in the case of instruments made in her majesty's dominions, the want of a stamp in pursuance of the *lex loci* forms no objection to their admissibility in evidence upon the trial of an action in this country, for our courts do not notice the revenue laws of any other state; and therefore, where *assumpsit* was brought for money lent in France, and unstamped receipts were produced in proof of the loan, evidence to show that by the law of France such receipts required stamps to render them valid was rejected. *James v. Catherwood*, 3 D. & R. 190.

In an action of debt by two out of three syndics of a French bankrupt, upon an arbitral sentence and ordinance adjudging that the defendant should pay a sum of money to the bankrupt, the court held, first, that an examined copy of the agreement of reference, which was entered into in France, verified by the attesting witness, although the agreement was expressed to be "*fait au double*," was good evidence, as the original was deposited with a notary, and it was proved to be the usage in France (though there was no written law upon the subject) not to allow the removal of documents so deposited. Secondly, that although by the express agreement of the parties merchants were to be appointed as arbitrators, the Tribunal de Commerce, which it was agreed might name the arbitrators in case of disagreement, might appoint persons not merchants; and that the proceedings of foreign tribunals must be assumed to be according to the law, unless the contrary were shown. Thirdly, where a judgment had been obtained on a decree in the Cour de Première Instance, at Paris, on an award, the court refused to stay execution, on the ground that the defendant had lodged an appeal against the decree in the Cour de Cassation, which prevented any execution in France on the decree and award. *Alivon v. Furnival*, 3 Dowl. 202; 1 C., M. & R. 277; 4 Tyr. 751.

In an action upon a judgment recovered in the island of Mauritius, where the French law prevailed, for loss occasioned by fire originating in the defendant's house, the court held first, that this court could not say that the French judgment founded on the 1384th article of the French Code was necessarily bad, because it was not averred in the proceedings that the action was caused by negligence; and secondly, the foreign law requiring that process against a party absent from the country at the time when the suit was commenced should be served upon the king's attorney-general, the court could not say the law was so contrary to natural justice as to render the judgment void. The party, at the time the cause of action arose, being resident within the jurisdiction, the court would presume that the public officer would do whatever was necessary in the discharge of that public duty. *Becquet v. M'Carthy*, 2 B. & Adol. 951. But a decree of a foreign court, misinterpreting the law of this country, is not binding here. Thus, where an acceptance was cancelled by mistake, and the mistake was discovered immediately, and the mistake written on the face of the bill. The bill was drawn in France, upon a person in England, and there accepted and made payable. One of the indorsees brought the question before a French court, which, in mistake of the English law, decided that the holder could not recover. The court held, nevertheless, that he might recover in an action against the indorser, who had so raised the question before the French court, although he had by their decision lost his remedy against the drawer and prior indorsers. *Novello v. Rossi*, 2 B. & Adol. 757.

The assignee of an Irish judgment by *cognovit* may sue in this country in his own name. *O'Callaghan v. Marchioness of Thomond*, 3 Taunt. 82.

A plea of prescription by the law of France omitted the exception in that law — viz. "that the debt is not acknowledged by a separate and distinct act of the party charged in writing:" — *Held*, that the plea was bad in form, but that such defence being available under the general issue, and the doctrine of prescription applying only *ad litis ordinationem*, taken from the *lex fori* where the suit is instituted, and did not prevail in this country, which adopts only that part of the law of the foreign courts which affects the rights and merits of the contract, the right of action was only barred in the foreign country, and not in this; the plea, therefore, of the Statute of Limitations here being avoided by the defendant's absence beyond the sea since the cause of action accrued: — *Held*, that the plaintiff was entitled to recover. *Huber v. Steiner*, 2 Dowl. 781; S. C. 2 Scott, 304; S. C. 2 Bing. (N. S.) C. P. 202.

A foreigner coming to this country may be sued for debt, although the claim may have been confiscated in his own country, if such confiscation be contrary to the usage of nations. *Wolff v. Oxholm*, 6 M. & S. 92.

Where, in debt on a foreign judgment, the object of the pleas was to raise the question whether, by the foreign law, an escape after being taken in execution was a satisfaction, the court ordered the plea of *nil debet* to be struck out. *Alivon v. Furnival*, 1 Dowl. P. C. 690.

A foreign prince becoming a plaintiff voluntarily in a court of law in this country, becomes subject as to all matters connected with that suit to the jurisdiction of the court of equity; and a discovery being necessary to the plaintiff's defence at law, demurrer for that as against a sovereign. The suit was not maintainable. Overruled. *Rothschild v. Queen of Portugal*, 3 You. & C. 594.

There is, however, an exception to the rule that contracts are governed by the law of the country in which they are made, namely, when the parties, at the time of making the contract, had a view to a different kingdom: for contracts are also to be considered according to the place where they are to be executed. *Robinson v. Bland*, 1 W. Black. 256: *per Lord Mansfield*. Thus a bill of exchange payable in France is a foreign bill, although it be actually made in England (*Rothschild v. Currie*, 1 Q. B. 43), and due notice of dishonour being parcel of the contract, it is sufficient to entitle a party to recover on such a bill in this country to show that he gave sufficient notice of dishonour according to the law of France. (Id.)

Further, our courts will not afford redress on a contract made abroad, if it be expressly stipulated in such contract that no proceeding thereon shall be taken in a foreign country. Accordingly where, in a suit by seamen for wages, it appeared they were foreigners, and had expressly stipulated in

II. But the Proceedings to Enforce the Contract are Governed by the Lex Loci Fori.

Huber v. Steiner, 2 Scott, 304.

An instrument was made in Scotland which by the Scotch law had the operation and effect of a bond, and by that law a term of forty years was allowed, within which a suit might be instituted upon such an obligation. To an action brought in this country upon the instrument as a Scotch bond, the declaration in which set forth the Scotch term of limitation, the defendant pleaded the English Statute of Limitations upon demurrer to the plea.

The Court. That the remedy in this country was to be governed by our law of limitations, and that the claim here was barred thereby.

The proceedings to enforce the contract are governed by the *lex loci fori:* a period of limitation is an incident to the suit within this rule.[1]

III. With respect to Torts committed in a Foreign Country.[2]

IV. Foreign Laws, how Proved.[3]

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a contract made abroad that they should not sue the captain for wages in foreign parts, *Lord Ellenborough* said, "It is impossible for me to treat this stipulation as void. There may be great reason for protecting the captain from suits in foreign countries, where he may have no funds to answer the demands of the mariners; and it may be conducive to the interests of commerce that the mariners should have the strongest inducement to remain in the ship till the adventure is completed. The rate of wages might be in part determined by the condition that they were not demandable till the ship's return home. The agreement was made abroad, but it is transitory, and we are bound to give it the same construction and effect which it would receive in the country where it was made." *Johnson v. Machielsne*, 3 Camp. 44. *Gienar v. Meyer*, 2 H. Black. 603.

And all contracts made in one country concerning land and houses and immovable property situate in another country, must be interpreted according to the law of the country in which the property is situate, by the *lex loci rei sitæ*, and not by the *lex loci contractus*, or the law of the country where the contract is made. Story's *Confl.* ss. 424, 428. A contract or settlement, therefore, made in consideration of marriage, which deals with heritable property situate in Scotland, will be construed in England according to the law of Scotland. *Duncan v. Cannon*, 23 L. J. Ch. 265.

Where money is due upon a contract, it seems that it ought to be paid according to the currency of the place or country in which it is stipulated that the payment shall be made. See *Scott v. Bevan*, 2 B. & Adol. 78. *Suse v. Pompe*, 8 C. B. (N. S.) 538; 30 L. J. C. B. 75; *ante*, vol. ii. p. 483; 3 Chit. *Com. L.* 109.

With respect to the rule according to which the *lex loci* is to be determined, it has been thus stated:—When contracts are entered into between parties residing in different countries, through the medium of letters, the place where the final assent has been given by one party to an offer made by the other, is the place where the contract is considered to be made. Thus if a merchant at Genoa, by letter or by agent, offers to sell certain goods at a certain price to a person in London, and the latter accepts the offer, the contract is made at London. But if the person at London refuses the offer, and proposes to buy upon different terms, and the merchant of Genoa agrees to the proposal, the contract will then be deemed to have been concluded at Genoa. 2 Burge on Col. Law, 753. In the case of contracts in writing, the place where the covenantor or promisor executes or signs the contract is the place where it is made, although the contract is inchoate or incomplete, and does not obtain legal validity until something else has been done with his authority at some different place. *Snaith v. Mingay*, 1 M. & S. 29.

[1] *See* to same effect *British Linen Co. v. Drummond*, 10 B. & C. 903.

The protest and notice of dishonour of a bill are parcel of the contract, and not incidents of the remedy for the breach of it. *Rothschild v. Currie*, 1 Q. B. 43. The right to arrest a debtor is part of the *lex loci fori*, and may be enforced, although the creditor could not have resorted to that redress according to the law of the country where the contract was made. *De la Vega v. Viana*, 1 B. & Adol. 284. See *Kelsall v. Marshall*, 26 L. J. C. P. 19. *Show v. Harvey*, M. & M. 526.

[2] An action pending abroad for a wrong is no ground for staying proceedings in an action for the same wrong instituted in a tribunal in this country. *Cox v. Mitchell*, 7 C. B. (N. S.) 55. Neither does the pendency of a criminal proceeding in a foreign tribunal of the country in which an assault, the subject-matter of the action, was committed, prevent our courts entertaining jurisdiction in an action for the same assault, notwithstanding by the law of the foreign country no civil redress can be had until the defendant has been convicted of the assault by a court of special or criminal jurisdiction. *Scott v. Lord Seymour*, 6 L. T. (N. S.) 607.

[3] Independently of 24 Vic. c. 11 (*see ante*), foreign laws and customs, when in controversy in our courts, are proved by the evidence of an expert; that is, some person, whose official position, profession, or business, has made him familiar with the par-

FOREIGNERS. *See* Alien, vol. i. p. 285.

FOREST,[1] **and Forest Courts.** *See post*, Game; Mines.

ticular law or custom in question. See *Vanderdonckt v. Thellusson*, 19 L. J. C. P. 12. *Reg. v. Dent*, 1 C. & Kir. 97.

"The way of knowing foreign laws is, by admitting them to be proved as facts; and the court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement, the construction of which depends upon the custom of Paris, witnesses must be received to explain what the custom is, as evidence is received of customs in respect of trade. So in the supreme resort the judicial privy council determine all cases that arise in the plantations, in Gibraltar or Minorca, in Jersey or Guernsey, and they inform themselves by having the law stated to them." *Per Cur.: Mostyn v. Fabriyas*, Cowp. 174.

If the law is in writing, an authenticated copy of it ought to be produced. *Miller v. Heinrick*, 4 Camp. 155. *Clegg v. Levy*, 3 id. 166. *Boehkinck v. Schneider*, 3 Esp. 58.

A foreign seal can only be proved by one who is acquainted with the impression. *Henry v. Adey*, 3 East, 221. *Ganer v. Lanesborough*, Peake, 17. And the acts of a foreign state must be proved by copies examined with the archives abroad. *Richardson v. Anderson*, 1 Camp. 65, n.

A witness whose knowledge of the law of the foreign country was derived merely from having studied the law in a university in that country, to which he was a foreigner, and in which he resided merely during the period of his study at the university, is not an expert. *Bristow v. Sequeville*, 5 Ex. 275. *See* also as to what constitutes an expert, *Vanderdonckt v. Thellusson*, 8 C. B. 812. *Perth Peerage case*, 2 H. of L. C. 874.

[1] A great or vast wood, *locus sylvestris et saltuosus*. Our law-writers define it thus: *Foresta est locus ubi feræ inhabitant vel includuntur*; others say it is called *Foresta, quasi ferarum statio, vel tuta mansio ferarum*. Manwood, in his *Forest Laws*, gives this particular definition of it: "A forest is a certain territory or circuit of woody grounds and pastures, known in its bounds and privileges for the peaceable being and abiding of wild beasts; and forest chase and warren, to be under the king's protection for his princely delight, replenished with beasts of venery or chase, and great coverts of vert for succour of the said beasts, for preservation whereof there are particular laws, privileges, and officers belonging thereunto." Manw. p. 2, c. 1. *See* 1 Ex. 211; 8 Q. B. 981. *See*, as to Forest of Dean, 21 & 22 Vic. c. 37; 24 & 25 Vic. c. 40; and generally, 27 L. J. Ch. 23, 761; 9 C. B. (N. S.) 648.

Forests are of that antiquity in England, that (except the New Forest of Hampshire, erected by William, called the Conqueror, and Hampton Court, erected by King Henry Eighth; *see* stat. 31 Hen. 8, c. 5) it is said there is no record, nor history does make any certain mention of their erections and beginnings, though they are mentioned by several writers in the books of our laws and statutes. 4 Inst. 319. Our ancient historians tell us that the New Forest was raised by the destruction of twenty-two parish churches, and many villages, chapels, and manors, for the space of thirty miles together, which was attended with several judgments, as they are termed, on the posterity of King William I., who erected it; for William Rufus was there shot with an arrow; and before him, Richard, the brother of Henry I., was there killed; and Henry, nephew to Robert, the eldest son of the Conqueror, did hang by the hair of his head in the boughs of the forest.

Besides the New Forest, there are sixty-eight other forests in England, thirteen chases, and more than seven hundred parks; the four principal forests are,—New Forest on the Lea, Shirewood Forest on the Trent, Dean Forest on the Severn, re-afforested by stat. 20 Car. 2, c. 3, and Windsor Forest on the Thames. The way of making a forest is thus: certain commissioners are appointed under the Great Seal of England, who view the ground intended for a forest, and fence it round with metes and bounds; which, being returned into the Chancery, the king causes it to be proclaimed throughout the county where the land lies, that it is a forest, and to be governed by the laws of the forest, and prohibits all persons from hunting there without his leave; and then he appoints officers fit for the preservation of the vert and venison, and so it becomes a forest on record. Manw. c. 2. Though the king may erect a forest on his own ground and wastes, he may not do it on the ground of other persons without their consent; and agreements with them for that purpose ought to be confirmed by parliament. 4 Inst. 330. By the grant of the forest, the game of the forest do pass, and beasts of the forest are the harts, hind, buck, doe, boar, wolf, fox, hare, &c.

By stat. 50 Geo. 3, c. 65, his majesty is authorised to appoint three persons to be Commissioners of his Majesty's Woods, Forests, and Land Revenues, in whom are vested all the powers of surveyor-general of the land revenues, and surveyor-general of the woods, &c.

By stat. 52 Geo. 3, c. 16, s. 5, &c. the Treasury are empowered to alienate small parcels of crown lands intermixed with the property of subjects, upon report of the Commissioners of his Majesty's Woods, &c., and to make compensation and grant leases to persons relinquishing purprestures or encroachments in the forest; and by ss. 11 and 15 of the same act, additional powers are given to the Court of Attachment in Forests for preventing and punishing unlawful inclosures, and regulating the conduct of regarders, under-foresters, underkeepers, and other officers of the forests.

By stat. 55 Geo. 3, c. 55, s. 11, the Com-

FORESTALLING, Regrating, or Engrossing.[1]

FORFEITURE.[2] *See* Attainder, vol. ii. p. 1; Conditions, vol. iii. p. 164; Dower, *ante*, p. 130; *Felo de Se*, *ante*, p. 449; Felony, *ante*, p. 449; *post*, Outlawry; Treason.

missioners of the Woods, Forests, and Land Revenues, are empowered to contract for and sell his majesty's rights and interests in small parcels of lands, belonging to subjects within the royal forests.

As to the courts, the most especial court of a forest is the Swainmote, which is no less incident to it than a court of piepowder to a fair; and if this fail, there is nothing remaining of the forest, but it is turned into the nature of a chase. Manw. c. 21; Compt. Jur. 146.

The Court of Attachments, or Woodmote in Forests, is kept every forty days; at which the foresters bring in the attachments, *de viridi et venationi*, and the presentments thereof, and the verderors to receive the same, and enrol them; but this court can only inquire, not convict. The Court of Swainmote is holden before the verderors, as judges, by the steward of the Swainmote, thrice in the year; the swains are freeholders within the forest; are to appear at this court to make inquests and juries; and this court may inquire *de superoneratione forestariorum et aliorum ministrorum forestæ et de eorum oppressionibus populo nostro illatis*, and also may receive and try presentments certified from the Court of Attachments against offences in vert or venison; and this court may inquire of offences, and convict also, but not give judgment, which must be at the justice seat. 4 Inst. 289.

The Court of Regard or Survey of Dogs, is holden likewise every third year, for expeditation or lawing of dogs by cutting off to the skin three claws of the fore feet, to prevent their running at, or killing of deer. No other dogs but mastiffs are to be thus lawed or expeditated, for none other were permitted to be kept within the precincts of the forest, it being supposed that the keeping of these, and these only, was necessary for the defence of a man's house. 4 Inst. 308. The principal court of the forest is the Court of Chief Justice in Eyre, or Justice Seat, which is a court of record, and hath authority to hear and determine all trespasses, pleas, and causes of the forest, &c. within the forest, as well concerning vert and venison, as other causes whatsoever; and this court cannot be kept oftener than every third year. As before other justices in eyre, it must be summoned forty days at least before the sitting thereof; and one writ of summons is to be directed to the sheriff of the county, and another writ *custodi forestæ, domini regis vel ejus locum tenenti*, &c., which writ of summons consists of two parts; first, to summon all the officers of the forest, and that they bring with them all records, &c.; secondly, all persons who claim any liberties or franchises within the forest, and to show how they claim the same. It may also proceed to try presentments in the inferior courts of the forest, and to give judgment upon conviction of the swainmote. And the chief justice may, therefore, after presentment made, or indictment found, but not before, issue his warrant to the officers of the forest to apprehend the offenders. Stat. 1 Edw. 3, c. 8; 7 Ric. 2, c. 4. This court, being a court of record, may fine and imprison for offences within the forest; and therefore, if there be erroneous judgment at the justice-seat, the record may be removed by writ of error into B. R., or the chief justice in eyre may adjourn any matter to that court. 4 Inst. 291, b. 313.

[1] *Forestalling* was the buying or contracting for any merchandise or victual coming on the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price there. *Regrating* was the buying of corn or other dead victual in any market, and selling it again in the same market, or within four miles of the place. *Engrossing* was the getting into one's possession, or buying up large quantities of corn or other dead victual, with intent to sell them again. 4 Bl. Com. 148; 3 Inst. 195. These were offences at common law (*Rex v. Wadington*, 1 East, 142); but they were abolished by the 7 & 8 Vic. c. 24. *See* Godson on Patents and Copyright, p. 7, 2d edit.

[2] In all cases of forfeiture for the non-performance of any act, there must be evidence of the omission to do the act. *Doe d. Chandless v. Robson*, 2 C. & P. 245.

A right to re-enter for breach of covenant to repair is not waived by the giving of an extended time to make the repairs; but at the expiration of such extended time, if the default continue, the landlord may enforce the forfeiture. Neither is it waived by the acceptance of rent which accrued due before the forfeiture. *Doe d. Ranklin v. Brindley*, 4 B. & Adol. 85; 1 Nev. & M. 1. So a right to register is not waived by the steward of the party allowing a contractor to proceed with work as if it had been waived, he having full knowledge of the facts. *Doe d. Lord Kensington v. Brindley*, 12 Moore, 37.

The acceptance of (*Goodright v. Davids*, Camp. 803. See *Doe v. Pritchard*, 5 B. & Adol. 768), or distress for rent (*Doe v. Peck*, 1 id. 428), due after condition broken, with notice of the breach (*Gregson v. Harrison*, 2 T. R. 425. *Doe v. Birch*, 1 Mee. & W. 402. See *Croft v. Lumley*, 27 L. J. Q. B. 321), is a waiver of the forfeiture. If the forfeiture be for the breach of a continuing covenant, *e. g.* a covenant to keep insured (*Doe v. Peck*, *supra*) to repair (*Doe v. Jones*, 5 Ex. 498), not to underlet, &c. (*Doe v. Bliss*, 4 Taunt. 735), such acceptance or distress operates as a waiver of last breaches only, and, there-

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fore, a lessor who has a right of re-entry, reserved on a breach of covenant not to underlet, does not, by waiving his re-entry on one under-letting, lose his right to re-enter on a subsequent underletting; but where the condition is in its nature single and complete, *e. g.* a covenant not to assign (*Doe v. Pritchard*, 5 B. & Adol. 781), or to effect one policy of insurance (*Doe v. Peck*, *supra*), there the acceptance of rent or a distress is a waiver of the covenant or condition itself. *See* Conditions, vol. iii. p. 164; Covenant, id. p. 443; *post*, Landlord and Tenant.

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I. In General.

(A) *What constitutes the Offence.*[1]

[1] At common law the offence of forgery was punishable as a misdemeanor. It is defined by Blackstone (4 Com. 247), as "the fraudulent making or alteration of a writing, to the prejudice of another man's right." It has also been defined as "a false making, a making *malo animo* of any written instrument for the purpose of fraud and deceit." 2 East, P. C. 852. See *Reg. v. Marcus*, 2 C. & Kir. 356: *per Cresswell, J.*

It is not necessary to the sustaining an indictment for forgery at common law that any prejudice should, in fact, have happened from the fraud. *Ward's case*, 2 Stra. 747; 2 Ld. Raym. 1461. Nor is it necessary that there should be any publication of the forged instrument. 1 Russ. 318; 2 East, P. C. 855.

A publication or uttering of the instrument forged not being necessary to complete the offence of forgery (*see* 2 East, P. C. 855), where the note which the prisoner was charged with having forged was never published, but was found in his possession at the time he was apprehended, no objection was taken to the conviction, on the ground of the note never having been published, there being in the case circumstances sufficient to warrant the jury in finding a fraudulent intention. *Elliott's case*, 1 Leach, 173; 2 East, P. C. c. 19, s. 44, p. 951; 2 N. R. 93, note a; *Crocker's case*, Russ. & Ry. 97; 2 Leach, 987.

A forgery must be of some document or writing; therefore, painting an artist's name in the corner of a picture, in order falsely to pass it off as an original picture by that artist, is not a forgery. *Reg. v. Closs*, 1 Dears. & B. 460. See *Reg. v. Smith*, id. 566.

It is not a forgery fraudulently to induce a person to execute an instrument on a misrepresentation as to its contents (*Reg. v. Collins*, 2 M. & Rob. 461); nor, as it seems, fraudulently to procure a party's signature to a document, the contents of which have been altered without his knowledge. *Reg. v. Chadwick*, id. 454.

At common law, the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery. See *Ward's case*, 2 Stra. 747; 2 Ld. Raym. 1461; 2 East, P. C. 861.

As the counterfeiting of a matter of record is forgery, for since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. 1 Roll. Abr. 65. *See post*, p. 517. Also, it is agreed to be forgery to counterfeit any authentic matter of a public nature; as a privy seal (Cro. Car. 326; *post*, p. 505), or a license from the Barons of the Exchequer to compound a debt (2 Buls. 137), or a certificate of holy orders (1 Lev. 173), or a protection for a parliament man. 1 Sid. 142. It is also unquestionable that a man may be in like manner guilty of forgery at common law by forging a deed, (*see* Raym. 81), and therefore it seems that one may be equally guilty by forging a will, which cannot be thought to be less consequence than a deed. *See* Morr. 760. There seems to have been some strong opinions in the books, that the counterfeiting of any writings of an inferior nature to those above mentioned is not forgery at common law. *See* 1 Roll. 431. And it has been holden that the forging of another's hand, and thereby receiving rent due to him from his tenants, is not punishable at all (*see* Cro. Eliz. 166); but since *Ward's case*, 2 Stra. 747, this doctrine is exploded.

Deceit or a fraudulent intent is indispensable as an element in constituting the offence. *Coogan's case*, 2 East, 853. *Rex v. Jones*, 1 Leach, C. L. 365. *Rex v. Powell*, id. 77; 2 Bl. 787. Hence it has been holden, that he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks upon this as the other's hand and sealing, being done by his approbation and command. *See* 1 Hawk. P. C. c. 70.

Fraud may be inferred from the circumstances, and the intent to defraud the person who would have to pay, if the instrument is genuine, is to be presumed. *Rex v. Mazagora*, 1 Russ. & Ry. 291.

So the fraudulent application of a true signature to a false instrument for which it was not intended, or *vice versâ*, will also be forgery. *See* 2 East, P. C. 855. And it is forgery in a man who is ordered to draw a will for a sick person to insert legacies in it not authorised (*see* Noy. 101); or if, finding another name at the bottom of a letter, at a considerable distance from the other writing, he cause the letter to be cut off, and a general release to be written above the name, and then take off the seal and fix it under the release. *See* 3 Inst. 171.

So by altering a valid instrument, thereby giving it currency (*Rex v. Treble*, 2 Leach. C. L. 1040; 2 Taunt. 328; Russ. & Ry. 164); or by allowing an indorsement from the name of one firm to the name of another (*Rex v. Birkett*, 1 Russ. & Ry. 251); or a will, by changing a devise of a life estate into a fee. *Kinder's case*, 2 East, P. C. 855. An alteration is a forgery, notwithstanding the use of the words "alter and forge" in the statute. *Teague's case*, 2 id. 977.

Expunging an indorsement by means of lemon juice is forgery. *Rex v. Bigg*, 3 P. Wms. 419.

To constitute forgery by omission, the omission must be wilful, and not a bare nonfeasance. Hence, where an omission in a devise of an estate for life to one man causes a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, the person making such an omission is

guilty of forgery. *See* Moore, 762; Noy, 101.

Altering an instrument from a lower to a higher sum is forgery (*Rex v. Teague*, 2 East, P. C. 979); as by converting one into ten, although the word "pound" is not changed into "pounds." *Rex v. Dyson*, 1 Russ. & Ry. 101. So is an alteration of the date of an instrument with intent to accelerate payment or other fraudulent intent. *Master v. Miller*, 4 T. R. 320.

An indorsement by a person other than the person to whom a bill is payable, though he have the same name as such person, may be forgery. *Mead v. Young*, id. 28.

Falsely making an instrument in the name of a non-existing person (*Rex v. Bolland*, 1 Leach, C. L. 83; 2 East, P. C. 958), or falsely making and uttering an instrument representing it to bear the name of another person when no such person exists, is forgery (*Rex v. Parkes*, 2 Leach, C. L. 775; 2 East, P. C. 963); and it is the same as if the assumed name were the name of a person of known credit. *Francis' case*, 2 Russ. C. & M. 337. Hence, uttering a power of attorney bearing a fictitious name (*Lewis' case*, Fost. C. L. 116); or indorsing a bill (*Wilkes' case*, 2 Russ. C. & M. 328); or drawing a cheque on a banker in a fictitious name, is forgery (*Rex v. Lockett*, 2 East, P. C. 940; 1 Leach, C. L. 94); and it is immaterial whether any additional credit be gained by using the false name. *Rex v. Taft*, 1 Leach, C. L. 172; 2 East, P. C. 959. *Rex v. Whiley*, 1 R. & R. 90. Therefore, a receipt indorsed on a bill is a forgery; for although the prisoner did not gain any additional credit by signing the name to the receipt, as the bill was not by the indorsement made payable to the person whose name was used, yet still it was a forgery, for it was done with intent to defraud the true owner of the bill. *Rex v. Taylor*, 2 East, P. C. 960; 1 Leach, C. L. 214. So, uttering a forged order for the payment of money is forgery, although credit was actually given to such person independently of the order. *Rex v. Sheppard*, 1 Leach, C. L. 226; 2 East, P. C. 967. The offence consisting in the misrepresentation with a view to defraud. *Rex v. Peacock*, 1 Russ. & Ry. 278.

It is said to be clearly settled, that in the case of forgery committed in the name of a person really existing, it matters not whether the offender pass himself off upon the parties at the time for such person, and receive credit from them as such, the credit in such case not being given to the impostor personally without any relation to another, but to that other person whom he represents himself to be. *See* 2 East, P. C. 962. But if the signature is genuine, a false pretence by the person who utters such genuine document that he is that person does not constitute forgery. *Rex v. Hevey*, 1 Leach, C. L. 229; 2 East, P. C. 556. See *Rex v. Webb*, 1 Russ. & Ry. 405; 3 B. & B. 228. *Rex v. Watts*, 3 B. & B. 197; 1 Russ. & Ry. 436.

Where a woman assumed a false name, and represented herself to be the widow of a seaman, and induced a navy agent to advance her money on that representation, and put her mark in such assumed name to a promissory note for the amount, it was held to be forgery. *Dunn's case*, 1 Leach, C. L. 57; 2 East, P. C. 962. See *Haassela's case*, 2 Russ. C. & M. 327.

The forgery of a railway pass to allow the bearer to pass free on a railway is a forgery at common law; but the utterance of it *per se* is not a misdemeanor. *Reg. v. Boult*, 2 C. & Kir. 604.

A. gave to B., his clerk, a blank check, and directed him to fill it up with the amount of a bill and expenses (for which A. was to provide, and which amount B. was to ascertain), and get the cheque cashed and pay the amount to W., and take up the bill. The bill was for 156*l.* 9*s.* 9*d.*, the expenses about 10*s.* B. filled up the cheque for 250*l.*, got it cashed, and kept the whole amount, alleging that it was due to him for salary. It was held that this was forgery, and that it would be so notwithstanding B. *bonâ fide* believed that 250*l.* was due to him from A., or even if it were really due to him. *Reg. v. Wilson*, 2 C. & Kir. 527; 1 Den. C. C. R. 284; 17 L. J. M. C. 82.

To forge a certificate of service, sobriety, and good conduct at sea, with intent to deceive and defraud, is an offence indictable at common law. 1 Den. C. C. R. 492. Accordingly, a testimonial to character in order to obtain an appointment as a schoolmaster (*Reg. v. Sharman*, Dears. C. C. 285), a recommendation to a situation as a police-constable (*Reg. v. Moah*, 1 Dears. & B. 550), and the like, are forgeries at common law.

Where B., the prosecutor, made powders called B.'s Baking Powders, which he sold in packets wrapped up in printed papers, and the defendant caused a great number of wrappers to be printed so nearly resembling B.'s as to deceive persons of ordinary observation, and make them believe that they were B.'s, in which the defendant inclosed powders of his own, which he fraudulently sold as B.'s powders, this was held not to be forgery, but obtaining money by false pretences. *Reg. v. Smith*, 1 Dears. & B. 566.

It is forgery for a person having authority to fill up a blank acceptance, or a cheque for a certain sum, to fill up the bill or cheque for a larger sum. *R. v. Minter Hart*, 1 M. C. C. 486; 7 C. & P. 652. *Reg. v. Wilson*, 1 Den. C. C. 284; 2 C. & Kir. 527. See *Reg. v. Richardson*, 2 T. & Fin. 343.

It will not be forgery where the false instrument has no resemblance to the true one. Accordingly, in *Rex v. Jones*, 1 Leach, 204; 2 East, P. C. 883; Dougl. 302, the indictment was for altering a certain forged paper writing, purporting to be a bank-note, as follows:—

London, March 4, 1776.

I promise to pay John Wilson or bearer, ten pounds.

For Self and Company of my
Bank in England.

On a special verdict, the court were of opinion that the representation which the prisoner had made that it was a good bank-note could not alter the purport of it, which is what appears on the face of the instrument itself; for, although such false representations might make the party guilty of a fraud, or cheat, this could not make him guilty of felony. So, a document in the form of a promissory note which does not purport to be signed, cannot be regarded as a forged note. *Rex v. Pateman*, 1 Russ. & Ry. 455.

Where the practice was for a majority of the officers of a parish to draw cheques on the treasurer of a union, and one of their blank cheques, filled up for 1*l.* 3*s.* 6*d.* had a note at the bottom, "Unless this cheque is signed by a majority of the parish officers it will not be cashed;" and this cheque was signed by one of the officers, and was afterwards altered to 3*l.* 3*s.* 6*d.*, and when cashed by the treasurer had the signatures of a majority of the officers to it; it was held, that if the cheque were fraudulently altered when it had only one name to it this was no forgery, as it was then an incomplete instrument. *Reg. v. Turpin*, 2 C. & Kir. 820.

But a forged bank-note, although the word "pound" be omitted, and there be no watermark, is the subject of prosecution for forgery. *Rex v. Elliot*, 1 Leach, C. L. 175; 2 East, P. C. 951. So, in the case of engraving a counterfeit stamp, an exact resemblance or *fac-simile* is not required to constitute the crime of forgery; for if there be a sufficient resemblance to show that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient. *Rex v. Collicott*, 2 Leach, C. L. 1048; 4 Taunt. 300. And the same rule applies to the signing the wrong Christian name of a person whose will a forged instrument purports to be. *Rex v. Fitzgerald*, 1 Leach, C. L. 20; 2 East, 953.

It is said by *Lord Coke*, that to cause, is to procure, or counsel, one to forge; to assent, is to give his assent or agreement afterwards to the procurement or counsel of another; to consent, is to agree at the time of the procurement or counsel, and he in law is a procurer. But it is observed, that the assent here mentioned must be understood of an assent to the design of forging, before the fact of the forgery committed; since, according to *Lord Hale*, an assent after the fact committed makes not the party assenting guilty as principal in the forging: but it must be a precedent or concomitant assent.

Accessories are those who are privy to the forgery, but not so near to the utterer as to be able to afford him aid or assistance. *Rex v. Soares*, 2 East, 974; 1 Russ. & Ry. 25.

Where several persons, each by himself, executes a distinct part of the forgery, though they come not together when the instrument is completed, yet they are principals, and not accessories. *Rex v. Bingley*, 1 Russ. & Ry. 446. And where a wife, by the incitement of her husband, but in his absence, knowingly uttered a forged instrument, it was held that she might be indicted as principal, and he as accessory. *Rex v. Morris*, 2 Leach, 1096; 1 Russ. & Ry. 270. As to the punishment of accessories, *see post*, p. 527.

By the 24 & 25 Vic. c. 98, s. 40, "where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this act expressed to be an offence, if any person shall, in England or Ireland, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter in whatsoever place or country out of England and Ireland, whether under the dominion of her majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in England or Ireland; and if any person shall in England or Ireland forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or security, or any deed, bond, or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), or any indorsement on or assignment of any such undertaking, warrant, order, authority, request, deed, bond, or writing obligatory, in whatsoever place or country out of England and Ireland, whether under the dominion of her majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, authority, request, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, order, authority, or request be or be not under seal, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England or Ireland."

II. Forging the Great Seal, Privy Seal, &c.

Forging the Great Seal, Privy Seal, &c.[1]

24 & 25 Vic. c. 98, s. 1. "Whosoever shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, the Great Seal of the United Kingdom, her Majesty's Privy Seal, any Privy Signet of her Majesty, her Majesty's Royal Sign Manual, any of her Majesty's seals appointed by the twenty-fourth article of the Union between England and Scotland to be kept, used, and continued in Scotland, the Great Seal of Ireland, or the Privy Seal of Ireland, or shall forge or counterfeit the stamp or impression of any of the seals aforesaid, or shall utter any document or instrument whatsoever, having thereon or affixed thereto the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impression of such forged or counterfeited seal, or any forged or counterfeited stamp or impression made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or shall forge or alter, or utter, knowing the same to be forged or altered, any document or instrument having any of the said stamps or impressions thereon or affixed thereto, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

III. Forging Transfers of Stock, &c.

Forging transfer of certain stock, and power of attorney relating thereto.[2]

By sect. 2, "whosoever shall forge or alter, and shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any act of parliament, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, or to receive any dividend or money payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

(A) *Personating Owner of Stock.*[3]

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[1] By sect. 55, "nothing in this act contained shall extend to Scotland, except as otherwise hereinbefore expressly provided."

[2] See *Reg. v. Hatson*, 2 C. & Kir. 777.

It has been held upon the construction of the 33 Geo. 3, c. 30, that a person might be indicted for forging a transfer of stock standing in the name of a person by whom it never was accepted, and although the transfer was not attested by two witnesses. *Rex v. Gade*, 2 Leach, C. L. 732; 2 East, P. C. 874.

[3] By sect. 3, "whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the Bank of Ireland, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter, or by, under, or by virtue of any act of parliament, or any owner of any dividend or money payable in respect of any such share or interest as aforesaid, and shall thereby transfer or endeavour to transfer any share or interest belonging to any such owner, or thereby receive or endeavour to receive any money due to any such owner, as if such

(B) *Forging Attestation to Power of Attorney for Transfer of Stock, &c.*[1]

(C) *Making False Entries in the Books of the Public Funds.*[2]

(D) *Clerks of the Bank making out False Dividend Warrants.*[3]

IV. Forging East India Bonds.

Forging an East India bond.

24 & 25 Vic. c. 98, s. 7. "Whosoever shall forge or alter, or shall offer,

offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Obtaining and indorsing a dividend warrant at the bank in the name of a stockholder, is "personating a proprietor" within the statute. *Rex v. Parr*, 2 East, P. C. 1005; 1 Leach, 434.

[1] By sect. 4, "whosoever shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature of a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, as is in either of the last two preceding sections mentioned, or to receive any dividend or money payable in respect of any such share or interest, or shall offer, utter, dispose of, or put off, any such power of attorney or other authority, with any such forged name, handwriting, or signature thereon, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Where one of several trustees (a partner in a banking firm) executed a forged power of attorney to enable the partners, or either of them, to sell out the trust stock, and the other partners had signed the receipts for the money, but which, after being paid into the city bankers of the firm, and credited and entered into the pass-book, he had intercepted and kept out of the house-book of the firm; the judge, assuming the validity of the power of attorney, directed the jury, that, in the absence of any authority under it to pay the money to one party, who, according to the ordinary course of business, was not entitled to receive it, payment to him was no discharge; the unusual mode of transacting the business of the firm might avail as between the partners, but not as between them and the plaintiffs. *Stone v. Marsh*, 1 Ry. & M. 364. So, where bankers employed to receive dividends in the funds had in their own books credited their employers with the dividends as received, and had allowed them to draw without having any other funds in their hands:—*Held*, that the bankers were bound by the entries so acted on, though not communicated; and that they could not set up as a defence that the entries had been fraudulently made by one of the partners, the money never having been received by the house. *Hume v. Bolland*, 1 id. 371. The forgery of a power of attorney for any pension due, or supposed to be so, is within the statute, although it may be that no such pension exists to which such document professes to relate. *Reg. v. Pringle*, 2 M. C. C. 127.

[2] By sect. 5, "whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the Governor and Company of the Bank of England, or the Governor and Company of the Bank of Ireland, in which books the accounts of the owners of any stock, annuities, or other public funds, which now are or hereafter may be transferable at the Bank of England, or at the Bank of Ireland, shall be entered and kept, or shall in any manner wilfully falsify any of the accounts of any of such owners in any of the said books, with intent in any of the cases aforesaid to defraud, or shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the Bank of Ireland, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

[3] By sect. 6, "whosoever, being a clerk, officer, or servant of or other person employed or intrusted by the Governor and Company of the Bank of England, or the Governor and Company of the Bank of Ireland, shall knowingly make out or deliver any dividend warrant, or warrant for payment of any annuity, interest, or money payable at the Bank of England or Ireland, for a greater or less amount than the person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

utter, dispose of, or put off, knowing the same to be forged or altered, any bond commonly called an East India bond, or any bond, debenture, or security issued or made under the authority of any act passed or to be passed relating to the East Indies, or any indorsement on or assignment of any such bond, debenture, or security, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

V. Forging Exchequer Bills, Bonds, and Debentures, &c.

Forging exchequer bills, bonds, and debentures, &c.

24 & 25 Vic. c. 98, s. 8. "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill, or exchequer bond, or exchequer debenture, or any indorsement on or assignment of any exchequer bill, or exchequer bond, or exchequer debenture, or any receipt or certificate for interest accruing thereon, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

(A) *Making Plates, &c. in Imitation of those used for Exchequer Bills, &c.*[1]

(B) „ *Paper in Imitation of that used for Exchequer Bills, &c.*[2]

(C) *Having in possession Paper, Plates, or Dies, to be used for Exchequer Bills, &c.*[3]

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[1] By sect. 9, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or cause or procure to be made, or shall aid or assist in making, or shall knowingly have in his custody or possession, any frame, mould, or instrument having therein any words, letters, figures, marks, lines, or devices peculiar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills, or exchequer bonds, or exchequer debentures, or any machinery for working any threads into the substance of any paper, or any such thread, and intended to imitate such words, letters, figures, marks, lines, threads, or devices, or any plate peculiarly employed for printing such exchequer bills, bonds, or debentures, or any die or seal peculiarly used for preparing any such plate, or for sealing such exchequer bills, bonds, or debentures, or any plate, die, or seal intended to imitate any such plate, die, or seal as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

[2] By sect. 10, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or cause or procure to be made, or aid or assist in making, any paper in the substance of which shall appear any words, letters, figures, marks, lines, threads, or other devices peculiar to and appearing in the substance of any paper provided or to be provided or used for such exchequer bills, bonds, or debentures, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall knowingly have in his custody or possession any paper whatsoever, in the substance whereof shall appear any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any parts of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall cause or assist in causing any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, to appear in the substance of any paper whatever, or shall take or assist in taking any impression of any such plate, die, or seal as in the last preceding section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

[3] By sect. 11, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or

VI. Forging Bank-Notes.

Forging a bank-note, &c.

By 24 & 25 Vic. c. 98, s. 12, "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the Governor and Company of the Bank of England, or of the Governor and Company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, commonly called a bank-note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank-note, bank bill of exchange, or bank post bill, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

(A) *Purchasing or Receiving, or having Forged Bank-Notes, &c.*[1]

(B) *Making and Engraving Plates, &c. for Bank-Notes, &c.*[2]

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receive, or knowingly have in his custody or possession, any paper manufactured and provided by or under the directions of the Commissioners of Inland Revenue or Commissioners of her Majesty's Treasury, for the purpose of being used as exchequer bills, or exchequer bonds, or exchequer debentures, before such paper shall have been duly stamped, signed, and issued for public use, or any such plate, die, or seal as in the last two preceding sections mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three years, with or without hard labour."

[1] By sect. 13, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or receive from any other person, or have in his custody or possession, any forged bank-note, bank bill of exchange, or bank post bill, or blank bank-note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

[2] By sect. 14, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or use, or knowingly have in his custody or possession, any frame, mould, or instrument for the making paper with the words 'Bank of England' or 'Bank of Ireland,' or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used by the Governor and Company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively, or shall make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession, any paper whatsoever with the words 'Bank of England' or 'Bank of Ireland,' or any part of such words intended to resemble and pass for the same visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, appearing visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used by the Governor and Company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively, or shall by any art or contrivance cause the words 'Bank of England' or 'Bank of Ireland,' or any part of such words intended to resemble and pass for the same, or any device or distinction peculiar to and appearing in the substance of the paper used by the Governor and Company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills, of such banks respectively, to appear visible in the substance of any paper, or shall cause the numerical sum or amount of any bank-note, bank bill of exchange, or bank post bill, blank bank-note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

By sect. 15, "nothing in the last preceding section contained shall prevent any person

(C) *Engraving or having any Plates, &c. for making Notes of Bank of England or Ireland, or other Banks, or having such Plate, &c., or Uttering or having Paper upon which a Blank Bank-Note, &c. shall be Printed.*[1]

(D) *Engraving Word, Number, or Device resembling Part of a Bank-Note or Bill, &c.*[2]

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from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in a numerical figure or figures denoting the amount thereof in pounds sterling, appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines or any other devices in the nature of watermarks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines or the watermarks of the paper used by the Governor and Company of the Banks of England and Ireland respectively."

[1] By sect. 16, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in any wise make upon any plate whatsoever, or upon any wood, stone, or other material, any promissory note, bill of exchange, or bank post bill, or part of a promissory note, bill of exchange, or bank post bill, purporting to be a bank note, bank bill of exchange, or bank post bill, of the Governor and Company of the Bank of England or of the Governor and Company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, or to be a blank bank-note, blank promissory note, blank bank bill of exchange, or blank bank post bill of the Governor and Company of the Bank of England or of the Governor and Company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or to be a part of a bank-note, promissory note, bank bill of exchange, or bank post bill of the Governor and Company of the Bank of England or of the Governor and Company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or any name, word, or character resembling or apparently intended to resemble any subscription to any bill of exchange or promissory note issued by the Governor and Company of the Bank of England or the Governor and Company of the Bank of Ireland, or by any such other body corporate, company, or person as aforesaid, or shall use any such plate, wood, stone, or other material, or any other instrument or device, for the making or printing any bank-note, bank bill of exchange, or bank post bill, or blank bank-note, blank bank bill of exchange, or blank bank post bill, or part of a bank-note, bank bill of exchange, or bank post bill, or knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any blank bank-note, blank bank bill of exchange, or blank bank post bill of the Governor and Company of the Bank of England, or of the Governor and Company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or part of a bank-note, bank bill of exchange, or bank post bill, or any name, word, or character resembling or apparently intended to resemble any such subscription, shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

The unlawful possession of a copperplate of a colonial bank was held an offence within a similar enactment. *Reg. v. Hannon*, 9 C. & P. 11; 2 M. C. C. 77.

[2] By sect. 17, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any word, number, figure, device, character, or ornament, the impression taken from which shall resemble or apparently be intended to resemble any part of a bank-note, bank bill of exchange, or bank post bill of the Governor and Company of the Bank of England, or of the Governor and Company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, or shall use, or knowingly have in his custody or possession, any such plate, wood, stone, or other material, or any other instrument or device for the impressing or making upon any paper or other material any word, number, figure, character, or ornament which shall resemble or apparently be intended to resemble any part of a bank-note, bank bill of exchange, or bank post bill of the Governor and Company of the Bank of England, or of the Governor and Company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper or other material upon which there shall be an impression of any such matter as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen

(E) *Making or having Mould for making Paper with the Name of any Banker, or making or having such Paper.*[1]

(F) *Engraving Plates for Foreign Bills or Notes, or using or having such Plates, or Uttering Paper on which any Part of any such Bill or Note is Printed.*[2]

VII. Forging Deeds, Wills, Bills of Exchange, &c.

Forging deeds, bonds, &c.

By 24 & 25 Vic. c. 98, s. 20,[3] "whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory, having thereon any such forged name, handwriting, or signature,

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years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

[1] By sect. 18, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any body corporate, company, or person carrying on the business of bankers (other than and except the Banks of England and Ireland respectively), appearing visible in the substance of the paper, or knowingly have in his custody or possession any such frame, mould, or instrument, or make use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession, any paper in the substance of which the name or firm of any such body corporate, company, or person shall appear visible, or by any art or contrivance cause the name or firm of any such body corporate, company, or person to appear visible in the substance of the paper upon which the same shall be written or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

See *Reg. v. Keith*, Dears. C. C. 486.

[2] By sect. 19, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatsoever language the same may be expressed, and whether the same shall or shall not be or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate or body of the like nature, constituted or recognised by any foreign prince or state, or of any person or company of persons, resident in any country not under the dominion of her majesty, or shall use, or knowingly have in his custody or possession, any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any part of any such foreign bill, note, undertaking, or order shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

See *R. v. Wasshaner*, 1 M. C. C. 466. *R. v. Harris*, 7 C. & P. 416. *Reg. v. Hannon*, 2 M. C. C. 77; 9 C. & P. 11.

[3] By sect. 39, "where by this or by any other act any person is or shall hereafter be made liable to punishment for forging or altering, or for offering, uttering, disposing of or putting off, knowing the same to be forged or altered, any instrument or writing designated in such act by any special name or description, and such instrument or writing, however designated, shall be in law a will, testament, codicil, or testamentary writing, or a deed, bond, or writing obligatory, or a bill of exchange, or a promissory note for the payment of money, or an indorsement on or assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant, order, authority, or request for the payment of money, or an indorsement on or assignment of an undertaking, warrant, order, authority, or request for the payment of money, within the true intent and meaning of this

knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

(A) *Forging Wills.*

Forging wills.

By 24 & 25 Vic. c. 98, s. 21, "whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off,[1] knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

(B) *Forging Bills of Exchange or Promissory Notes.*

Forging bills of exchange or promissory notes.[2]

By sect. 22, "whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, indorsement, or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement or assignment of

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act, in every such case the person forging or altering such instrument or writing, or offering, uttering, disposing of, or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this act, and punished accordingly."

The giving of an administration bond to the ordinary in a false name is a forgery. *Reg. v. Barber*, 1 C. & Kir. 434.

[1] A., an attorney, was employed by B. as his solicitor to put out money on mortgage; C. applied to A. to procure him the advance of money on mortgage, and to act as his solicitor in procuring it; C. stated to A. that he was the owner of certain freehold lands, and produced a forged will in proof of his title, which he placed in the hands of A. B. advanced the money, A. acting as his solicitor by preparing the mortgage deeds, &c.:—*Held*, that on the trial of C. for uttering the forged will, A. was bound to produce the will, and also to give evidence of what C. said to him as to the advance of the money. The forgery of the will of a non-existing person is a forgery within the statute. *Reg. v. Avery*, 8 C. & P. 596.

If a forged instrument, purporting on the face of it to be a last will and testament, be uttered and published as a true last will and testament, under circumstances manifesting an intention to defraud, it is equally within the meaning of the act of parliament, whether the supposed testator be in fact alive or dead; for the objection is only applicable to the effect which a will has in law, and not to the fact of making it. A contrary doctrine would operate as a repeal of the law; for, if the act of making the will were not forgery at the time, a publication afterwards would not make it so. *Rex v. Coogan*, 1 Leach, C. L. 440. *Murphy's case*, 10 St. Tr. 183; 2 East, P. C. 949. *Rex v. Sterling*, 1 Leach, C. L. 99; 2 East, P. C. 950.

[2] An instrument drawn by A. on B., requiring him to pay the administrators of C. a certain sum at a certain time, "without acceptance," is a bill of exchange, and may be so described in the indictment. *Reg. v. Kinnear*, 2 M. & Rob. 117. And though no person be named as drawee, yet the defendant may be indicted for uttering a forged acceptance on a bill of exchange. *Reg. v. Hawkes*, 2 M. C. C. 60. But an indictment for forging a bill of exchange cannot be supported in the case of such an instrument. *Reg. v. Curry*, id. 218. An instrument payable to the order of A., and directed "At Messrs. P. & Co., bankers," was held to be properly described as a bill of exchange. *Reg. v. Smith*, id. 295; 1 C. & Kir. 700. See *Gray v. Milner*, 8 Taunt. 739.

Adding a false addition to a fictitious name, for the purpose of inducing a party to present a second time a bill he had before presented without success, is forgery. *Rex v. Francis*, 1 R. & R. 208. It is not the less forgery because the bill is not stamped (*Rex v. Hewkeswood*, 1 Leach, 257), or not negotiable. *Rex v. Box*, 6 Taunt. 325; 1 R. & R. 200.

Putting an address to the name of a drawer of a bill of exchange, while the bill is in the course of completion, with intent to make the acceptance appear to be that of a different existing person, is a forgery. *Reg. v. Blenkinsop*, 1 Den. C. C. R. 276; 2 C. & Kir. 57; 17 L. J. M. C. 62.

An intention to take up a forged bill does not alter the offence. *Rex v. Geach*, 9 C. & P. 499. And where the prisoner uttered a bill, all the names on which were fictitious, but known to be so to the party to whom it was tendered in payment of a debt, although it was believed that he intended to provide for it when at maturity:—*Held*, that the prisoner was properly convicted. *Reg. v. Hill*, 2 M. C. C. 30. Forging an acceptance

any such promissory note, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

(C) *Forging Orders, Receipts, &c. for Money, Goods, &c.*

Forging orders, receipts, &c. for money, goods, &c.[1]

By 24 & 25 Vic. c. 98, s. 23, "whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or any other security for the payment of money, or for procuring or giving credit, or any

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of an incomplete instrument, as where at the time no drawer's name was inserted:—*Held*, not a forgery of an acceptance of a bill of exchange within 1 Wm. 4, c. 66, s. 64. *Rex v. Butterwick*, 2 M. C. C. 196. So, where the prisoner was charged with uttering a forged bill, it appeared that the bill was not addressed to drawee by name, but at a house of business, and having an acceptance forged on it:—*Held*, to be properly described as a bill of exchange. *Reg. v. Hawkes*, id. 60. The writing an acceptance of an existing person without authority, or of a non-existing firm or person, with intent to defraud, is forgery. *Reg. v. Rogers*, 8 C. & P. 629. So, where the prisoner, having received from the prosecutor a bill dated at three months, and afterwards alleging that he could not get one for so large an amount discounted, prevailed on the prosecutor to accept one for a smaller sum, and, pretending to destroy the former one, afterwards altered it to a date of twelve months:—*Held* to be a forgery, with intent to defraud the prosecutor. *Rex v. Atkinson*, 7 C. & P. 669. Where, from previous dealings, a party has used the name of another on bills, under a *bonâ fide* belief that he had authority to do so, and without intention to defraud, the jury ought to acquit him. *Rex v. Parish*, 8 C. & P. 94. *Reg. v. Beard*, id. 143. *Rex v. Forbes*, 7 id. 224. And the fact that, on three or four previous occasions, when he had drawn bills in that way, the party whose name was used had paid even without remark or remonstrance, would afford fair ground for the belief that he had such authority. But if a person, wishing to raise money, put the name of another on a bill without his authority, intending to pay the bill when due, and believing that he should be able to do so, this is forgery. So, if a person, relying on the kindness of another (a near relation, for instance), uses his name on a bill without authority, trusting that that person will pay it rather than there should be a criminal prosecution on the subject, this also is forgery. *Reg. v. Beard, supra.* A letter written by the prisoner to a third person, saying that his name was on another bill, and desiring him not to say that it was a forgery:—*Held* admissible as proof of a guilty knowledge, though not of actual forgery, without such other bill being produced. *Rex v. Forbes, supra.* It is forgery for a person having authority to fill up a blank acceptance for one sum only, to fill up the bill for a larger sum. *Rex v. Hart*, 1 M. C. C. 486; 7 C. & P. 652. The forging an instrument in the form of a promissory note for 100*l.*, or such other sum not exceeding that sum as the payee might incur by reason of becoming surety to the sheriff for his officer:—*Held* to be a forging an undertaking for the payment of money. *Rex v. Reed*, 8 C. & P. 623. Where the prisoner deposited a forged acceptance with bankers, which he hoped would be a security for what he owed, to which the manager replied that it would depend on the result of inquiries as to the acceptor:—*Held* a sufficient uttering. And where a party utters what he knows to be a forged instrument, it is a consequence that he intends to defraud the party to whom he utters it:—*Held* also, that writing an acceptance on a blank stamp, which is afterwards filled up by another, would not amount to a forgery of the acceptance of a bill. *Rex v. Cooke*, 8 C. & P. 582. On the trial of an indictment for uttering a forged bill of exchange, if the jury are satisfied that the prisoner uttered the bill as a true bill, meaning it to be taken as such, and at that time knew it to be forged, they ought to find, as a necessary consequence of law, that the prisoner intended to defraud; and the jury ought to infer the intent to defraud if they are satisfied on the two other points. *Rex v. Hill*, id. 274.

Where the forged notes were furnished by the prisoner to the agents of government for the detection of forgeries, it was held to be "a disposing of and putting away" the notes. *Rex v. Holden*, 2 Leach, 1019.

[1] Any instrument for the payment of money under which, if genuine, the payer might recover the amount against the party signing it, may properly be considered as a warrant for the payment of money; and it is equally such, whatever may be the state of account between the parties, and whether the party apparently signing it had at the time funds in the hands of the party to whom it is addressed or not. *Reg. v. Vivian*, 1 Den. C. C. 35; 1 C. & Kir. 719. Accordingly, it has been held that a forged draft

indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

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on a banker in a fictitious name, or in the name of a person who does not keep an account, or in the name of a person who does keep an account, whatever the state of his account may be, is an order for payment of money within the statute. *R. v. Lockett*, 1 Leach. 94. *R. v. Abraham*, 2 East, P. C. 941. *Reg. v. Carter*, 1 Den. C. C. 65; 1 C. & Kir. 741.

The statute applies as well to a written promise for the payment of money by a third person as by the supposed party to the instrument. *Reg. v. Stone*, 1 Den. C. C. 181; 2 C. & Kir. 364. A written promise to pay a sum specified, or such other sum not exceeding the same as A. B. may incur by reason of his suretiship, is an undertaking for the payment of money within the statute. *Reg. v. Reed*, 2 M. C. C. 62; 8 C. & P. 623. A sailor's shipping-note for a certain sum, payable to A. or bearer five days after the ship shall sail, is an undertaking within the statute. *Reg. v. Anderson*, 2 M. & Rob. 469. But an instrument professing to be a scrip certificate of a railway company is not an undertaking within the act. *Reg. v. West*, 1 Den. C. C. 258; 2 C. & Kir. 496.

The defendant, who was in the employment of a tanner, and paid by the job, was employed also to arrange the accounts for himself and the other men, and made out the account weekly, and brought it to the foreman, stating therein the amount to which he was entitled, and the foreman looked it over, and if he found it correct signed it, and then the defendant took it so signed to the cashier, who, on seeing the signature, paid the amount. The defendant, on one occasion, presented to the cashier an account for a larger sum than was due to him, with the name of the foreman forged thereto. This was held not to be a forgery of a warrant for the payment of money, inasmuch as, assuming the document to be genuine, the cashier would have no claim in respect of it against the foreman. *Reg. v. Pilling*, 1 F. & F. 324.

Upon the construction of the 7 Geo. 2, c. 22, nine of the judges were clearly of opinion that the words "warrant" or "order," as they stood in the act, were synonymous, and imported that the person giving such warrant or order had, or at least claimed, an interest in the money or goods which were the subject-matter of it, and had, or at least assumed to have, a disposing power over them, and took on him to transfer the property, or at least the custody of them, to the person in whose favour such warrant or order was made. *Mitchell's case*, 2 East, 936; Fost. C. L. 119.

An instrument in the form of a bill for "my proportion of money due to me for my services on board his majesty's ship Leander," but which was not a bill of exchange, being for an unascertained sum, was held to be properly described as an order for money. *Rex v. M'Intosh*, 2 East, 942.

A writing in the form of a bill of exchange, but without any drawee's name, cannot be charged as an order for the payment of money, at least unless shown by averments to be such. *Reg. v. Curry*, 2 M. C. C. 218.

A foreign letter requesting a correspondent in England to advance money, was held to support a charge of forging an order for money, upon proof that such letters were in the ordinary course of business treated as orders for payment of money. *Reg. v. Rauke*, 2 M. C. C. 66; 8 C. & P. 627. Where the instrument was an order to pay the prisoner or order 4*l.* 5*s.*, being a month's advance on an intended voyage to Quebec in the ship Mary Ann, as per agreement with G. M., master, and the prisoner had written in the margin of the order, "On receiving this cheque I agree to sail and to be on board within sixteen days from the date of this cheque," it was held to be an order for the payment of money within the statute. *R. v. Bamfield*, 1 M. C. C. 417. A dividend warrant of a railway company, signed by the secretary and addressed to a banker, requesting him to pay the sum named in the warrant to a certain shareholder, and to charge the same to the company's revenue account, may be properly described as a warrant and order for money. *Reg. v. Antey*, 1 Dears. & B. 295. A writing purporting to authorise the bearer to receive money deposited in a bank by a friendly society on accountable receipts, and purporting to be signed by the principal officers of the society (the bank having received the money on terms of repayment to the order of the society), was held to be well described as a warrant for the payment of money; and it was held to be no objection that the defendant was himself a member of the society. *Reg. v. Harris*, 2 M. C. C. 267; 1 C. & Kir. 179.

A paper in the following terms:—"I hereby certify that the within-named W. M. is gaining his living by hawking," the production of which was necessary in order

that the defendant might obtain payment of a sum of money, was held not to be either an undertaking, a warrant, or an order for the payment of money, and to be the subject only of prosecution for forgery at common law. *Reg. v. Mitchell*, 2 F. & F. 44. A letter written to a wholesale house in London, in the name of a customer in the country, in the following terms:—"I shall feel obliged by your paying Mr. B. the sum of 2*l.* 7*s.* 8*d.*, and debiting me with the same. You will please have a receipt, and add the amount to invoice of order in hand," was held neither to be an undertaking, a warrant, or an order for the payment of money, but a request. *Reg. v. Thorn*, 2 M. C. C. 210; Car. & M. 206. See *Reg. v. Roberts*, 2 M. C. C. 258; Car. & M. 652. But a forged document purporting to be a bill for goods sold to the prosecutor, with a request for its payment, may be described either as a warrant or as an order for payment of money. *Reg. v. Dawson*, 2 Den. C. C. 75. And where the defendant in England forged on a letter of credit, whereby a bank in Australia was required to "honour the draft of R. T." for 50*l.*, an indorsement of R. T.'s name, this was held not to be a forgery of an order for money, the payment of the money on such simple indorsement not being within the original mandate. *Reg. v. Wilton*, 1 F. & F. 391.

It was the practice of the treasurer of the county of S., when an order had been made on him for the payment of the expenses of a prosecution, to pay the whole amount of the expenses of the prosecution to the attorney or his clerk, and to require the signature of every person named in the order to be written on the back of it, and opposite to each name the sum ordered to be paid to each person respectively. It was held that such a signature was not a receipt, the forgery of which is an offence against the statute, but was merely an authority to the treasurer to pay the amount. *Reg. v. Cooper*, 2 C. & Kir. 586.

Where the request was addressed to a woman in her maiden name, but she had married before the date of it, an indictment charging the intent to be to defraud her husband was held good. *R. v. Carter*, 7 C. & P. 134.

Where a high constable had issued his precept for the payment of a county rate for a certain amount, and having received it wrote a receipt at the foot, and the prisoner, who had collected the rate, afterwards fraudulently altered the precept by adding a figure in the amount, namely, changing 5*s.* to 15*s.*, and claimed to be allowed that larger amount in the account, this was held to be a forgery in the receipt. *R. v. Vaughan*, 8 C. & P. 276; and see *Reg. v. Griffiths*, 1 Dears. & B. 548.

A "tasting order" for the London Docks, purporting to be signed by a merchant, was held to be an order for the delivery of goods, notwithstanding before the bearer is allowed to taste it is necessary to have the order crossed by the clerk there with his signature, and when presented to the clerk he refused to cross it. *R. v. Hedges*, 1 Den. C. C. 404; 2 C. & Kir. 871.

In *Rex v. Cullen*, 5 C. & P. 116, it was held to be essential that the order should be directed to some person. But in a subsequent case, a prisoner was indicted on the 2 & 3 Wm. 4, c. 123, for forging a warrant for the payment of money (not setting it out). The forged paper was as follows:—"This is to *satisfy* that R. R. *as* swept the flues and cleaned the bilges, and repaired bridges of the Princess Victoria. (Signed) J. N., 4*l.* 10*s.*" It was proved that, by the course of dealing between the parties, the voucher, if genuine, would have authorised S. & Co. to pay 4*l.* 10*s.*:—*Held*, that it is not necessary that a warrant for the payment of money should be addressed to any particular person; and that, as it appeared that this document, if genuine, would have been a voucher for the payment of money mentioned in it, that was a sufficient proof of the allegation that it was a warrant for the payment of money; and that if in an indictment for forgery the instrument be described and not set out, it is matter of evidence whether the instrument comes within the designation given of it in the indictment or not; and that averments to show that the document comes *within* the designation given of it in the indictment are now (in this form of indicting) unnecessary. *Reg. v. Rogers*, 9 C. & P. 41.

The forging of a paper by which the supposed writer promises to pay to W. B. or order 100*l.*, or such other sum not exceeding the same as he may incur by reason of his becoming one of the sureties to the sheriff of G., for J. R., a sheriff's officer, is a forging of an undertaking for the payment of money. *Rex v. Reed*, 8 C. & P. 623.

Indictment for forging an order for payment of money. The instrument was an order to pay prisoner or order the sum of 4*l.* 5*s.*, being a month's advance on an intended voyage to Quebec in the ship Mary Ann, as per agreement with G. M., master. The prisoner had in the margin of the order written, "On receiving this cheque I agree to sail, and to be on board within sixteen hours from the date of this cheque:"—*Held*, a good order for payment of money within the meaning of the statute. *Rex v. Bamfield*, 1 M. C. C. 416.

The prisoner having obtained an order for payment, signed in the names of the chairman and one guardian, added the name of another:—*Held*, that by uttering the instrument he put forth as true whatever was stated in it, and it appearing from the minutes that another person was chairman on the day of the date was immaterial. *Reg. v. Pike*, 2 M. C. C. 70.

It was held not to be any offence under the stat. 1 Wm. 4, c. 66, to forge an indorsement upon a warrant or order for the payment of money; nor, if a party wrote on the back of a bill of exchange, "Received, for R. A.," and signed his own name to it, was he guilty of forging a receipt within the

provisions of that statute. *Rex v. Arscott*, 6 C. & P. 408.

On an indictment for uttering a forged order for goods, the letter purporting only to be a request, and the person whose name was forged having no authority to order:—*Held* wrong, as he might have been indicted for uttering a forged request. *Reg. v. Newton*, 2 M. C. C. 59.

In forgery, the order charged as forged ought to import that the person making it has a disposing power over the subject of the order, or there ought to be proof that the person in whose name it is made had such power. *Rex v. Baker*, 1 M. C. C. 231.

The forged warrant or order for the delivery of goods must, it has been said, purport to be the order of the owner of the goods, or of some person who has, or at least assumes, a disposing power over such goods, and takes upon him to transfer the property or custody of them to the person in whose favour such order is made. *Rex v. Clinch*, 1 Leach, 540; 2 East, 938. *Rex v. Lockett*, 1 Leach, 94.

In *Rex v. Richards*, 1 Russ. & Ry. 193, the indictment was for forging an order for the payment of money. It was objected that no payee was appointed. The prisoner was found guilty, but the majority of the judges (*Mansfield, C. J., dissentiente*) held it was not an order for payment of money, because of the want of a payee, and that therefore the conviction was wrong. *See* also *Rex v. Clark*, 2 East, 938.

A justice's order was forged, stating that a dead body had been cast on shore in the parish of A., that T. S. had made oath before the justice that he had laid out 3*l.* 5*s.* in the burying him, and requiring the treasurer to pay him the sum; the judges held that this was a warrant or order for the payment of money within the 7 Geo. 2, though the order did not state that T. S. was a churchwarden, &c. *Rex v. Froud*, 1 Russ. & Ry. 389; 1 B. & B. 300.

Where the forged document purported to be a request to let the prisoner have goods, and a promise that the person whose name was forged would be answerable for the amount, it was held to be a request within the statute. *Reg. v. White*, 9 C. & P. 282. It is not necessary that the request should be addressed to any individual. *Rex v. Carney*, 1 M. C. C. 351. *Reg. v. Pulbrook*, 9 C. & P. 37. Where the prisoner represented that a relative had died and left him money, which was in the hands of C., and that he wanted mourning, and afterwards produced a letter as from C. in these terms, "Please to let W. T. (the prisoner) have such things as he wants. I have got the amount of 27*l.* for C. in my hands these many years:"—It was held to be a forged request, although it seems it might also have been laid as a false pretence. *Rex v. Thomas*, 7 C. & P. 851; 2 M. C. C. 16. A forged paper addressed to a tradesman, and purporting to be signed by one of his customers, requesting him to let the bearer have goods for him, is a forged request within the statute. *Rex v. James*, 8 C. & P. 292.

With respect to Receipts.—A scrip receipt is not a "receipt" until filled up. *Rex v. Lyon*, 2 East, 933; 2 Leach, 597. *Rex v. Thomas*, 2 Leach, 877; 2 East, 934.

As to forgery of an administration bond, see *Reg. v. Barber*, 1 C. & Kir. 434.

An unsigned forged paper in the following form:—"Received from Mr. Bendon, due to Mr. Warman, 17*s.* Settled," has been held to be a receipt. *Reg. v. Juda*, 2 id. 635.

Where it was shown to be the custom of bankers to give receipts on the deposit of money in the following form:—"Received of A. B. 85*l.* to his credit—this receipt not transferable," and to repay the money with interest on the return of the receipt with A. B.'s name written on it, it was held that forging the name of A. B., and receiving the money due on its return, was a forging and uttering an acquittance for 85*l.* *Reg. v. Atkinson*, 2 M. C. C. 215; Car. & M. 325.

A servant employed by her mistress to pay tradesmen's bills, received from her a bill of a tradesman named Sadler, together with the money to pay that and other bills. She brought the bill again to her mistress with the words "Paid Sadler." The mistress stated that she believed the words to be a receipt, and that no application was made for the money afterwards:—*Held*, on an indictment for forgery, that the words "Paid Sadler," under the circumstances, imported an acquittance for the money, and were not merely a memorandum of the servant of her having paid the bill. *Reg. v. Houseman*, 8 C. & P. 180.

Where the prisoner, on quitting the office of assistant-overseer, delivered over to his successor, amongst other vouchers, a paper in the usual form: "£—— for the high-constable. Signed, J. H.;" which had been altered to a larger sum:—*Held*, to amount to an uttering a forged receipt with intent to defraud the high-constable. *Reg. v. Boardman*, 2 M. C. C. 147. So, where the prisoner acting for his father, an overseer, received a receipt for a county-rate from the high-constable for the sum of 3*l.* 5*s.* 9*d.*, which, on payment, the constable subscribed, "Received the above rate;" and the prisoner afterwards inserted a figure 1 before the 5*s.*:—*Held*, to be a forgery of the receipt, and that the instrument might be described in the same way as if the subject of larceny. *Reg. v. Vaughan*, 8 C. & P. 276. Where the prisoner gave his employer a bill, subscribed with a receipt for the amount of goods, and the jury found that it was uttered for the purpose of deceiving into a belief that money given had been applied to the purpose for which it had been obtained, being a mere pretence and fraud:—*Held*, that he was properly convicted of uttering a receipt with intent to defraud. *Rex v. Martin*, 1 M. C. C. 483; S. C. 7 C. & P. 549.

(*a*) *Making or Accepting Bill or Note by Procuration without Lawful Authority, or Uttering the same with Intent.*[1]

(*b*) *Obliterating Crossings on Cheques, &c.*[2]

VIII. Forging Debentures.

Forging debentures.

By 24 & 25 Vic. c. 98, s. 26, "whosoever shall fraudulently forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any debenture issued under any lawful authority whatsoever, either within her Majesty's dominions or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

IX. Forging Records, Process, Instruments of Evidence, &c.

(A) *Forging Proceedings of Courts of Record, or Courts of Equity.*

Forging proceedings of courts of record or courts of equity.

By 24 & 25 Vic. c. 98, s. 27, "whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognisance, *cognovit actionem*, or warrant of attorney, or any original document whatsoever of or belonging to any court of record, or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order, or decree, or any original document whatsoever of or belonging to any court of equity or court of admiralty in England or Ireland, or any document or writing, or any copy of any document or writing, used or intended to be used as evidence in any court in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

(B) *Forging Copies or Certificates of Records, Process of Courts not of Record, and using Forged Process.*[3]

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[1] By 24 & 25 Vic. c. 98, s. ~~24~~, "whosoever, with intent to defraud, shall draw, make, sign, accept, or indorse any bill of exchange, or promissory note, or any undertaking, warrant, order, authority, or request, for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money, by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, note, undertaking, warrant, order, authority, or request so drawn, made, signed, accepted or indorsed, by procuration or otherwise, without lawful authority or excuse, as aforesaid, knowing the same to have been so drawn, made, signed, accepted, or indorsed as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

This was no forgery before the above enactment. *Reg. v. White*, 1 Den. C. C. R. 208; 2 C. & Kir. 404.

[2] By sect. 25, "whenever any cheque or draft on any banker shall be crossed with the name of a banker, or with two transverse lines with the words 'and company,' or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off any cheque or draft, whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

[3] By sect. 28, "whosoever, being the clerk

(C) *Forging Instruments made Evidence by any Act of Parliament.*[1]

X. Forging Court Rolls.

Forging court-rolls.

By 24 & 25 Vic. c. 98, s. 30, "whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any court-roll, or copy of any court-roll, relating to any copyhold or customary estate, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

XI. Forging Registers of Deeds.

Forgery as to the registry of deeds.

By sect. 31, "whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing, made or issued under the provisions of any act passed, or hereafter to be passed, for or relating to the registry of deeds, or shall forge or counterfeit the seal of or belonging to any office for the registry of deeds, or any stamp or impression of any such seal, or shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature of any person to any such memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing, which shall be required or directed to be signed by or by virtue of any act passed or to be passed, or shall offer, utter, dispose of, or put off any such memorial or other writing as in this section before mentioned, having thereon any such forged stamp or impression of any

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of any court, or other officer having the custody of the records of any court, or being the deputy of any such clerk or officer, shall utter any false copy or certificate of any record, knowing the same to be false; and whosoever, other than such clerk, officer, or deputy, shall sign or certify any copy or certificate of any record as such clerk, officer, or deputy; and whosoever shall forge or fraudulently alter, or offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any copy or certificate of any record, or shall offer, utter, dispose of, or put off any copy or certificate of any record having thereon any false or forged name, handwriting, or signature, knowing the same to be false or forged; and whosoever shall forge the seal of any court of record, or shall forge or fraudulently alter any process of any court other than such courts as in the last preceding section mentioned, or shall serve or enforce any forged process of any court whatsoever, knowing the same to be forged, or shall deliver or cause to be delivered to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any court of law or equity, or a copy thereof, knowing the same to be false, or shall act or profess to act under any such false process, knowing the same to be false, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

An indictment had been found against A. for an assault, on which the clerk of the peace had granted a certificate, upon which a magistrate committed A. to the county goal till he should find sureties, or otherwise be discharged by due course of law. A. wrote a forged letter, in the name of another magistrate, to the governor of the county gaol, stating that A. had found sureties, and authorising the discharge of A.: — *Held*, that the writing and uttering of this forged letter was an indictable offence. *Rex v. Harris*, 6 C. & P. 129; S. C. 1 M. C. C. 393. Indictment for forging an order for relief to a discharged prisoner under 5 Geo. 4, c. 85, being in many instances ungrammatical, and at variance from the act: — *Held* bad. *Rex v. Donnelly*, 1 M. C. C. 438.

[1] By sect. 29, "whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any instrument, whether written or printed, or partly written and partly printed, which is or shall be made evidence of any act passed or to be passed, and for which offence no punishment is herein provided, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

such seal, or any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

XII. Forging Orders, &c. of Justices of the Peace.

Forging orders of justices, recognisances, affidavits, &c.

By sect. 32, "whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any summons, conviction, order, or warrant of any justice of the peace, or any recognisance purporting to have been entered into before any justice of the peace, or other officer authorised to take the same, or any examination, deposition, affidavit, affirmation, or solemn declaration, taken or made before any justice of the peace, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

XIII. Forging the Name of the Accountant-General, &c.

Forging name of accountant-general, &c. of Court of Chancery in England or Ireland, or of any judge of the Landed Estates Court in Ireland.[1]

By 24 & 25 Vic. c. 98, s. 33, "whosoever, with intent to defraud, shall forge or alter any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing, made or purporting or appearing to be made by the Accountant-General, or any other officer of the Court of Chancery in England or Ireland, or by any judge or officer of the Landed Estates Court in Ireland, or by any officer of any court in England or Ireland, or by any cashier or other officer or clerk of the Governor and Company of the Bank of England or Ireland, or the name, handwriting, or signature of any such accountant-general, judge, cashier, officer, or clerk as aforesaid, or shall offer, utter, dispose of, or put off any such certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing, knowing the same to be forged or altered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

XIV. Falsely Acknowledging Recognisances, &c.

Acknowledging recognisance, bail, cognovit, &c. in the name of another.

By sect. 34, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall, in the name of any other person, acknowledge any recognisance or bail, or any *cognovit actionem*, or judgment, or any deed or other instrument, before any court, judge, or other person lawfully authorised in that behalf, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

XV. Forging or Uttering Marriage License or Certificate.[2]

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[1] A similar provision in the 12 Geo. 1, c. 32, was held to apply to a paper writing purporting to be an office copy of a report of the accountant-general of money being paid into the bank. *Rex v. Gibson*, 1 Leach, 61; 2 East, 899.

[2] By sect. 35, "whosoever shall forge or fraudulently alter any license of, or certificate for marriage, or shall offer, utter, dispose of, or put off any such license or certificate, knowing the same to be forged or fraudulently altered, shall be guilty of fe-

XVI. Forging Registers of Births, Marriages, and Deaths.[1]

(A) *Making False Entries in Copies of Register sent to Registrar.*[2]

XVII. Demanding Property upon Forged Instruments.

Demanding property upon forged instruments.

By 24 & 25 Vic. c. 98, s. 38, "whosoever, with intent to defraud, shall demand, receive, or obtain, or cause or procure to be delivered or paid to any person, or endeavour to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever, under, upon, or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration shall have been obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

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lony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

[1] By sect. 36, "whosoever shall unlawfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of births, baptisms, marriages, deaths, or burials, which now is or hereafter shall be by law authorised or required to be kept in England or Ireland, or any part of any such register, or any certified copy of any such register, or any part thereof, or shall forge or fraudulently alter in any such register any entry relating to any birth, baptism, marriage, death, or burial, or any part of any such register, or any certified copy of such register, or of any part thereof, or shall knowingly and unlawfully insert, or cause or permit to be inserted, in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and unlawfully give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any such register, knowing such writing, or the part of such register whereof such copy or extract shall be so given, to be false in any material particular, or shall forge or counterfeit the seal of or belonging to any register office or burial board, or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, forged, or altered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

A false entry, made on the information of the defendant, in a register of births, &c., constitutes a felony within the 36th section. *Reg. v. Mason*, 2 C. & Kir. 622. *Reg. v. Dewitt*, id. 905.

It is not the less a "destroying, defacing, or injuring," of a register within the meaning of the statute, because, when produced in evidence, the torn part has been pasted in, and the register is as legible as before. *Reg. v. Bowen*, 1 Den. C. C. 22.

It is not necessary to set out the instrument in the indictment. *Rex v. Sharp*, 8 C. & P. 436.

[2] By sect. 37, "whosoever shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register directed or required by law to be transmitted to any registrar, or other officer, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any copy of any register so directed or required to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed or required to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, or shall unlawfully destroy, deface, or injure, or shall for any fraudulent purpose take from its place of deposit, or conceal, any such copy of any register, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

(A) *Of the Indictment.*

(*a*) *Venue.*

(1) *Forgers, &c. may be Tried in the County where they are Apprehended or are in Custody.*

Forgers, &c. may be tried in the county where they are apprehended or are in custody.

By 24 & 25 Vic. c. 98, s. 41, "if any person shall commit any offence against this act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law, or by virtue of any act passed or to be passed, every such offender may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence, and the offence of his principal, had been actually committed in such county or place."[1]

(2) *Description of Instrument in Indictments for Forgery.*

Description of instrument in indictments for forgery.[2]

By sect. 42, "in any indictment for forging, altering, offering, uttering, disposing, or putting off any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof."

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[1] By sect. 50 of the same act, "all indictable offences mentioned in this act which shall be committed within the jurisdiction of the Admiralty of England or Ireland, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed on the "high seas:" Provided that nothing herein contained shall alter or affect any of the laws relating to the government of her majesty's land or naval forces."

[2] The manner in which the fraud was to have been committed need not to be stated. *Rex v. Powell*, 2 East, P. C. 989; 1 Leach, 77. *Rex v. Elsworth*, 2 East, P. C. 989.

The word "falsely" need not be used in the indictment; stating that the prisoner forged and counterfeited is sufficient. 2 East, P. C. 985. See *Rex v. Goate*, 1 Ld. Raym. 737.

The instrument, if set out, must, when given in evidence, correspond exactly with that set out in the indictment. As any variance will be fatal, it will always be prudent to frame a count under the 42d section of the act.

If the instrument be in a foreign language, and it is set out in the indictment, there must be a translation. *Rex v. Goldstein*, 1 R. & R. 473.

Where set out, if the instrument is partly in figures, the form ought to be "in words and figures following," &c. (*see* 2 East, P.C. 975); for, upon an indictment for forging a receipt for money, it was objected that, in the receipt as set forth, some of the sums were in figures, it was holden that the receipt must be pursued exactly, or it would be a variance. *See* id. 976. If only part of a true instrument be altered, the offence may be treated as a forgery of the whole instrument, and be so laid in the indictment. But it appears to have been more usual to lay forgeries of this kind by stating the particular alteration at least in one count. *See* id. 980.

It is sufficient to say "a certain will," without adding, "purporting to be the last will." *Rex v. Birch*, 1 Leach, 79; 2 Black. 790; 2 East, 980. The words of the instrument must be strictly pursued. *Rex v. Bear*, Carth. 408. *Reg. v. Drake*, 2 Salk. 661.

In *Rex v. Hart*, 1 Leach, C. L. 145, in an indictment for forging a bill of exchange, it was set forth as follows: "that is to say," &c. In reciting the bill, the words were "*value*

received," but in the bill produced, "*value receiv'd*," omitting the *e*. And the judges held it to be properly left to the jury whether the two words imported the same thing, for then it would not vitiate; and the variance was holden immaterial.

Before the 24 & 25 Vic. c. 98, it was held that an indictment for forging a certain warrant and order for the payment of money was not supported by proof of the forgery of an instrument which was a warrant for the payment of money, but which was not an order. *Reg. v. Williams*, 2 C. & Kir. 51.

But now, though an instrument be called in the indictment "a warrant, order, and request," when it is but one of these, if it be set out *in hæc verba*, so as to enable the court to judge of its purport, the misdescription (if it be one) is, it seems, immaterial. *Reg. v. Williams*, 2 Den. C. C. 61.

An indictment for uttering a forged foreign promissory note need not allege it to be payable in England. *Reg. v. Lee*, 2 M. & Rob. 281.

A writing directed to A. and Co., requiring them to pay the bearer, on demand, a sum of money, is not a bill of exchange or order for the payment of money. 2 M. C. C. 218.

Before the late statute, it was held that a document in the ordinary form of a bill of exchange, but requiring the drawee to pay to his own order, and purporting to be indorsed by the drawer, and accepted by the drawee, could not, in an indictment for forging and uttering, be treated as a bill of exchange. *Reg. v. Bartlett*, 2 M. & Rob. 362.

An indictment for forging an indorsement upon a bill imported to set out the bill according to its tenor. The bill was directed to "Messrs. Masterman and Co.," but, upon the indorsement, the *r* in Messrs. was omitted, and it stood Mess^{s}. The point was saved for the consideration of the twelve judges, and they were unanimous that, as it appeared by the context that Mess^{s}. must mean Messrs., the variance was immaterial, and the conviction unobjectionable. *Rex v. Oldfield*, 2 Russ. C. & M. 360.

And the indictment, where the instrument is set out, must describe the signature as purporting to be that of the person whose name is supposed to be forged. *Carter's case*, 2 East, 985. *Rex v. Hunter*, 2 Leach, 624.

Where the indictment charged that the defendant, being possessed of a bill of exchange, purporting to be directed to one John King, by the name and description of John Ring, forged the acceptance of the said John King, it was holden to be bad, on the ground that Ring does not purport to be King. See *Rex v. Reading*, 2 Leach, 590. So, an indictment for forging a bill of exchange, directed to Ranson, Moreland, and Hammersley, stating that it purported to be directed to George Lord Kennaird, William Moreland, and Thomas Hammersley, by the names and descriptions of Ransom, Moreland, and Hammersley, is bad, for the purport and tenor are repugnant. *Rex v. Gilchrist*, 2 Leach, 657; 2 East, P. C. 982. In *Reeve's case*, which occurred about the same time, the indictment, which was for forging a script receipt, charged that the prisoner forged it "with the name C. Olier thereunto subscribed, purporting to have been signed by one Christopher Olier;" and it was objected that this must be necessarily bad, as C. Olier did not, on the face of it, purport to be Christopher Olier, but might be Charles, &c. But the court thought that this case differed in some degree from the two cases cited in support of the objection, viz. *Jones's case*, 2 East, P. C. 956, and *Gilchrist's case*, *supra*, inasmuch as the note in *Jones's case* did not purport to be a bank-note, and, therefore, that the indictment charging that it did so purport was bad; and in *Gilchrist's case*, as the name of Lord Kinnaird did not appear on the face of the bill, it could not purport to be directed to him; but that in the present case this superscript being subscribed with the name C. Olier, and the indictment charging that it purported to be signed in the name of Christopher Olier, a cashier of the Bank of England, it was not, upon the face of it, repugnant to the bill, or inconsistent with itself. *See* also *Reg. v. Davis*, 9 C. & P. 427. *Rex v. Rice*, 6 id. 634.

Altering a regimental receipt for the subsistence money: — *Held* to be properly charged as a forgery of a receipt for money, although the instrument in its effect might be used and operate as an order for payment. *Rex v. Hope*, 1 M. C. C. 414.

On an indictment for forging an instrument, in the terms, "Twenty-one days after date pay (without acceptance) to the order of ——, ——*l.*": — *Held*, that it was properly described as a bill of exchange. *Reg. v. Kinnear*, 2 M. & Rob. 117. So, a forged cheque on a banker: — *Held*, properly described as "a warrant and order for the payment of money," and that the presenting for payment at a banker's, where it was supposed the drawer had funds, although he was not a customer there, was sufficient evidence of an intent to defraud the bankers. *Per Bosanquet, J.: Rex v. Crowther*, 5 C. & P. 316. So, a count in an indictment for forging a request for the delivery of goods, which describes the forged instrument as "a certain forged request for the delivery of goods to one J. R.," is good under the statute, and is not too general. *Reg. v. Robson*, 9 id. 423.

It is sufficient to allege that the prisoner forged a promissory note for ——*l.*, without stating the date. *Rex v. Burgiss*, 7 C. & P. 490. *Rex v. James*, id. 553.

Indictment for uttering a forged bill of exchange set out, "*à 4 mois de date, par cette lettre de change, à l'ordre de nous-même, la somme de 500 livres sterling*," and translated, "At four months' date, by this bill of exchange, to the order of ourselves, the sum of 500*l.* sterling: — *Held* good. *Rex v. Szudurskie*, 1 M. C. C. 429.

Where the prisoner, after 1 Wm. 4. c. 66, was charged on different counts with "forg-

(3) *In Indictments for Engraving, &c.*[1]

(4) *Intent to Defraud particular Persons need not be Alleged or Proved.*

Intent to defraud particular persons need not be alleged or proved.

By sect. 44, "it shall be sufficient, in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud."

(B) *Of the Evidence.*[2]

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ing," "uttering," and with "offering and disposing:"—*Held*, that the indictment was not vitiated by the introduction of the terms of the old enactments, not now in force (*Rex v. Brewer*, 6 C. & P. 363); but an indictment for forging a receipt at the foot of an account, signed with initials only, there being no averment to show their meaning, and that it meant a party to whom the money might have been paid:— *Held* insufficient. *Rex v. Barton*, 1 M. C. C. 141.

A count, alleging the uttering a forged bill and acceptance:—*Held*, not to be supported by evidence, that the acceptance only was forged:—*Held*, also, that a count alleging that the prisoner, having in his possession a certain bill with a forged acceptance, uttered the said bill with intent, &c., was bad. *Rex v. Horwell*, 6 C. & P. 148; 1 M. C. C. 405.

Where several were engaged in a system of forging bills on bankers:—*Held*, that each individual taking was liable as a principal in the felony, and that the ignorance as to who were to effect the other parts of the forgery was immaterial; it was sufficient if they knew it was to be executed by some one. *Rex v. Kirkwood*, 1 M. C. C. 304; S. P. *Rex v. Dade*, id. 307. *Rex v. Bingley*, Russ. & Ry. 446. So, where several are jointly indicted for using plates of forged notes, the jury must be satisfied of all being present or assisting at an act of issuing; and it is not sufficient to show their singly using the plates, or acting as criminal dealers in such notes, or individually in posession of them, but held that the indictment, setting out as a translation of foreign notes the word "guilder," was a sufficient English word, as translating the foreign word corresponding; but that the counts which omitted to set out marginal words, denoting the year of issuing, and without which the notes could not be circulated in the foreign country, was insufficient. A description of a foreign note in the English language only would be bad on special demurrer, but cured after verdict, provided the description be in the words of the statute creating the offence. Sewing the forged notes to the parchment on which the indictment is engrossed:—*Held*, not a legal mode of setting out the instruments. *Rex v. Harris*, 7 C. & P. 416, 429.

A prisoner, acquitted of forgery on a variance between the instrument produced in evidence and that recited in the indictment, cannot plead *autre fois acquit* to another indictment for the same offence, except the instrument be again misrecited in the same manner. See *Rex v. Coogan*, 1 Leach, 448.

[1] 24 & 25 Vic. c. 98, s. 43. "In any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful custody or possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing by any name or designation by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter, or thing."

[2] *As to the Evidence of the Instrument being Forged.*—The instrument must appear upon the face of it to have been made to resemble a true instrument of the denomination mentioned in the indictment upon which it is framed, so as to be capable of deceiving persons using ordinary observation, according to their means of knowledge, although not, perhaps, those scientifically acquainted with such instruments. *R. v. Collicott*, 2 Leach, 1048; 4 Taunt. 300. *R. v. Jones*, 1 Leach, 204. *R. v. Hoost*, 2 East, P. C. 950. *R. v. Elliott*, 1 Leach, 175. *R. v. Fitzgerald*, id. 20. Thus, a bill of exchange or county bank-note, which, for want of a signature, is incomplete, or a navy bill, payable to ——, or order, is not the subject of an indictment for forgery. *R. v. Richards*, R. & R. 193. *R. v. Randall*, id. 195. *R. v. Pateman*, id. 455. *Reg. v. Butterwick*, 2 M. & Rob. 196. See *R. v. Burke*, R. & R. 496. *R. v. Turpin*, 2 C. & Kir. 820. *R. v. Wall*, 2 East, P. C. 953. *R. v. Moffatt*, 1 Leach, 431. But a man may be indicted for forging and uttering a bill of exchange, although it was not stamped (*R. v. Hawkeswood*, 2 T. R. 660; 1 Leach, 257. *R. v. Reculist*, 2 Leach, 703), or although the name of the payee was not

indorsed on it. *R. v. Wicla*, R. & R. 149. And an indictment will lie for forging an instrument which, if genuine, could not be made available, by reason of some circumstances not appearing on the face of the instrument, but to be made out by extrinsic evidence (see *R. v. M'Intosh*, 2 Leach, 833; 2 East, P. C. 942); as a post-dated cheque (*Reg. v. Taylor*, 1 C. & Kir. 213), or a deed void for non-compliance with the requirement of a particular statute. *R. v. Lyon*, R. & R. 255. *R. v. Froud*, id. 389; 1 B. & B. 300.

Where the prisoner, being himself the payee of the note uttered, stated that W. H. of B. was the maker, it was held sufficient for the prosecutor to show that it was not the note of that person, and that it lay on the prisoner to prove it to be the genuine note of another W. H., if it were so. *Rex v. Hampton*, 1 M. C. C. 255. So, where a bill purported to be accepted by "Samuel Knight, Market-place, Birmingham," it was held, on an indictment for the forging of the acceptance, that the result of the inquiries made at Birmingham by the prosecutor, who was not acquainted with the place, was evidence for the jury, though neither the best nor the usual evidence given to prove the non-existence of a party whose name is used. *Rex v. King*, 5 C. & P. 123.

On an indictment for forging a will, written, apparently, over pencil writing, before rubbed out, the evidence of an engraver, in the habit of looking at minute lines on paper, held admissible as to the existence of such pencil marks, which he had examined with a microscope. *Rex v. Williams*, 8 C. & P. 434.

On an indictment for uttering a forged cheque on bankers, army agents, in the name of W.: — *Held*, that calling a clerk of the agents to state that, from his own knowledge, and inquiry of other persons in the house, there was no such customer as W., was sufficient *primâ facie* evidence for the jury. *Rex v. Brannan*, 6 P. & C. 326.

Upon an indictment for uttering forged notes of the Royal Bank of Scotland: — *Held*, that it was not necessary to show an express authority to draw and issue such notes, the power being recognised by statute. *Rex v. M'Keay*, 1 M. C. C. 130.

Where the prisoner was examined upon oath before Commissioners of Bankruptcy, having been cautioned to elect what questions he would answer, it was held that such depositions were admissible against him on a charge of forgery. *Reg. v. Wheater*, 2 M. C. C. 45.

The prosecutor cannot give secondary evidence of a forged deed, unless he has given the prisoner notice to produce it, and notice at the assizes is insufficient; but if the prisoner has declared that the document was destroyed, no notice is necessary. *Rex v. Haworth*, 4 C. & P. 255. However, the grand jury may receive secondary evidence of the contents of the forged instrument, where, from its being in the hands of the prisoner, or any other cause, it cannot be produced; and where a witness objects to produce deeds, if they are part of the evidence of the title to his estate, he cannot be compelled to produce them, but if not he may. *Rex v. Hunter*, 3 id. 591.

Proof of the altering of a part of a genuine instrument will support an indictment charging the defendant with having forged and counterfeited the instrument itself. But when the forgery is of a mere addition to the instrument, and which has not the effect of altering it, but is merely collateral to it, as, for instance, a forged acceptance or indorsement to a genuine bill of exchange, proof of the forgery of the addition will not support an indictment charging the forgery of the entire instrument. The forgery of such addition must be specially alleged, and must be proved as laid. Forging the signature of the drawer to a bill of exchange, however, is the same precisely as forging the entire bill, and may be laid as such. The instrument must also appear, upon the face of it, to have been made to resemble a true instrument of the denomination mentioned in the indictment, and in the statute upon which it is framed, so as to be capable of deceiving persons using ordinary observation. 2 Leach, 1048; 4 Taunt. 300.

That the signature or other part of the instrument alleged to be forged is not of the handwriting of the party, may be proved by the party himself, or any person acquainted with his handwriting, either by having seen him write, or by being in the habit of corresponding with him.

It is also stated, as an established rule of evidence, that handwriting cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine, the 27th sect. of the 17 & 18 Vic. c. 125, allowing such comparison being restricted to civil causes. But in a case where the point was whether a will had been forged, and a paper, purporting to be instructions for the will, in the handwriting of the testatrix, became material, a question was put to a clerk of the Post-office, who had been used to inspect franks and detect forgeries, if he could judge whether the instructions were written by the same person who was admitted to have written a certain memorandum at the bottom of the instructions, and who was suspected of having been the contriver of the will; and the question, though objected to, is said to have been allowed by the court. 4 T. R. 497. It is, however, observed upon this evidence, that it was a mere comparison of handwriting, and a sort of comparison the least of all to be trusted, as it was an attempt to trace a resemblance between two papers which the writer would endeavour to make as unlike as possible. Phil. Ev. 430. And see *Cary v. Pitt*, Peak. Ev. 85. The subject underwent a very considerable discussion in a subsequent case (*Rex v. Cator*, 4 Esp. 117), from which, it is said, this distinction may properly be made, viz. that persons of skill may be called to ascertain whether hand-

writing is genuine, or whether it was written at interrupted strokes, like the writing of a person attempting to imitate the handwriting of another, but that they cannot be asked whether the same hand which wrote another paper wrote also the feigned paper. Phil. Ev. 430; Peake on Ev. 112. The admissibility, however, of evidence of this kind was denied by a learned judge where, upon an issue to try a question of forgery, the evidence of an inspector of franks at the Post-office was tendered in support of the alleged forgery. The question put to the witness (who had stated that he was unacquainted with the handwriting of the party whose handwriting was the subject of inquiry) was whether, from his knowledge of handwriting, he believed the handwriting in question to be a genuine signature, or an imitation. An objection being taken to the question, the learned judge allowed the objection, and stated several strong reasons in his report to the Court of K. B. against the admissibility of evidence of this kind, which he termed loose general evidence. The judges of the Court of K. B. expressed doubts as to the evidence being admissible, and refused to disturb the verdict, on the ground of its having been rejected; for, even if it were admissible, it was, in their opinion, entitled to very little weight. *Gurny v. Langlands*, 5 B. & A. 330. *See* 2 Russ. C. & M. 379. *Post*, Handwriting. *Doe v. Suckermore*, 5 Ad. & E. 721.

Evidence must also be given of the identity of the party whose handwriting is alleged to be forged; that is, it must be proved expressly, or from circumstances, that the alleged forgery was intended to represent the handwriting of the person whose handwriting it is proved not to be, or that it was attempted to be uttered as the handwriting of a person who never existed. *Rex v. Ponsonby*, 2 East, P. C. 996, 997. *Rex v. Downs*, id. 997.

It is not necessary to prove that the prosecutor was actually defrauded by the forgery (*Rex v. Crooke*, 2 Stra. 901. *Rex v. Goate*, 1 Ld. Raym. 737); if, from circumstances, the jury can presume that it was the defendant's intention to defraud, or if, in fact, he might have been defrauded if the forgery had succeeded, it is sufficient to satisfy this allegation in the indictment.

If A. by letter desire B., an innocent agent, to write the name of W. S. to a receipt on a post-office order, and the innocent agent do it, believing that he is authorised so to do, A. is a principal in this forgery, and it makes no difference that by the letter A. says to B. that he is at liberty to sign the name of W. S., and does not in express words direct him to do so. *Reg. v. Clifford*, 2 C. & Kir. 202.

Where H., who was tried for forging the will of S. J., had sent the forged will to Mr. M., his attorney, with some deeds of S. J., ostensibly for the purpose of asking his advice, but really that he might find the will and act on it. It was afterwards produced by Mr. M. before the magistrates at the hearing of the charge; and at the trial Mr. M. was called upon to produce the will, which he did, without any objection being taken: but when the officer of the court was proceeding to read the document, the prisoner's counsel objected, that it was privileged in the hands of Mr. M. The judge directed the will to be read; and it was held that course was regular, as it was not entitled to the protection which extends to confidential communications made to an attorney. *Reg. v. Hayward*, 2 C. & Kir. 234.

As to Evidence of Guilty Knowledge.—It was ruled that if a subsequent uttering be made the subject of a distinct indictment, it cannot be given in evidence to show a guilty knowledge in former uttering. *R. v. Smith*, 2 C. & P. 633; 4 id. 411. But this distinction has been denied, and it has been subsequently ruled that such evidence ought notwithstanding to be admitted. *Reg. v. Acton*, 1 Russ. 407. *See* also *Reg. v. Forster*, Dears. C. C. 456.

In order to prove guilty knowledge on an indictment for forging and circulating forged Polish notes, it was held that conversations between the parties as to the forgery and circulation of forged Austrian notes were admissible. *Rex v. Harris*, 7 C. & P. 416. Upon a charge of uttering forged notes in order to show the guilty knowledge, evidence was received of acts of uttering subsequent to the act under inquiry of other forged bills, precisely similar in the names of drawers and acceptors with those the uttering of which was charged. *Rex v. Smith*, 4 id. 411.

As to what is an Uttering.—The words "offer and utter" in the indictment mean nothing more than that the party tendered or attempted to pass or make use of the forged instrument: they do not import that the person to whom the forged instrument was tendered actually accepted it with intention to retain it, or was defrauded by it. Arch. C. L. 491, 15th ed. Showing a forged receipt to a person with whom the defendant is claiming credit for it, has been held to be an offering or uttering, though the defendant refused to part with the possession of it. *Reg. v. Radford*, 1 Den. C. C. 59; 1 C. & Kir. 707. But where the defendant merely showed a forged instrument to a person with intent to raise a false idea of his substance, and afterwards left it under cover with such person for the pretended purpose of safe custody, it was held not to be an "uttering and publishing" within the 13 Geo. 3, c. 79; but the recent statute, in addition to these words, contains the words "offer," "dispose of," or "put off." *R. v. Shukard*, R. & R. 200.

The giving of a forged note to an innocent agent, or to an accomplice, that he may dispose of it, is a disposing and putting away of the note. *R. v. Palmer*, R. & R. 72; 1 N. R. 96. *R. v. Giles*, 1 M. C. C. 166. But where several by concert are privy to the uttering of a forged note, which is uttered by one only in the absence of the other, he only who utters it is a principal,

(*a*) *What constitutes Criminal Possession.*

By 24 & 25 Vic. c. 98, s. 45, "where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in the actual custody or possession of any other person, or shall knowingly and wilfully have any such matter in any

Interpretation as to criminal possession.

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but the others are accessories before the fact. *R. v. Soares*, R. & R. 25. *R. v. Badcock*, id. 249. *R. v. Stewart*, id. 363. *R. v. Davis*, id. 113. See *R. v. Morris*, id. 270. *R. v. Harris*, 7 C. & P. 416.

The using of the forged instrument in some way for the purpose of getting money or credit upon it, or by means of it, is sufficient to constitute the offence described in the statute 24 & 25 Vic. c. 98. Thus, where the defendant placed a forged receipt for poor-rates in the hands of the prosecutor for the purpose of inspection only, in order, by representing himself as a person who had paid his poor-rates, fraudulently to induce the prosecutor to advance money to a third person for whom the prosecutor purposed to become a surety for its repayment, this was held to be an offering, &c. within the statute. *Reg. v. Ion*, 2 Den. C. C. 475. And where a pawnbroker, upon the hearing of an application against him under the 39 & 40 Geo. 3, c. 99, s. 14, to compel him to deliver up goods which had been pledged with him (the money advanced with interest having been repaid), produced and delivered to the magistrates by the hand of his attorney a forged duplicate as the genuine one he had given when the goods were pledged, and which he had received back when the money was repaid, this was held to amount to an uttering by the pawnbroker. *Reg. v. Fitchie*, 1 Dears. & B. 175.

The giving of a forged note to an agent or accomplice that he might pass it, has been held to be a sufficient disposing thereof to him to support a conviction for disposing and putting it away. *Rex v. Giles*, 1 M. C. C. 166.

Under the counts for uttering evidence may be given that the defendant offered or tendered the note in payment, or that he actually passed it, or otherwise disposed of it to another person. Where it appeared that the defendant sold a forged note to an agent employed by the Bank to procure it from him, the judges held this to be within the act, although it was objected that the prisoner had been solicited to commit the act proved against him by the Bank themselves, by means of their agents. *Rex v. Holden*, 2 Taunt. 334; R. & R. 154. So, where A. gave B. a forged note to pass for him, and upon B.'s tendering it in payment of some goods it was stopped, the majority of the judges held that A., by giving the note to B., was guilty of disposing of and putting away the note within the meaning of the act. *Rex v. Palmer*, 1 N. R. 96. So, on an indictment against the prisoner for having a forged bank-note in his possession, it must be proved that the defendant had in his possession the bank-notes set out in the indictment, or one of them. See *Rex v. Rowley*, R. & R. 110.

With respect to the Intent.—A man may be convicted of forging and uttering an instrument with intent to defraud, though there is no person in a position to be defrauded by his act. *Reg. v. Nash*, 2 C. & Kir. 448; 21 L. J. M. C. 147.

If a man forge a document, such as a diploma of the College of Surgeons, with intent only to induce people generally, or particular persons, to believe that he is a member of that college, but have no intent of committing any particular fraud, or doing any specific wrong to any individual, he is not guilty of the offence of forgery at common law. *Reg. v. Hodgson*, Dears. & B. 3. If from circumstances the jury can presume that it was the defendant's intention to defraud, it is sufficient to satisfy this allegation in the indictment; for, where the intent to defraud exists in the mind of the defendant it is sufficient, though, from circumstances of which he is not apprised, he could not, in fact, defraud the prosecutor (*Reg. v. Marcus*, 2 C. & Kir. 356. *Reg. v. Hoatson*, id. 777. *R. v. Holden*, R. & R. 154); or, though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him. *R. v. Sheppard*, id. 169. See *R. v. Harvey*, 2 B. & C. 261. And it has even been said that the existence of the intention is sufficient, though no person could, in fact, have been defrauded by the forged instrument. See *per Maule, J.: Reg. v. Nash*, 1 Den. C. C. 499. The jury ought to infer an intent to defraud the person who would have had to pay the instrument if it were genuine, although he would not likely have been imposed upon by it. *R. v. Mazagora*, R. & R. 291. See *Reg. v. Trenfield*, 1 F. & F. 43.

On the trial of an indictment for forgery with intent to defraud A. B., "one of the public officers" of a banking company, established under 7 Geo. 4, c. 46, A. B. stated that he was a public officer; and an examined copy of the return forwarded to the stamp-office under that act, in which also he was stated to be so, was put in; but this copy had not the affidavit at the close of the return, which is directed by Schedule (A) of that statute, and the date was left blank. The judges held that A. B. was sufficiently proved to be the public officer. *Reg. v. Carter*, 1 Den. C. C. 65; 1 C. & Kir. 741. See *Edwards v. Buchanan*, 3 B. & Adol. 788.

dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act."

(1) *Search for Paper or Implements employed in Forgery, and for Forged Instruments.*

Search for paper or implements employed in any forgery, and for forged instruments.

By 24 & 25 Vic. c. 98, s. 46, "if it shall be made to appear, by information on oath or affirmation before a justice of the peace, that there is reasonable cause to believe that any person has in his custody or possession, without lawful authority or excuse, any note or bill of the Governor and Company of the Bank of England or Ireland, or of any body corporate, company, or person carrying on the business of bankers, or any frame, mould, or implement for making paper in imitation of the paper used for such notes or bills, or any such paper, or any plate, wood, stone, or other material having thereon any words, forms, devices, or characters capable of producing or intended to produce the impression of any such note or bill, or any part thereof, or any tool, implement, or material used or employed, or intended to be used or employed in or about any of the operations aforesaid, or any forged security, document, or instrument whatsoever, or any machinery, frame, mould, plate, die, seal, paper, or other matter or thing used or employed or intended to be used or employed in the forgery of any security, document, or instrument whatsoever, such justice may, if he think fit, grant a warrant to search for the same; and if the same shall be found upon such search, it shall be lawful to seize and carry the same before some justice of the county or place, to be by him disposed of according to law; and all such matters and things so seized as aforesaid shall by order of the court where any such offender shall be tried, or in case there shall be no such trial, then by order of some justice of the peace, be defaced and destroyed, or otherwise disposed of as such court or justice shall direct."

(C) *Of the Punishment.*[1]

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[1] By sect. 48, "where by any act now in force any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to have been falsely made, forged, counterfeited, erased, or altered, or any person demanding or endeavouring to receive or have anything, or to do or cause to be done any act, upon or by virtue of any matter whatsoever, knowing such matter to have been falsely made, forged, counterfeited, erased, or altered, would, according to the provisions contained in any such act, be guilty of felony, and would, before the passing of the act of the first year of King William the Fourth, chapter sixty-six, have been liable to suffer death as a felon; or where by any act now in force any person falsely personating another, or falsely acknowledging anything in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund, in the name of any person not being the owner thereof, or knowingly taking any false oath, or knowingly making any false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any such act, be guilty of felony, and would, before the passing of the said act of the first year of King William the Fourth, have been liable to suffer death as a felon; or where by any act now in force any person making or using, or knowingly having in his custody or possession, any frame, mould, or instrument, for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any such act, be guilty of felony, and would, be-

Other punishments substituted for those of the 5 Eliz. c. 14, which have been adopted in other acts.

By sect. 47, "whosoever shall, after the commencement of this act, be convicted of any offence which shall have been subjected by any act or acts to the same pains and penalties as are imposed by the act passed in the fifth year of the reign of Queen Elizabeth, intituled 'An Act against Forgers of False Deeds and Writings,' for any of the offences first enumerated in the said act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

By sect. 52, "whenever imprisonment, with or without hard labour, may be awarded for any offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction."

By sect. 53, "whenever solitary confinement may be awarded for any offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year."

(*a*) *Punishment of Principals in the Second Degree, and Accessories and Abettors in Misdemeanors, under the* 24 *&* 25 *Vic. c.* 98.

Principals in the second degree, and accessories and abettors in misdemeanors.

By sect. 49, "in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act shall be liable to be proceeded against, indicted, and punished as a principal offender."

(*b*) *In what cases Fines and Sureties for Keeping the Peace may be required.*

Fine and sureties for keeping the peace; in what cases.

By sect. 51, "whenever any person shall be convicted of a misdemeanor under this act it shall be lawful for the court, if it shall think fit, in addition to or in lieu of any of the punishments by this act authorised, to fine the offender, and to require him to enter into his own recognisances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in all cases of felonies in this act mentioned it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognisances, and to find sureties, both or either, for keeping the peace, in addition to any of the punishments by this act authorised; provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year."

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fore the passing of the said act of the first year of King William the Fourth, have been liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall after the commencement of this act be convicted of any such felony as is hereinbefore in this section mentioned, or of aiding, abetting, counselling, or procuring the commission thereof, and the same shall not be punishable under any of the other provisions of this act, every such person shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

(D) *Costs of Prosecution.*

The costs of the prosecution of misdemeanor against this act may be allowed.

By sect. 54, "the court before which any indictable misdemeanor against this act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony."

FORMEDON.[1]

FRACTIONEM Diei non recipit Lex.[2]

FRANCHISE.[3] *See* Corporation, vol. iii. p. 263; Elections, *ante*, p. 189.

FRAUD, Effect of on Contract. *See* Deceit, vol. iii. p. 560.

I. Makes Contract Void.[4]

[1] The writ of formedon was a writ in the nature of a writ of right, and was the appropriate remedy for a tenant in tail on a discontinuance, for he could not have a writ of right proper; and it was so called because he claimed performance done according to the form of the gift, which the statute said should be observed. See *Rimmington v. Cannon*, 22 L. J. C. P. 153. This writ, together with many other real actions, was abolished by the 3 & 4 Wm. 4, c. 27, s. 37. *See* vol. i. p. 137, n. [1].

[2] Courts of justice will not take notice of the fraction of a day, except in those cases where there are conflicting rights between subjects, for the determination of which it is necessary they should do so. Judgment, *Russell v. Ledlam*, 14 Mee. & W. 582; 2 Ld. Raym. 1095: *per Holt, C. J.* See *Godson v. Sanctuary*, 4 B. & Adol. 255. *Thomas v. Desanges*, 2 B. & A. 586. *Sadler v. Leigh*, 4 Camp. 197. *Saunderson v. Gregg*, 3 Stark. 72. *The Queen v. St. Mary's*, 22 L. J. M. C. 109. But where the title of the Crown and of the subject accrue the same day, the title of the Crown shall be preferred. *Edwards v. the Queen*, 23 L. J. Ex. 165. *See* Execution, *ante*, p. 344.

[3] A privilege or exemption from ordinary jurisdiction; as for a corporation to hold pleas to such a value, &c. And sometimes it is an immunity from tribute, when it is either personal or real; that is, belonging to a person immediately, or by means of this or that place whereof he is a chief or member. Cromp. *Jurisd.* 141. There is also a franchise royal, which seems to be that where the king's writ runs not. 21 Hen. 6, c. 4. But franchise royal is said by some authors to be where the king grants to one and his heirs that they shall be quit of toll, &c. Bract. lib. 2, c. 5.

Franchises are a species of incorporeal hereditaments. Franchise and liberty are used as synonymous terms, and their definition is "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." Finch. L. 164. Being therefore derived from the Crown, they must arise from the king's grant; or in some cases may be held by prescription, which pre-supposes a grant. (Id.) The kinds of them are various, and almost infinite; they may be vested either in natural persons or in bodies politic; in one man or many; but the same identical franchise that has before been granted to one, cannot be bestowed on another. 2 Roll. Abr. 191; Keilw. 196; 2 Steph. Com. 14; 3 Kent, Com.; Grant, Corp.

Sheriffs of counties, within which is any franchise, where the lord is entitled to a return of writs, shall nominate and appoint one or more deputies to reside at some place near, there to receive all writs in the sheriff's name, and under his seal to issue warrants for their due execution; and the Chancellor is to settle the charges to be paid any such deputy, &c. 13 Geo. 2, c. 18.

A franchise has no relation to the county wherein it lies, as has been generally held; for it is not necessary to set forth the county when anything is shown to be done within a liberty or franchise.

If a franchise fails to administer justice within the same, the franchise shall not be allowed; but on any such failure, the Court of B. R. may compel the owners of the franchise, &c. to do justice; for that court ought to see justice equally distributed to all persons. 1 Lill. Abr. 635.

All franchises may be lost by non-user or neglect; and the strongest case of non-user or neglect is, where the parties are called upon in a court of justice to state their right, and they neglect or refuse to do it. *Rex v. Amery*, 2 T. R. 567; Grant, Corp. 33, 168, 169, n.

A franchise to hold pleas within a particular precinct does not exclude any other jurisdiction. *Crosse v. Smith*, 12 Mod. 645. And the cause may be removed by *habeas corpus*. (Id.) The mode of obtaining an information for the usurpation of a franchise is by application to the attorney-general. *Ibbotson's case*, Ca. Temp. Hard. 261. But no action lies by the lord of the liberty for disturbance where the practice of the court warrants the inserting in a writ in the first instance the *non omittas* clause. *Carrett v. Smallpage*, 9 East, 330.

[4] Fraud avoids a contract *ab initio*, both

at law and in equity, whether the object be to deceive the public, or one party endeavour thereby to cheat the other. For the law will not sanction dishonest views and practices, by enabling an individual to acquire, through the medium of his deception, any right or interest. See *Fermor's case*, 3 Co. 77: *per Lord Mansfield, C. J. Bright v. Eynon*, 1 Burr. 390; and *Foxcraft v. Devonshire*, 1 Black. 193. *See* 1 Fonbl. Tr. Eq. 6th ed. 122, and notes. *Boulton v. Watt*, 2 H. Bl. 465. *Willis v. Baldwin*, 2 Dougl. 450. *Carter v. Beohm*, 3 Burr. 1909; 3 Ves. & B. 42. *Haigh v. De la Cour*, 3 Camp. 319, 154, 506; 3 Chit. Com. L. 155, 336, 698. Story's Equity, s. 186.

Where a fraudulent misrepresentation *dans locum contractui*, giving occasion to the contract, has been made by a person who is a party to the agreement, the contract may be avoided at common law by the party who has been deceived, or it may be set aside in the Court of Chancery. *Pulsford v. Richards*, 17 Beav. 95; 22 L. J. Ch. 559. *Rawlins v. Wickham*, 28 id. 188. *Smith v. Kay*, 7 H. L. C. 775; 30 L. J. Ch. 61. It matters not in this respect whether the foundation of the claim be a record, a deed, or a writing without seal; for in either case the instrument will be void if obtained by fraud, and the fraud may be established by parol evidence. *Buckler v. Millard*, 2 Vent. 107. *Filmer v. Gott*, 4 Bro. P. C. 230. *See* Bond.

A court of equity will not, however, rescind a contract on the ground of fraud, without the clearest proof of such fraud; nor unless it appear that the contract was based on the misrepresentations complained of. *Attwood v. Small*, 6 Clark & Fin. 232. *See* Smith's Equity, 48; 5 id.

In the case of a sale or purchase obtained by fraud the property in the thing sold passes by the contract until the contract is avoided, so that an innocent party buying from a fraudulent purchaser may acquire an indisputable title to the subject-matter of the contract, though the contract is voidable as between the original parties. All mesne dispositions of the property to persons not cognisant of the fraud are valid. *White v. Garden*, 10 C. B. 927. *Stevenson v. Newnham*, 13 id. 302; 22 L. J. C. P. 110.

The fraud of an authorised agent avoids a contract made by him for his principal. *Fitzherbert v. Mather*, 1 T. R. 12. *Hern v. Nicholls*, 1 Salk. 289. *Richardson v. Mellish*, 2 Bing. 243; 9 Moore, 435. *Taylor v. Green*, 8 C. & P. 316. *Everett v. Desborough*, 5 Bing. 503.

There has been no little conflict of opinion in modern cases upon the question, whether the principal is responsible for the fraudulent misrepresentation of his agent in a case where the principal was entirely innocent, and has performed his part of the contract in ignorance of the fraud. There appears to be a difference between a misrepresentation made by an agent which is collateral to the contract, and one which is embodied in the contract, it being necessary in the former case to bring home the fraud to the principal, by showing, either that he authorised the misrepresentation of his agent, or that he afterwards assented thereto (*Cornfoot v. Fowke*, 6 Mee. & W. 358, 370. *Wright v. Crookes*, 1 Scott, N. R. 685); whilst in the latter case, the fraud of the agent will affect the principal without its being shown that he was privy to it. *Cornfoot v. Fowke*, *supra*. See *Watson v. Earl of Charlemont*, 18 L. J. Q. B. 65. It was held in a recent case by a majority of the judges of the Court of Exchequer, that a principal is liable to an action for deceit for the false and fraudulent representations of his agent as to the quality and value of an article, whereby a person has been induced to purchase it for more than its worth, notwithstanding that the principal neither authorised nor knew of the fraudulent conduct of his agent. *Udell v. Atherton*, 7 H. & N. 172. And it has been said, that wherever an agent makes a contract on behalf of his principal, whether with or without authority, the principal cannot approbate and reprobate the contract. He must adopt it altogether or not at all. He cannot at the same time take the benefit which it confers, and repudiate the obligation which it imposes. *Bristowe v. Whitemore*, 9 W. R. 621: *per Lord Kingsdown*. "Whatever," said *Wilde, B.* (*Udell v. Atherton, supra*), "the principal's previous authority to the agent, whatever his own innocence, he must, as it seems to me, adopt the old contract, including the statements and representations which induced it, or repudiate the contract altogether." And if the clerk of a merchant or tradesman offers goods for sale to a customer with a representation very material to their value, which misrepresentation his master knows to be false, but the clerk supposed to be true, whereupon the customer gives double the real value of the goods, the contract ought to be dealt with in the same way as if the master himself had made the misrepresentation: *per Lord Abinger*, 6 Mee. & W. 385.

All deceits and frauds, however, practised by persons who stand in the relation of agents general or particular, do not fall upon their principals. For unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the employer. On this principle it was that the Court of Common Pleas, in *Grant v. Norway*, 10 C. B. 665, held a shipowner not responsible for the fraud of the captain in signing bills of lading without any goods on board; and so in the case of *Coleman v. Ridus*, 16 id. 104, a wharfinger was held not liable for a false receipt which his agent had given, representing that goods had been received at the wharf, which had not so been received. In neither of these cases did the principal authorise, or in any way adopt or obtain the benefit of the fraudulent act: *per Wilde, B., Udell v. Atherton*, 7 H. & N. 180. See *Re Swann*, 7 C. B. (N. S.) 400.

A false representation as to a matter alto-

II. Who may take Advantage of.[1]
III. In what Fraud may Consist.[2]
IV. Effect of on Bills and Notes. *See* vol. ii. p. 436.

gether collateral to the contract, cannot be taken advantage of with a view to avoid the bargain. In a case where an agreement was entered into for the hiring and letting of certain apartments on the strength of a false representation by the hirer, that he wanted them for the purpose of carrying on therein the business of a perfumer, and as soon as the agreement was executed and he obtained possession he used the premises as a brothel; whereupon the landlord gave him notice to quit, and on his refusal turned him out: it was held that the landlord had no right to avoid the contract and treat the tenant as a trespasser. In this case there was no proof that at the time the agreement was executed the hirer had determined to appropriate the premises to an immoral purpose. The hirer of the premises may have had no intention of using them otherwise than in accordance with the representation, and if so, there was a valid demise — the estate in the land passed and became vested in the hirer, and could not be divested by a mere change in the intention of the hirer as to the use to be made of them. *Feret v. Hill*, 15 C. B. 225; 23 L. J. C. P. 186.

The right to repudiate a contract on the ground of fraud cannot, however, be exercised where the innocent person has by his own deliberate act placed it beyond his power to reinstate the opposite party in the same position as if the contract had not been entered into. In such a case he will be remitted to his remedy by action of deceit. Accordingly it was held, that a purchaser of shares could not rescind the contract and sue for money had and received to recover back the purchase-money on the ground of fraud, where he had put it out of his power to return the shares. "If," said *Crompton, J.*, "he cannot return the article, he must keep it, and sue for his real damage in an action on the deceit. Take the case I put in the argument, of a butcher buying live cattle, killing them, and even selling the meat to his customers. If the rule of law were, as the plaintiff contends, that the butcher might, on discovering a fraud on the part of the grazier who sold him the cattle, rescind the contract and get back the whole price: but how could that be consistently with justice? The true doctrine is, that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition. *Clarke v. Dickson*, Ell. B. & El. 148. Further, if avoidable contract has been acted upon by a party who might have avoided it, and who has refrained from doing so in the hope that it might turn out to his advantage, such party cannot after having thus abided that event elect to annul the transaction. *Ormes v. Beadel*, 30 L. J. Ch. 4.

[1] It is not competent to the person who was guilty of the fraud to avoid the contract on the ground thereof (*per Lord Tenderden: Jones v. Yates*, 9 B. & C. 532, 538); but the election so to do is left solely to the party defrauded. Thus, where a man has executed a bill of sale of his goods, it is not competent to either of the parties thereto to impeach it on the ground that it was given to defeat the claims of creditors. *Bessy v. Windham*, 6 Q. B. 166. *Deady v. Harrison*, 1 Stark. 60. *Robinton v. M'Donnell*, 2 B. & A. 134. *Doe d. Roberts v. Roberts*, id. 367. *Hawes v. Leader*, Cro. Jac. 270. See *Re Swann*, 7 C. B. (N. S.) 400; and 6 Jur. N. S. 543.

But fraud may in some cases be taken advantage of as against the party who was guilty thereof, even by one who was no party to the contract. Thus, where the defendant sold a gun to the plaintiff's father, *for the use of himself and his sons*, and warranted the gun; and one of the sons, the plaintiff, confiding in the warranty, used the gun, whereupon it burst and injured him: it was held that the plaintiff might sue the defendant for the deceit. *Levy v.* Langridge (in error), 4 Mee. & W. 337; 2 id. 519; and see *Philimore v. Hood*, 5 Bing. N. C. 97; Chit. Contr. 587. 4 De Gex & J. 429. *Badford v. Bayshaw*, 29 L. J. Ex. 59; 4 H. & N. 538.

[2] Fraud is of various kinds; but it generally consists in the *misrepresentation* or the *concealment* of a material fact. It is difficult to lay down any general principles, since what does or does not amount to fraud depends very much on the facts of each particular case, on the relative situation of the parties, and on their means of information. In settling the law on this subject it has, on the one hand, been the aim of our courts to repress dishonesty; whilst on the other they have required, that before relieving a party from a contract on the ground of fraud, it should be made to appear that in entering into such contract he exercised a due degree of caution. See *per Tindal, C. J.: Shrewsbury v. Blount*, 2 Scott, 588, 594. *Vigilantibus et non dormientibus succurunt jura.* And, accordingly, it may now be regarded as settled, that a misrepresentation as to a fact, the truth of which a party or his agent has an opportunity of ascertaining, or the concealment of a matter which an individual, possessed of ordinary sense, vigilance, or skill might discover, cannot in law constitute fraud. Thus, if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him, or to his agent, he cannot be heard to say that he was deceived by the vendor's representations, the rule in such cases being *Caveat emptor;* and the knowledge of his agent being as binding on him as his own knowledge. Chit. Contr.

588. *Attwood v. Small*, 6 Clark & Fin. 232; *ante*, vol. iii. p. 52.

A misrepresentation as to the *legal effect* of an agreement does not constitute fraud. *Lewis v. Jones*, 4 B. & C. 506; 6 D. & R. 567.

And if there be no misrepresentation of any existing fact, but only an intention at the time of the contract to depart from it, which intention is not alleged to have been carried into effect, that does not vitiate the contract. *Per Parke, B.: Hemingway v. Hamilton*, 4 Mee. & W. 115, 122.

Fraud, however, clearly occurs where one person misrepresents or conceals a material fact, which is peculiarly within his own knowledge (*Attwood v. Small, supra. Per Cur.: Wilson v. Wilson*, 6 Scott, 540, 573), or uses a device which is naturally calculated to lull the suspicions of a careful man, and induce him to forego inquiry into a matter upon which the other party has information, although such information be not exclusively within his reach. *Dobell v. Stevens*, 3 B. & C. 623; 5 D. & R. 490; 2 Bl. Com. 451. But still it must be shown that the concealment or other deception was practised with respect to the particular transaction. *Green v. Gosden*, 3 Man. & G. 446.

The question has been raised whether legal fraud is actionable, and whether it invalidates a contract though not coupled with moral fraud?—that is, whether a statement false in fact, but not so to the knowledge of the party making it, and not made with intent to deceive, will invalidate a contract. This question does not appear to have been finally solved. See *Moens v. Heyworth*, 10 Mee. & W. 147. *Taylor v. Ashton*, 11 id. 401. *Collins v. Evans*, 5 Q. B. 820. *Rawlings v. Bell*, 1 C. B. 951. *Bailey v. Walford*, 9 Q. B. 197. *Freeman v. Baker*, 5 B. & Adol. 797. *Flinn v. Tobbin*, M. & M. 367. *Early v. Garratt*, 9 B. & C. 928. *Polhill v. Walter*, 3 B. & Adol. 114. *Behn v. Kemble*, 7 C. B. 260. *Childers v. Wooler*, 29 L. J. Q. B. 129. *Collins v. Cave*, id. Ex. 35.

In *Ormrod v. Huth*, 14 Mee. & W. 651, which was an action for false representation on the sale of goods, *Tindal, C. J.*, delivering the judgment of the Court of Exchequer Chamber, said: "The rule which is to be derived from all the cases appears to us to be that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, which is a matter for his own consideration, he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would in general be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of *Caveat emptor* applies, and the representation itself does not furnish a ground of action."

In *Cornfoot v. Fowke*, 6 Mee. & W. 358, the plaintiff declared in *assumpsit* for the non-performance of an agreement to take a ready-furnished house, the defendant pleaded that he had been induced to enter into the contract by the fraud and covin of the plaintiff; and on this plea issue was joined. It appeared on the trial that the plaintiff, being the owner of the house in question, employed an agent to let it, and the defendant being in treaty with such agent for hiring it, asked him whether there was "anything objectionable about the house," upon which the agent replied, "Nothing whatever." On the day after signing the agreement, the defendant discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It further appeared that the plaintiff was fully aware of the existence of the brothel, but that the agent was not. It was held by the majority of the Court of Exchequer, that it was not sufficient to support the plea that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; whereas the principal, though he knew the fact, was not cognisant of the representation being made, and never directed the agent to make it. The agent, though he made the misrepresentation, did not know it to be one at the time he made it, but gave his answer *bonâ fide*.

In *Collins v. Evans*, 5 Q. B. 820, it was held that a plea to an action of deceit, that the defendant had reason to believe, and with good faith believed his representations to be true, was a good answer to the action; that falsehood in a statement without fraud would not sustain it; and that a "representation which is false in fact, but not known to be so by the party making it, but, on the contrary, made honestly and in the full belief that it is true, affords no ground of action." *See* also *Cornfoot v. Fowke, supra. Fuller v. Wilson*, 3 Q. B. 58. *Stone v. Compton*, 5 Bing. N. C. 156. *Moens v. Heyworth, supra. Thorn v. Bigland*, 8 Ex. 725. *Ormrod v. Huth, supra.* But if a party for a fraudulent purpose states a fact which is untrue, and, without knowing it to be untrue, he does not at the time believe it to be true, this is both a legal and a moral fraud. *Per Cur.: Taylor v. Ashton*, 11 Mee. & W. 401. And where the representation expressly or impliedly forms part of the contract between the parties, it is not essential, in order to invalidate the contract, that there should have been moral fraud in making such representation. *Per Parke, B.: Moens v. Heyworth*, 10 Mee. & W. 147, 157. Thus, a policy of insurance is made upon an implied contract that everything material known to the assured should be disclosed by them. (Id.) It is, moreover, a question for the jury whether or not any particular fact was material (*Westbury v. Aberdein*, 2 Mee. & W. 267); and if it were and were not communicated, no claim can be made by the assured, although it do not appear that he was aware of the materiality of such fact. *Lindenau v. Desborough*, 8 B. & C. 586.

"When a contract of insurance," observed

Lord Abinger, "is said to be a contract *uberrimæ fidei*, this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract in which one of the parties is necessarily less acquainted with the details of the subject of the contract than the other. Now, nothing is more certain than that the concealment or misrepresentation, whether by principal or agent, by design or mistake of a material fact, however innocently made, avoids the contract on the ground of a legal fraud." 6 Mee. & W. 379.

Where one party to a contract stands by and allows the other to enter into the contract under a delusion, of the existence of which he was aware, and which he might have removed, the contract is void. *Hill v. Gray*, 1 Stark. 434. Thus, if a creditor compounds with his debtor under a false impression as to the extent of the debtor's estate, in which the latter knowingly leaves him, the composition is void, and the creditor may sue for his original debt. *Vine v. Mitchell*, 1 M. & Rob. 337. And where a party, who was about to sell a public-house, falsely represented to B., who had agreed to purchase it, that the receipts amounted to so much a month; and B., to the knowledge of defendant, communicated that representation to C., who afterwards agreed to become the purchaser instead of B.: this was held to amount to a fraud by the defendant upon C. *Pilmore v. Hood*, 6 Scott, 827.

But there are cases in which the mere omission to communicate a fact will not amount to fraud, if the omission was made *bonâ fide* and without actual fraud. Thus, where the prospectus of a joint-stock company stated that the capital consisted of 60,000 shares, of 25*l.* each, but at the time the plaintiff executed the subscribers' agreement the deposits had been paid only on 18,160 shares, it was held that, inasmuch as the directors might honestly suppose that other names would come in afterwards, the omission to communicate that fact to the plaintiff at the time he executed the agreement did not avoid that instrument, so as to entitle him to recover his deposit. *Vane v. Cobbald*, 1 Ex. 798.

Inadequacy of consideration will not of itself defeat the contract, or substantiate a charge of fraud. But with other circumstances of suspicion it may undoubtedly assist in establishing fraud, at least in a court of equity. *Astley v. Weldon*, 2 B. & P. 346; 2 Bro. C. C. 175; 3 Ves. & B. 187. Although the weakness of intellect, not amounting to insanity, in one of the contracting parties, is no ground for invalidating a contract, it may have that effect if additional facts betraying an intention to overreach can be proved. *Osmond v. Fitzroy*, 3 P. Wms. 130; Fonbl. Tr. Eq. 6th ed. 68; 6 Bro. P. C. 137.

So great is the jealousy of the law with respect to fraud, that the alteration of a written contract in a material part, either by one of the contracting parties or by a stranger; or the alteration of such a contract by one of the contracting parties, even in a part which is not material, will avoid it *in toto*, provided such alteration be made in either case without the consent of the other party to the contract. *See* vol. i. p. 308.

Where parties deal for an estate they may put each other at arm's length. The purchaser may use his own knowledge, and is not bound to give the vendor information of the value of the property; as, if an estate is offered for sale and I treat for it, knowing that there is a mine under it, and the vendor makes no inquiry, I am not bound to give him any information of it. *Turner v. Harvey*, 1 Jac. 178.

Thus if a vendor, knowing that he has no right or title to property, or, being cognisant of the existence of incumbrances or outgoings upon it, or of latent defects materially lowering its value in the market, sells it, and neglects to disclose such defects to the purchaser, there is a fraudulent concealment vitiating the contract. *Edwards v. M'Leay*, 2 Swanst. 287. *Peto v. Blades*, 5 Taunt. 657. *Fuller v. Wilson*, 3 Q. B. 65. *Shirley v. Stratton*, 1 Bro. C. C. 440.

If a vendor affirms that he is the owner of corporeal or incorporeal hereditaments, believing what he says to be true, and so induces another party to buy, an action for deceit will not lie against him if the purchaser was furnished with the means of ascertaining for himself the truth or falseness of the representation. *Roswel v. Vaughan*, 2 Cro. 196. But if the vendor knew at the time that his title was defective, and kept back the fact from the purchaser, this is a fraudulent concealment, which avoids the contract *ab initio*, and entitles the purchaser to recover back his purchase-money. *Edwards v. M'Leay*, Coop. R. 313; 2 Swanst. 287. *Early v. Garrett*, 9 B. & C. 932.

An action on the case may be maintained for a fraudulent misrepresentation as to the extent of the business of a public-house, and the amount of the rent of the premises, although such representation were not embodied in a subsequent agreement and conveyance between the parties, and could not be substantiated without the aid of parol evidence. *Dobell v. Stevens*, 3 B. & C. 623; 5 D. & R. 490.

Contracts and agreements to recommend parties for employment in offices of trust, in consideration of the payment of money, or to pay money in consideration of such recommendation, entered into without the knowledge of the employer, or person who has the office or employment at his disposal, are a fraud upon the latter, and are void. *Waldo v. Martin*, 4 B. & C. 319; 6 D. & R. 364. *Card v. Hope*, 2 B. & C. 672. *Blachford v. Preston*, 8 T. R. 89. *Richardson v. Mellish*, 2 Bing. 242. And where a tenant holding under a lease, which was not assignable without the consent of the landlord, was desirous of selling his lease, and the plaintiff, in order to obtain an assignment of the lease to a friend, represented the latter to be a responsible and eligible person; and upon the faith of this representation ob-

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I. At Common Law.

(A) *What amounts to.*[1]

(*a*) *With respect to the Crown and Public.*[2]

(*b*) „ *Private Transactions.*[3]

tained from the defendant an agreement to assign the lease to such friend, and also the landlord's written consent to the assignment, and the representation was false to the knowledge of the plaintiff at the time he made it, and therefore fraudulent, it was held that the representation went to the essence of the contract, and entitled the plaintiff to rescind the agreement. *Canham v. Barry*, 15 C. B. 603; 24 L. J. C. P. 100.

[1] Defrauding or cheating consists in deceitful practices, in defrauding or endeavouring to defraud another of his right by means of some artful device, contrary to the plain rules of common honesty. As, where the party obtaining the goods has recourse to fraudulent means in the first instance, and thereby succeeds to the extent of inducing the owner not only to deliver the possession of the goods to him, but absolutely to part with the property in them. But where the possession of goods is obtained, in the first instance, without fraud, upon a contract or trust, a subsequent dishonest conversion of them, while the privity of contract continues undetermined, will, in general, be only a breach of trust or civil injury.

Any person maiming himself, in order to have a greater pretence for soliciting charity, is a cheat. *See* Hawk. P. C. c. 55; 1 Hale, P. C. 412; Co. Litt. 127, a.

Those frauds which affect the Crown and the public at large are also clearly the subject of indictment, though they may arise in the course of some particular transaction or contract with private individuals. Hence it had been holden, that a person who, being committed to gaol under an attachment for a contempt in a civil cause, counterfeited a pretended discharge, as from his creditor, to the sheriff and gaoler, under which he obtained his discharge from gaol, was guilty, as a cheat, of a misdemeanor at common law. 2 East, P. C. 862.

[2] Making a false instrument to pervert the course of justice is a fraud. In *O'Mealy v. Newell*, 8 East, 364, *Lord Ellenborough*, *C. J.*, said: "I have not the least doubt, that any person making use of a false instrument, in order to pervert the course of justice, is guilty of an offence punishable by indictment. The case of the *King v. Mawbey and others* went the whole length of that proposition." 6 T. R. 619.

So an apprentice who enlisted as a soldier, and obtained the king's bounty, was held indictable. *Rex v. Jones*, 1 Leach, C. L. 174; 2 East, P. C. 822.

[3] In private transactions, a mere false affirmation does not constitute a common cheat. In fact, the transaction must amount to a conspiracy or forgery, which are substantive offences, for all the cases seem to show that the cheating or fraud must be affected by some deceitful and illegal practice or token, which affects or may affect the public, in order to be indictable at common law; and it seems also to result from these cases that a cheat, in order to be punishable by the common law, must be of that nature that common prudence could not have guarded against it. *Rex v. Bryan*, 2 Stra. 866. *Rex v. Lewis*, Sayer, 205. *Rex v. Pankney*, 2 East, P. C. 818. In such a case the party injured was by the common law remitted to his civil remedy by action. *Reg. v. Jones*, 1 Salk. 379; 2 Ld. Raym. 1013.

Accordingly, where a person having no account gave a cheque upon a banker (*Rex v. Lara*, 6 T. R. 565), *Grose*, *J.*, said, "that in order to make this case something more than a bare naked lie, it had been said that the defendant used a false token, for that he gave a cheque on his banker; but that was only adding another lie; and that if the court should determine that this case was indictable, he did not know how to draw the line, for it might equally be said that every person who overdrew his banker used a false token, and might be indicted for it." *Lawrence*, *J.*, said, "It is admitted that a mere false assertion, unaccompanied by a recommendation, is not indictable; and I think there is

REX v. HAYNES, 4 M. & S. 214.

A fraud upon an individual is not in general the subject of indictment at common law, unless some false token has been used, or there has been a conspiracy to effect the object.

The indictment in substance charged the defendant, a miller, with receiving good barley to grind at his mill, and delivering a mixture of oat and barley-meal, different from the produce of the barley, and which was musty and unwholesome; and the defendant having been found guilty, it was assigned for error, amongst other things, that no indictable offence was charged against him. One of the grounds upon which it was contended that the offence charged was not indictable was, namely, that the statement should have been that the defendant delivered the barley to be eaten as for food, and that it was not fit to be eaten by man.

Lord Ellenborough, C. J., said, "that if the indictment had alleged that the defendant delivered the barley as an article for the food of man, it might possibly have been sustained, but that he could not say that its being musty and unwholesome, necessarily, and *ex vi termini*, imported that it was for the

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nothing in this case beyond the defendant's own false assertion."

So where a miller converted corn sent to be ground to his own use, it was held not to be indictable, because it was a matter of a private nature, for which an action would lie. *Channell's case*, 2 Stra. 793. So where a person sent sixteen gallons for eighteen. *Wheatley's case*, 2 Burr. 1125; 2 East, P. C. 273. Or vends an unsound horse. *Rex v. Pywell*, 1 Stark. 402. But if money is obtained by means of a false mark or token put on an article with a view to deception, it is a cheat at common law, and an indictable offence. *Reg. v. Closs*, 27 L. J. M. C. 54. *See* vol. iii. p. 95. See *Atkin's case*, Tremaine's P. C. 109. *Worrall's case*, id. 106; 2 Russ. Crimes, 282. And uttering a forged testimonial to character, knowing it to be forged, with intent to deceive, and thereby obtain a situation of emolument, is a misdemeanor at common law. *Reg. v. Sharman*, 23 L. J. M. C. 51; 1 Dears. C. C. 285. *If the case amounts to a conspiracy* it is indictable. *Rex v. Orbell*, 6 Mod. 42; 12 id. 499. As where A., pretending to be a merchant, and B. a broker, bartered bad wine for hats. *Reg. v. McCarty*, 2 Ld. Raym. 1179. *See* Conspiracy, vol. iii. p. 181. And it seems that if the fraud amount to a forgery, the party may be indicted as a cheat (*Rex v. Govers*, Sayer, 206), provided it were successful. *Rex v. Ward*, 2 Stra. 747. Accordingly, where a charge in the indictment appeared to be, that the defendant, intending to cheat J. S., did deceitfully take upon himself the style and character of a merchant, and did deceitfully affirm to J. S. that he was a merchant, and had received divers commissions from Spain; and that, in order to induce J. S. to believe that he was a merchant and had received such commissions, and to induce J. S. to give him credit, the defendant did deceitfully produce to J. S several paper writings, which he falsely affirmed to be letters from Spain, containing commissions for jewels, watches, and other goods, to the amount of 4000*l.*; by means whereof he did get into his hands two watches, the property of J. S.; whereas, in truth, the defendant was not a merchant, and the paper writings containing such commissions were false and counterfeit: the indictment was held good. *Rex v. Govers, supra.*

Mala praxis of a physician is indictable. In *Rex v. Groenvelt*, 1 Ld. Raym. 213, the court resolved that *mala praxis* is a great misdemeanor and offence at common law, (whether it be for curiosity and experiment, or by neglect,) because it breaks the trust which the party has placed in the physician, tending directly to his destruction.

Persons in official situations rendering false accounts are indictable (*Rex v. Bembridge*, cited 6 East, 135) as overseers (*Rex v. Commings*, 5 Mod. 179. *Rex v. Martin*, 2 Camp. 269), or churchwardens who convert a collection to their own purposes (*Rex v. the Minister of St. Botolph*, 1 Black. 443), or a parish officer who promotes the marriage of a pauper to settle her on another parish. *Rex v. Tarrant*, 4 Burr. 2106.

It is said to have been resolved by all the judges, that writers of false news are indictable and punishable; and that, probably at this day, the fabrication of news likely to produce any public detriment would be considered as criminal. *See* 4 Bl. Com. 149. *Lord Cochrane's case.*

Selling unwholesome provisions is an indictable offence. *Rex v. Treeves*, 2 East, P. C. 821. As, where a baker sells bread containing alum, in a shape which renders it noxious. *Rex v. Dixon*, 3 M. & S. 11; 4 Campb. 12.

Selling by false weights and measures, even to *one*, is indictable; but selling without false weights a less quantity to *one* is not. *Rex v. Young*, 3 T. R. 104. *Reg. v. Eagleton*, Dears. C. C. 515. The indictment must not lay the false pretence to one, and the deceit to have been practised on another. *Rex v. Lara*, 6 T. R. 565. And this is considered to apply to all cases where any species of false token is used which has the semblance of public authority (2 East, P. C. c. 18, s. 13); as to a case where cloth was sold with the alnager's seal counterfeited therein (Trem. P. C. 103); and to another case, where a general seal or mark of the trade on cloth of a certain description

food of man, and it was not stated that it was to be used for the sustentation of man only, that it was a mixture of oat and barley-meal." As to the other point, that this was not an indictable offence because it respected a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit, his lordship said, that "if the case had been that this miller was owner of a soke-mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the miller, abusing the confidence of this his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but as it then stood, it seemed to be no more than the case of a common tradesman who was guilty of a fraud in a matter of trade or dealing, such as was adverted to in *Rex v. Wheatley*, and the other cases, as not being indictable."

(B) *Of the Indictment.*[1]
(C) ,, *Evidence.*[2]
(D) ,, *Punishment.*[3]

II. By Statute. *See* False Pretences, *ante*, p. 434.[4]

FRAUDS, Statute of.

I. As to the Creation of a Title in Land, p. 537.

and quality was deceitfully counterfeited. (Id. 106.) So, if a person, selling corn, should measure it in a bushel short of the statute measure, or should measure it in a fair bushel, and put something into the bushel to help to fill it up, it seems that he might be indicted for the cheat. *Pinckney's case*, 2 East, P. C. c. 18, s. 3, p. 820. And though the knowingly exposing to sale and selling wrought gold under the sterling alloy, as and for gold of the true standard weight, was held not to be an indictable offence, but a private imposition only in a common person, where no false weight or measure was used is not indictable (Cowp. 323, 324); yet if, in such a case, the stamps or marks required by statute on plate of a certain alloy had been falsely used, it seems also in this case that an indictment would lie also. *See* 2 East, P. C. c. 18, s. 3, p. 820, note b; and also 1 id. c. 4, s. 34, p. 194.

[1] The indictment, we have seen, must not lay the false pretence to one, and the deceit to have been practised on another. *Rex v. Lara*, 2 Leach, C. L. 647; 6 T. R. 565.

Where the transaction has been effected by false tokens, it must specify and set forth what the false tokens were; and it is not sufficient to allege generally that the cheat was effected by certain false tokens, or false pretences. 2 East, P. C. c. 18, s. 13, p. 837. But it does not seem to be necessary to describe them more particularly than they were shown or described to the party at the time, and in consequence of which he was imposed upon; and it is also said, not to be necessary to make any express allegation that the facts set forth show a false token. Id. p. 838.

[2] The prosecutor must prove the pretence as stated in the indictment; any variance in substance between the pretence laid and that proved will be fatal. He must next prove that the goods, &c. stated in the indictment, or part of them (for the rule in this respect is the same as in larceny), was obtained from him by means of these pretences; and the intent may be implied sufficiently from the facts of the case.

[3] The punishment is either corporal or by fine, or imprisonment. *See* 1 Hawk. P. C. c. 71; 2 East, P. C. 838.

[4] Officers or servants of the Penitentiary at Millbank, making any false entry or conveyance in their accounts, or other fraudulent collusion, may be indicted and punished by fine and imprisonment, under the 56 Geo. 3, c. 63.

With respect to Fortune-Telling.—By the 9 Geo. 2, c. 5, s. 4, persons pretending to exercise witchcraft, &c., tell fortunes, &c., and being convicted, are to be imprisoned for a year, and may be obliged to give securities for good behaviour.

With respect to Fraudulent Conveyances.—The 13 Eliz. c. 5, declares that fraudulent conveyances, judgments, &c., shall be void, and that the parties to them shall incur a forfeiture of a year's value of the lands, &c., and suffer imprisonment for one half-year.

With respect to Gaming.—By the 8 & 9 Vic. c. 109, s. 17, cheating at cards or any other game is an indictable offence.

With respect to Servants.—Giving false characters to servants is punishable by the 32 Geo. 3, c. 56, by a penalty, on conviction before two justices.

As to frauds by bankers' agents and factors, *see* Embezzlement, *ante*, p. 231. As to frauds by directors and other officers of public companies, *see* id. and Joint-Stock Companies. As to frauds by bankrupts, *see* Bankruptcy, vol. ii. p. 294.

II. As to the Surrender or Assignment of Terms, p. 538.

III. Of Contracts for Interest in Land, and of Contracts which are not to be Performed within a Year, p. 538.

(A) *No Action can be brought unless the Agreement, or a Memorandum of it, is in Writing, and Signed by the Party to be Charged*, p. 538.

(*a*) *What is a Contract for Sale of Lands*, p. 540.

(*b*) *What Agreements are not to be Performed within a Year*, p. 542.

(*c*) *What is a sufficient Agreement or Memorandum in Writing*, p. 543.

(*d*) *What is a sufficient Signature*, p. 544.

IV. As to Contracts for the Sale of Goods, p. 545.

(A) *Buyer must accept Part or give Something in Earnest, or there must be a Written Contract*, p. 545.

(*a*) *What Contracts are within the Section*, p. 546.

(*b*) *What Delivery and Acceptance sufficient to satisfy the Statute*, p. 546.

(*c*) *What a sufficient Part-Payment or Acceptance of Earnest*, p. 548.

(*d*) *What a sufficient Memorandum of Sale of Goods to satisfy the Statute*, p. 548.

(*e*) *What Signature of the Memorandum is sufficient*, p. 548.

V. To Charge Executor Personally. *See* Executor, *ante*, p. 360.

VI. As to Promises to Answer for the Debt, Default, or Miscarriage of Another. *See post*, Guarantee.

VII. As to Promises in Consideration of Marriage. *See post*, Marriage.

VIII. (5th Sect. of Stat.) Relative to Devises of Land. *See post*, Will.

IX. (6th Sect.) Relative to Revocation of Devises of Land. *See ante*, Devise, p. 71.

X. (7th Sect.) Relative to Express Declarations, or Creation of Trusts. *See post*, Trustees; Uses and Trusts.

XI. (8th Sect.) Relative to Implied Creations of Trusts. *See* id.

XII. (9th Sect.) Relative to Grants and Assignments of Trusts. *See* id.

XIII. (10th Sect.) Relative to Lands, &c. being Liable to the Judgment of Cestui que Trust, in the Hands of his Heir, and where such Lands Descend to Him. *See ante*, Elegit, p. 224; *post*, Heir; Judgment.

XIV. (11th Sect.) Relative to the Exceptions of Heirs of Cestui que Trust from being Chargeable out of his own Estate. *See post*, Heir; Judgment.

XV. (12th Sect.) Relative to Estate per autre Vie being Devisable. *See post*, Will.

XVI. (13 and 14th Sects.) Relative to Docketing Judgments. *See post*, Judgments.

XVII. (15th Sect.) Relative to Effect of Judgment as regards the Rights of Purchasers. *See* id.

XVIII. (16th Sect.) Relative to Writs of Execution against Personal Property and Effects. *See ante*, Fieri Facias, p. 455.

XIX. (17th Sect.) Relative to Contracts for the Sale of Goods for the Price of Ten Pounds or Upwards. *See* Div. IV. *supra.*

XX. (18th Sect.) Relative to the Enrolment of Recognisances. *See post*, Recognisances.

XXI. (19th, 20th, 21st, 22d, 23d, and 24th Sects.) Relative to Nuncupative Wills. *See post*, Wills.

XXII. (25th Sect.) Relative to Husbands not being Compellable under Statute of Distribution to Distribute the Personal Estate of their Wives. *See* Distribution, *ante*, p. 117.

I. As to the Creation of a Title in Land.

Parol leases and interest of freehold shall have the force of estates at will only;

The 29 Car. 2, c. 3, s. 1, enacts, "that all leases, estates, interests of freehold or terms of years, or any uncertain interests of, in, to or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing[1] and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding."

Except leases not exceeding three years.

Sect. 2 makes the following exception of certain leases:—"Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-thirds at least of the full improved value of the thing demised."

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[1] Where the lease is required to be in writing it must now be by deed. 8 & 9 Vic. c. 106, s. 3; *see post*, Lease.

The meaning of the first and second sections appears to be, that such leases of messuages, manors, lands, &c. as do not exceed the term of three years from the making thereof, and upon which the rent reserved to the landlord during the term amounts to two-thirds at least of the full improved value of the thing demised, are valid without writing (2 Stra. 651), provided that no writing were necessary before the Statute of Frauds; but leases of messuages, lands, &c. which exceed the term of three years from the making thereof (whatever may be the amount of the rent reserved), or upon which (if they do not exceed that term) less than the two-thirds of the full improved value is reserved, have the force and effect only of leases or estates at will, unless put in writing and signed as the statute directs; and further, that all other interests, created without writing, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, whether they are interests of freehold or terms of years, or for an uncertain duration (Say. 4), can only have the same effect, namely, of leases or estates at will. The first section, as it has been justly observed (Sugden's *Vendors and Purchasers*, 4th ed. 56, 59; 6 East, 610); seems to embrace interests of every description, while the exception in the second section relates only to leases of a particular description. A mere easement in lands or tenements, &c. is not an interest within the provision of the first section. Agreements, therefore, for the liberty of using a way over another person's field, or for stacking coals upon his close (Say. 3); or for nailing the framework of a skylight against the wall of his house (8 East, 310, n.), are valid without writing. *See* 5 B. & C. 829; 10 Ad. & E. 753; 9 Mee. & W. 501; 13 id. 838; 28 L. J. Q. B. 88; id. C. P. 301.

Leases by parol, not within the exception before mentioned, are not available as to the duration of the interest; for the statute enacts that they shall have the force and effect of leases or estates at will only: but still they may in some cases be applied to regulate the terms on which the tenancy subsists in other respects; as, for example, the amount of the rent, or the time of the year when the tenant is to quit. In the case, therefore, of *Doe d. Rigge v. Bell*, 5 T. R. 471, where a tenant, who entered upon the premises on Lady-day under a parol lease for seven years, and was to quit (at Candlemas), held over, after receiving a notice to quit on Lady-day, the court were of opinion that the notice was irregular, and that the tenancy could only be deter-

II. As to the Surrender or Assignment of Terms.

Sect. 3 enacts, "that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised *by writing*, or by act and operation of law."[1]

III. Of Contracts for Interest in Land, or which are not to be Performed within a Year, &c.

(A) *No Action can be brought unless the Agreement, or a Memorandum of it, is in Writing, and Signed by the Party to be Charged.*

No action can be brought unless the agreement, or a memorandum of

Sect. 4 enacts, "that no action shall be brought[2] whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person;[3] or to charge any

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mined at Candlemas, which was the time for quitting fixed by the agreement. And though the statute, after enacting "that such leases shall have the force and effect of leases or estates at will," further enacts "that they shall not, either in law or equity, be deemed or taken to have any other or greater force or effect," yet these words have been understood to mean, that a parol lease exceeding three years should not operate as a term, but that a holding under such a lease will now operate as a tenancy from year to year; because that is now construed to enure as a tenancy from year to year which was then considered as a tenancy at will.

[1] And by the 8 & 9 Vic. c. 106, s. 3, a deed is rendered necessary. It is by that section enacted, that "a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing made after the 1st October, 1845, shall be void at law, unless made by deed: provided always, that the said enactment, so far as the same relates to a release or a surrender, shall not extend to Ireland."

It has been determined under this section, that a lease for years cannot be surrendered by a cancelling of the indenture; for the intent of the statute was to put an end to the practice which then prevailed of transferring interests in land by signs, symbols, and mere parol; and the words "by act and operation of law," are to be construed a surrender in law by the acceptance of a new lease, which being in writing is of equal notoriety with a surrender in writing. Gilb. Eq. C. 235; 6 East, 86, 102. And although taking a new lease of premises, which have been already demised, will in many cases operate as a surrender in law of the first lease; yet a recital in the second lease, that it was granted partly in consideration of the surrender of a former lease (the instrument not purporting to be of itself a surrender), is not a surrender by deed or note in writing within the meaning of the statute. 6 East, 86. The language of the third section corresponds as nearly as possible with that of the first, comprehending all leases and interests in the subject-matters specified, whether for a longer or shorter term than three years; and it is not followed, as that section is, by a clause excepting leases of a particular description: it must be obvious, therefore, upon the plain construction of the act, that leases (reserving a rent not less than two-thirds of the improved value) may be created by parol for a term not exceeding three years; yet that such leases cannot be assigned (1 Camp. 317), or surrendered (2 id. 103) by parol.

As the statute does not apply to a surrender by operation of law, therefore a surrender by deed is unnecessary where the former lessee is the party who takes the new lease, as the fact of his so doing is evidence that the new lease has been accepted by him, and such acceptance operates a surrender in law; but it is not enough that the lessee agrees to an act done by the reversioner; and it seems that a demise of premises by the reversioner to a stranger, by the consent of the lessee in possession, will not amount to a surrender by operation of law. *Lyon v. Reed*, 13 Mee. & W. 285.

[2] The words "no action shall be brought whereby to charge," &c. "unless the agreement upon which such action shall be brought," &c., do not render it necessary to prove an agreement in writing in those cases where it is not the subject of the suit, but comes only collaterally in evidence. *Griffith v. Young*, 12 East, 513.

[3] It was held that the note or memorandum of a promise to answer for the debt, default, or miscarriage of another, must disclose upon the face of it the consideration for the promise; but by the 19 & 20 Vic. c. 97, s. 3, it enacted, that "no such promise, being in writing and signed by the party to

person upon any agreement made in consideration of marriage;[1] or upon any contract or sale of lands, tenements, and hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

it, is in writing, and signed by the party to be charged.

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be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding, to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." See *Holmes v. Mitchell*, 7 C. B. (N. S.) 361. *Williams v. Lake*, 29 L. J. Q. B. 1. *See post*, Guarantee.

This clause does not apply to a case where the person giving a guarantee is himself liable to the demand for which it is given; it must be exclusively the debt, default, or miscarriage of another. *Orrell v. Coppock*, 26 L. J. Ch. 269. *Couturier v. Hastie*, 22 L. J. Ex. 97.

Where the defendant promised the plaintiff that if he would become bail and security for one H., he (the defendant) would indemnify the plaintiff from all payments, damages, costs, and expenses which he might incur by reason thereof, it was held to be within the statute. *Green v. Cresswell*, 10 Ad. & E. 453. *Batson v. King*, 4 H. & N. 739; 28 L. J. Ex. 327. See *Cripps v. Hartnall*, 31 L. J. Q. B. 150.

A promise to pay in consideration of withdrawing a distress (*Edwards v. Kelly*, 6 M. & S. 204), or an execution, is not within the statute (*Bird v. Gammon*, 3 Bing. N. S. 883), for such a promise is an original and independent undertaking, and not a collateral promise to pay the debt of another within the statute. So, a parol promise to indemnify an occupier who resists a suit for tithes is not within the statute. *Adams v. Dansey*, 6 Bing. 506; 4 M. & P. 245. *See post*, Guarantee; Principal and Surety.

[1] The act does not apply to the marriage contract itself, therefore a promise of marriage is binding, although by parol. *Cork v. Baker*, 1 Stra. 34. *Harrison v. Cage*, 1 Raym. 386. But a promise or agreement by one person in consideration of the completion of a marriage by another is within the statute. A letter written by a father signifying his assent to the marriage of his daughter, and that he would give her a marriage portion of 500*l.*, was held a sufficient promise in writing to satisfy the statute. *Countess of Mountacue v. Maxwell*, 1 Stra. 236. *Bird v. Blosse*, 2 Vent. 361. *See post*, Marriage.

It may be observed generally of this section, that the cases in which the legislature has required proof of the agreement in writing is, where the agreement is the subject of an action. Where an action, therefore, is brought upon any agreement specified by the act, it will be necessary to prove a written agreement; otherwise it cannot be enforced against the party charged. It is admitted in *Griffith v. Young*, 12 East, 513, that the proving the action is only applicable to instances where the note or memorandum is sought to be rendered available to privy enactions, and between the immediate parties to the contract, and not to cases where the agreement is used incidentally, or for a collateral purpose: it might perhaps be argued, with some probability of success, that the clause did not extend to occasions where the note or memorandum was used in a defence, and not for the purpose of bringing an action, or, in the language of the statute, "thereby to charge," &c. But the section does not give effect to agreements which would not be valid by the rules of common law; for it does not enact that when the agreement is contrary the party must at all events be liable, but that the party shall not be liable to an action in certain cases, unless a written agreement is proved. *Rann v. Hughes; Barrell v. Trussell*, 4 Taunt. 118.

Nor, if the agreement is in writing, will it be necessary so to state it in the declaration, in which respect the statute has not made any alteration (Com. Dig. Action in Assumpsit, F. 3); but where the defendant, in bar of the plaintiff's right of action, pleads such an agreement as cannot be the subject of a suit unless in writing (as if he were to plead, in an action of assumpsit, an accord to accept payment by another in satisfaction), there he ought to plead it to be in writing, that it may appear to the court that an action will lie upon it; for he ought not to be allowed to take away the plaintiff's action without giving him a complete remedy upon the agreement pleaded. *Case v. Barber*, Raym. 450; 2 Jon. 138; S. C. Com. Dig. id.

When a written contract is required by the statute, payment of money into court will dispense with the necessity of proving the agreement. *Ramsbottom v. Brewer*, Peake, 15. But an admission by one of the parties, not that the agreement as stated is binding, but merely that such an agreement was in fact made, would not be sufficient to preclude him from availing himself of the Statute of Frauds (*Rondeau v. Wyatt*, 2 H. Black. 63); or if a parol agreement were stated in a court of law, to which the other party demurs, that would admit the agreement, yet advantage might still be taken of the statute. *See* 2 H. Black. 78.

(*a*) *What is a Contract for Sale of Lands.*[1]

If an entire parol agreement be void as to part, by virtue of the Statute of Frauds, it is void *in toto*. *Lexington v. Clarke*, 2 Vent. 223. *Chater v. Beckett*, 7 T. R. 201. *Cooke v. Tombs*, 2 Anst. 420. *Lea v. Barber*, id. 425.

An executory contract on which money has been paid is not within the Statute of Frauds. *Pawle v. Gunn*, 4 Bing. N. S. 445.

It is not necessary to plead specially that the contract was not in writing, in order to render the defence of the Statute of Frauds available. *Maggs v. Ames*, 4 Bing. 470; 1 M. & P. 294. Neither where the contract is executory and relating to an interest in lands (*Buttermer v. Hayes*, 7 Dowl. P. C. 489; 5 Mee. & W. 456); or for goods. *Eastwood v. Kenyon*, 11 Ad. & E. 438. *Fricker v. Thomlinson*, 1 Man. & G. 772.

Upon a question in an issue directed by a court of equity, whether there had been any agreement for the sale of an interest in a lease, &c.:— *Held*, that a court of law was bound to take notice of the Statute of Frauds, although the court of equity might not, unless the party put himself on the statute; but the fact of an agreement might be found and indorsed as special matter on the *postea*. *Burnand v. Nerot*, 1 C. & P. 580.

[1] This portion of the statute extends not merely to contracts relative to houses or lands in the common acceptation of those terms, but also to all agreements, the subject-matter of which partakes of the realty. The first section, as we have seen, relates to interests in or out of lands, tenements, &c., actually made or created; this clause of the 4th section relates to a contract or sale of interest in them. A lease of land is within the first section, unless in some particular cases excepted by the 2d section; an assignment of a lease is within the 3d section; and an agreement for the assignment of a lease, or for letting in an undertenant, is within the fourth. Where anything is done which substantially amounts to a sale or parting with an interest in land, the case is within the statute. *Kelly v. Webster*, 12 C. B. 290. See *Foster v. Rowlands*, 30 L. J. Ex. 396.

Whenever the contract or promise sued upon forms part of one entire contract for an interest in land, it will fail to support an action if it is not authenticated by writing. *Hodgson v. Johnson*, Ell. B. & El. 689; 28 L. J. Q. B. 88.

If the action is founded on the special contract for the sum agreed to be paid as the price of the transfer of an interest in land, the action will fail if the contract is not in writing (*Kelly v. Webster*, 12 C. B. 283; 21 L. J. C. P. 163. *Cocking v. Ward*, 1 C. B. 868), unless it appear that the defendant had received actual possession of the property, and had all the benefit for which he contracted. *Green v. Saddington*, 7 E. & B. 503. As where the plaintiff had made an oral agreement with E. for the purchase of an estate for 600*l.*, and then agreed in writing with the defendant to sell him the bargain for 40*l.*, and the estate was afterwards, at the plaintiff's request, conveyed to the nominee of the defendant, it was held that an action was maintainable for the recovery of the 40*l.* *Seaman v. Price*, 1 R. & M. 195. See *Griffith v. Young*, 12 East, 514. And where a contract consists of two collateral agreements, one only of which relates to an interest in lands, then if that part of the contract has been executed, the fact of the whole contract not being in writing will not preclude an action on the other part, founded on a promise to be performed after such execution, but one contract founded upon due consideration cannot be bisected so as to make a new contract and a new consideration out of one half. *Hodgson v. Johnson, supra.*

An agreement for the sale of a milk-walk, by which A. agrees to let B. into the occupation of the premises, and B. agrees to pay rent, rates, and taxes, is a contract for an interest in land within the statute. *Smart v. Harding*, 24 L. J. C. P. 76.

A purchase of fixtures is not a contract for any interest in land under sect. 4. *Hallen v. Runder*, 1 C., M. & R. 266; 3 Tyr. 959.

An agreement for *primâ vestura*, or growing grass, whereby the exclusive right to the land is obtained for a limited time, or for a given purpose, is within the 4th section. *Crosby v. Wadsworth*, 6 East, 602. *Carrington v. Roots*, 2 Mee. & W. 248. *Griffiths v. Puleston*, 13 id. 358. *Petch v. Tutin*, 15 id. 115. *Scorell v. Boxall*, 1 Y. & J. 398. So is a contract for growing hops (*Waddington v. Bristow*, 2 B. & P. 452); or growing turnips, no time being stipulated for the removal, and the parties not considering the land as a mere warehouse for their reception and deposit. *Emerson v. Heelis*, 2 Taunt. 38. So the sale of growing underwood (*Scorell v. Boxall*, 1 Y. & J. 396); or a contract to take a farm for a term, with the crops, &c., is an interest in land within the statute. *Earl of Falmouth v. Thomas*, 1 C. & M. 89; 3 Tyr. 26. But where the vegetable sold is in a matured state, and it is agreed that it shall be immediately taken away, this is merely a sale of a personal chattel, and not within the act. *Parker v. Staniland*, 11 East, 362. *Mayfield v. Wadsley*, 3 B. & C. 357. *Evans v. Roberts*, 5 id. 829; 8 D. & R. 614. *Watts v. Friend*, 10 B. & C. 446. And this rule may hold good in the case of growing trees. *Villars v. Parry*, 1 Ld. Raym. 182. *Mayfield v. Wadsley*, 3 B. & C. 357; 5 D. & R. 231. For if fruit is sold at so much a bushel, and timber at so much a foot, with a view to its immediate severance from the soil, and delivery as a chattel to the vendee, the contract is not a contract for the sale of an interest in land, but for the sale of goods and chattels, "the produce of the trees when they should be cut down and severed

from the freehold." *Smith v. Surman*, 9 B. & C. 568. Therefore a contract for the purchase of felled trees does not convey an interest in land, but in goods, within the 17th section of the Statute of Frauds. *Smith v. Surman*, 9 B. & C. 561. So potatoes to be raised from the ground by the seller are goods, and not an interest in land. *Evans v. Roberts*, 5 B. & C. 829; 8 D. & R. 611. Therefore a parol contract to purchase potatoes then growing, and to have them at digging-time, and find diggers, is not a contract within the section. *Sainsbury v. Matthews*, 4 Mee. & W. 343; 7 Dowl. P. C. 23. But where a man agrees to hire the land, and take the crops growing thereon at a valuation, and to pay a certain sum for work and labour, and materials expended in getting the land ready for tillage, this is an entire contract for an interest in land, and the growing crops cannot in such a case be treated as goods and chattels. *Earl of Falmouth v. Thomas*, 1 C. & M. 89. *Harvey v. Grabham*, 5 Ad. & E. 62.

A contract to furnish seeds to the defendant, to be sown by him, and the crops sold to the plaintiff at a fixed sum per bushel, was held to be an agreement within the 17th section of the Statute of Frauds. *Watts v. Friend*, 10 B. & C. 446.

A verbal contract for growing crops may sometimes be sustained as distinct from another void parol agreement between the parties for giving up the possession of the land whereon they grow. *See* 3 B. & C. 347; 5 D. & R. 224. *Villars v. Parry*, 1 Ld. Raym. 182. *Mayfield v. Wadsley*, 3 B. & C. 357; 5 D. & R. 231; 6 Moore, 614. But if the defendant under a void parol contract fell or remove timber, or dig up or remove any growing crops, he is then liable as for goods sold, although if he had not thus carried the parol agreement into execution he could not have been sued thereon. *Teal v. Auty*, 4 Moore, 547; 2 B. & B. 99.

An agreement for a demise of a house to be furnished, &c., is an interest in land within the Statute of Frauds. *Mechelin v. Wallace*, 2 Nev. & P. 224.

A parol agreement to take lodgings for two or three years is void by the Statute of Frauds. *Edge v. Strafford*, 1 C. & J. 391; 1 Tyr. 293. *Inman v. Stamp*, 1 Stark. 12. But if the contract does not purport to give a right to any specific apartments, but is merely an agreement to receive a person into the defendant's house, and provide him with board and lodging, that is not, it seems, a contract for an interest in land. *Wright v. Stavert*, 29 L. J. Q. B. 161.

An agreement between a landlord and an intended lessee or tenant for the furnishing of the house, where the occupation of the house forms the substance of the contract, and the furnishing is bargained for only in connexion with such occupation, has been held to be a contract for an interest in land. *Vaughan v. Hancock*, 3 C. B. 766. *Simmons v. Simmons*, 12 Jur. 8.

In *Mechelin v. Wallace*, 7 Ad. & E. 49; 2 Nev. & P. 224, an oral agreement was entered into between the parties for the lease of a ready-furnished house. The house being only partially furnished, the landlord promised to send in more furniture, and the tenant was let into possession of the house. In an action for breach of this agreement to send in the additional furniture, it was held that the promise formed part of an entire contract for an interest in land, and ought, consequently, to have been expressed in writing.

So, an agreement between a landlord and an intended tenant or lessee, that the landlord shall make certain alterations, or do certain repairs upon the house, is, if the principal subject-matter of the agreement be the letting of the house, a contract concerning an interest in the land; for the making of the alteration is merely accessory to the letting of the house, and it ought, therefore, to be authenticated by writing. *Vaughan v. Hancock*, 3 C. B. 766. And where A., being tenant of premises, agreed to give up possession to B., and suffer him to become tenant thereof for the residue of the term, in consideration of B.'s undertaking to do certain repairs to the premises; and B. being let into possession, but neglecting the repairs, A. sued him. But it was held to be an agreement relating to an interest in land within the statute, and that the action was not maintainable. *Bullemere v. Hayes*, 5 Mee. & W. 456.

But where a tenant in the actual occupation of a house, under an existing demise, orally agreed that, in consideration of the landlord building another story to the house, he would pay him an additional rent of 10*l.*, it was held that the Statute of Frauds did not apply. *Hoby v. Roebuck*, 7 Taunt. 157; 2 Marsh. 433.

Where it was agreed between the plaintiff and the defendant that the plaintiff, who was tenant of a farm, should surrender her tenancy, and prevail on her landlord to accept the defendant in her place, and that the defendant should then pay her 100*l.* for so doing, it was held that the contract amounted to a sale of an interest in land within the statute, and that, there being no written evidence of the contract, no action could be maintained upon it. It, however, appeared that the plaintiff had let the defendant into occupation of the farm, and that he had succeeded to her interest, and had afterwards admitted that he owed her 100*l.*; and the court held that this amount might be recovered under an account stated. *Cocking v. Ward*, 1 C. B. 868; 15 L. J. C. P. 245.

A parol agreement to put a skylight over the defendant's area, which impeded the light and air from coming to the plaintiff's house through a window, is good. *Winter v. Brockwell*, 8 East, 310. And an agreement of a lessee to pay the lessor annually during the time 10*l.* per cent on the costs of new buildings, if the lessor would erect them, need not be in writing. *Hoby v. Roebuck, supra.* But in *O'Connor v. Spaight*,

(b) What Agreements are not to be Performed within a Year.[1]

1 Sch. & Lef. 506, an agreement for the abatement of the rent of lands was holden to be clearly within the statute. So is an agreement for the grant of a rent or of a right of common, or parol agreement between parties, in the course of a proceeding before an arbitrator, that he shall determine as to a lease to be granted; an award directing such demise cannot be enforced. *Walker v. Morgan*, 2 Cox, C. C. 369.

A sale of lands by auction is within the statute. *Stanfield v. Johnson*, 1 Esp. 101. But the auctioneer is considered the agent of both parties, and therefore his entry, or signature of the purchaser's name in his book, or elsewhere, as the vendee of the land, satisfies the act. *Emmerson v. Heelis*, 2 Taunt. 38.

An equitable mortgage by deposit of title-deeds was established in *Russel v. Russel*, 1 Bro. Ch. 269, and is now a matter of daily occurrence. This is mentioned in *Ex-parte Finden*, 11 Ves. 404, n., as the first case which broke in upon the statute and let in evidence which it was the very object of the statute to exclude. But the doctrine, although disapproved of, is not yet disturbed. *Ex-parte Haigh*, 11 Ves. 403. *Norris v. Wilkinson*, 12 id. 197.

[1] The clause as to agreements which are not to be performed within a year includes only those cases in which it is expressly stipulated, or in which it appears to be the understanding of the parties, as collected from the terms of the agreement, that they are not to be performed, that is completed, within the period of the year. *Souch v. Strawbridge*, 2 C. B. 808. *Boydell v. Drummond*, 11 East, 142. Hence, cases depending upon contingencies which may or may not happen in the course of a year of the making of the agreement, are not within the statute; as on the return of a ship at sea. *Anon.* 1 Salk. 280. *Peter v. Compton*, Skin. 353. Or a contract to bequeath money on the death of a party (*Fenton v. Emblers*, 3 Burr. 1278); for the statute has no reference to cases in which the whole contract may be performed within a year, and there is no stipulation to the contrary, even although it may appear as a fact that the performance has extended beyond that time. See *Miles v. Bough*, 3 Q. B. 845. But an agreement for a year's service, to commence on a subsequent day, being a contract not to be performed within the year, must be in writing (*Bracegirdle v. Heald*, 1 B. & A. 722); and, therefore, no action can be maintained for the breach of a verbal contract made on the 27th of May, for a year's service, to commence on the 30th of June following. (Id.) But a general hiring of a clerk, which is construed to be a hiring for a year, and so on from year to year, so long as the parties respectively please, operates as a yearly hiring, and it need not be in writing. *Beeston v. Collier*, 4 Bing. 309; 12 Moore, 552; 2 C. & P. 607. So, an agreement for the services of a clerk, with a stipulation to pay him a salary at the following rates, viz.—"For the first year, 50*l.*; for the second, 90*l.*; for the third, 110*l.*; for the fourth, 130*l.*; and 150*l.* for the fifth and following years he might remain in the employment," is within the statute, and must be put in writing. *Giraud v. Richmond*, 2 C. B. 835.

The provisions of the statute render a verbal contract void, if it appear to have been the understanding of the parties at the time that it was not to be completed within a year, although it might be, and was in fact, in part performed within that period. Thus, a verbal agreement to become a subscriber to the *Boydell Shakespeare*—being a series of prints, to be published in numbers—an undertaking which, in the contemplation of the parties, could not be performed or brought to a close for several years, is void. *Boydell v. Drummond*, 11 East, 142. In this case the action was for not accepting or paying for the residue of the numbers, the defendant having, for a time, taken in several numbers, and paid for them at so much per number, according to the agreement. So, a contract whereby a coachmaker agrees to let a carriage for a term of five years, in consideration of receiving an annual payment for the use of it, but which, by the custom of the trade, is determinable at any time within that period, upon the payment of a year's hire, is an agreement not to be performed within a year, and is void if not in writing. *Birch v. the Earl of Liverpool*, 9 B. & C. 392.

A promise by a debtor that his executors shall pay is not within the statute, the thing being contingent. *Wells v. Horton*, 4 Bing. 40; 12 Moore, 176. *See* 3 Burr. 1278; Skin. 353.

The Statute of Frauds applies to an agreement for the hire of a carriage for five years, at so much a year. Notwithstanding a custom of the trade, the hirer was entitled to annul the contract at any time on paying a year's hire. *Birch v. Earl of Liverpool, supra.*

It seems that a parol contract for the sale of goods to be delivered, and which are accordingly delivered, within a year from the making of the bargain, but which, by the terms of the contract, are not to be paid for until the expiration of that period, is not within the fourth section of the Statute of Frauds, which requires that an agreement which is not to be performed within a year from the making thereof shall be in writing, because, in such case, all that is to be performed on one side, namely, the delivery of the goods, is done within a year. *See* 11 East, 152, *per Lord Ellenborough*; 1 B. & A. 727, *per Abbot, J.* The correctness of this position may, however, be questioned. See *per Coltman, J.: Souch v. Strawbridge*, 2 C. B. 808; 1 Smith, L. C. 144.

(*c*) *What is a sufficient Agreement or Memorandum in Writing.*[1]

If the contract be for more than a year, the fact that it is defeasible within the year will not take it out of the operation of the statute. *Dobson v. Collis*, 1 H. & N. 84.

[1] To satisfy the statute, the agreement upon which the action is brought, or some memorandum or note thereof, must be in writing, and signed by the party to be charged, or some other person thereunto by him lawfully authorised. 29 Car. 2, c. 3, s. 4.

In construing this clause, the word "agreement" must be understood in its proper and correct sense; and that, as the consideration of the promise is part of the agreement, it ought to be stated in writing as well as the promise itself. *Wain v. Warlters*, 5 East, 10; 1 Smith, 299. *Saunders v. Wakefield*, 4 B. & A. 595. But it is not now necessary that the consideration should appear in the writing in order to make a written promise to answer for the debt or default of another binding. 19 & 20 Vic. c. 97. s. 3.

The strict construction of the act, by making it necessary to produce written evidence of the terms by which the party meant to be bound, is manifestly best calculated to give effect to the intention which the legislature had in view of securing the parties from being charged merely by parol testimony.

A letter, therefore, by one of the contracting parties, admitting that he made a parol agreement, but not containing the terms, is not sufficient evidence of an agreement to charge the party. *Seagood v. Meale*, Prec. Ch. 560; 1 Atk. 12; 9 Ves. 250, 252; 11 id. 555. So, a written agreement for a lease, under a certain rent, ought to specify the term for which the premises are to be demised (*Clinar v. Cooke*, 1 Sch. & Lef. 22), or, at least, ought to refer to some other written instrument by which the extent of the term may be ascertained. And as the word "agreement" implies the assent of two or more persons, it is clear that the contracting parties ought to be named, or the agreement cannot be enforced. *Charlewood v. Duke of Bedford*, 1 Atk. 497. *Champion v. Plummer*, 1 New. Rep. 252.

A letter complaining of the non-arrival of goods is not a sufficient memorandum. *Richards v. Porter*, 6 C. & B. 437.

It is not necessary that all the terms or essential parts of the agreement should be contained in a single paper. The statute only enacts that they shall be in writing, and does not require them to be specified by a single instrument. It is, therefore, the common practice to establish contracts by the evidence of several writings, and those writings need not be contemporaneous with the contract. *Dobell v. Hutchinson*, 3 Ad. & E. 355; 5 Nev. & M. 251. *Hemming v. Perry*, 2 M. & P. 375. They ought, however, to be connected, or have a plain reference to each other by their contents, or by the context, or, at least, by writing; they cannot be connected by mere parol evidence. *Boydell v. Drummond*, 11 East, 142. See *Sweet v. Lee*, 3 Man. & G. 452. Without some reference of this kind, the one cannot be received to support the other as evidence of the same transaction.

The statute does not require a formal agreement with technical precision; anything under the hand of the party expressing that he had entered into the agreement, and showing the terms thereof, suffices, although it be merely a recognition or adoption of a prior parol contract. *Shippey v. Derrison*, 5 Esp. 190. Thus, a letter in answer, and referring to a letter of the plaintiff's, which stated the terms of the contract, and by which answer the defendant recognises the contract, though he excuses the performance, is a sufficient compliance with the act. *Jackson v. Lowe*, 1 Bing. 9. *Saunderson v. Jackson*, 2 B. & P. 238. So an admission contained in an answer to a bill in Chancery. See *Rondeau v. Wyatt*, 2 H. Black. 63. But the one document must contain a distinct reference to the other, without requiring the aid of parol evidence. *Boydell v. Drummond*, 11 East, 142. *Hinde v. Whitehouse*, 7 id. 558. *Sandilands v. March*, 2 B. & A. 680. And a mere offer to contract, without evidence of an acceptance by the party to whom the proposal is made, is of no avail. *Gaunt v. Hill*, 1 Stark. 10.

Although the considerations must be stated, and parol evidence cannot be received to extend the terms of a written agreement, yet, even in the case of contracts within this section of the statute, parol testimony is admissible in explanation. *Bateman v. Phillips*, 15 East, 272. *Wilson v. Hart*, 7 Taunt. 295; 1 Moore, 45.

If a party writes a letter admitting the essential particulars of the contract, but repudiating the bargain upon bad or insufficient grounds, the letter will, nevertheless, constitute a sufficient memorandum of the contract to satisfy the statute. *Bailey v. Sweeting*, 9 C. B. (N. S.) 843; 30 L. J. C. P. 154.

A contract drawn up, but not signed by either party, though the tenant enters, is not a sufficient memorandum within the statute. *Snelling v. Huntingfield*, 1 C., M. & R. 20; 4 Tyr. 606.

Where the memorandum was signed only with the initials of the vendor, the name of the vendor nowhere appearing, and there was a subsequent letter by the vendee in no way referring to the memorandum: — *Held*, not a sufficient contract within the statute. *Jacob v. Kirk*, 2 M. & Rob. 221. *Sweet v. Lee*, 3 Man. & G. 452.

In the case of a written memorandum of an agreement for a lease, if the memorandum construed in connexion with surrounding circumstances leaves the duration of the term wholly uncertain, there is no binding contract. *Bailey v. Fitzmaurice*, 8 E. & B. 679; 27 L. J. Q. B. 143.

(*d*) *What is a sufficient Signature.*[1]

A letter making an offer or tendering certain terms for acceptance, may be interpreted with the aid of other letters between the same parties, referring to the same subject-matter, for the purpose of establishing the terms of a contract within the 4th section. *North Staffordshire Railway Co. v. Peek*, Ell. B. & Ell. 995; 29 L. J. Q. B. 100. *Ridgway v. Wharton*, 6 H. of L. C. 238.

Although it is not necessary that both parties should sign the memorandum, it is necessary that the names of the parties actually entering into the contract should appear on the face of the writing. *Williams v. Lake*, 29 L. J. Q. B. 1. Thus, in the case of a bargain and sale of goods and chattels, it must appear from the memorandum signed by the purchaser that the plaintiff is the vendor, for if that is left wholly uncertain the memorandum will be insufficient. *Sarl v. Bourdillon*, 1 C. B. (N. S.) 195; 26 L. J. C. B. 78. *Graham v. Musson*, 15 Bing. N. C. 603. And where a price is agreed on at the time of the sale, the price must be set forth on the face of the memorandum. *Goodman v. Griffiths*, 1 H. & N. 576.

If one person signs and forwards to another a written proposal, and this proposal is accepted and acted upon by the party to whom it is sent, there is a sufficient memorandum of the contract to satisfy the 4th section of the statute, provided the terms of the contract can be ascertained from the written proposal construed in connexion with the surrounding circumstances. *Smith v. Neale*, 2 C. B. (N. S.) 86; 26 L. J. C. P. 143. *North Staffordshire Railway Co. v. Peek*, *supra*. *Warner v. Willington*, 3 Drew, 533. *Sir Borough Bark v. Eccles*, 4 H. & N. 143; 28 L. J. Ex. 122. *Ridgway v. Wharton*, 6 H. of L. C. 293. *Bird v. Blosse*, 2 Vent. 361. *Bailey v. Sweeting*, 30 L. J. C. P. 150.

And a contract as to land cannot be varied by oral testimony. *Goss v. Lord Nugent*, 2 Nev. & M. 28; 5 B. & Adol. 58. Accordingly, where an agreement for a lease contained a stipulation for a mode of valuation:—*Held*, that it was to be taken to be and continue entire; and that such stipulation could not be waived by parol. *Harvey v. Grabham*, 5 Ad. & E. 73. And an alteration as to the time of executing the contract must be in writing. *Marshall v. Lynn*, 6 Mee. & W. 109. *Stowell v. Robinson*, 3 Bing. N. S. 928. And where the time for executing a written contract fell on a Sunday, and was enlarged by parol, it was held to be void. *Stead v. Dawber*, 2 Per. & D. 447, overruling *Cuff v. Penn*, 1 M. & Sel. 21.

If a contract is for the performance by the parties of mutually recurring acts and services from time to time, both must be bound by the contract, or neither can be made liable upon it, except in respect of acts done and services actually rendered. *Hoddesdon Gas Co. v. Haslewood*, 6 C.B. (N.S.) 249.

Where a letter of one of the contracting parties is referred to, for the purpose of supplying the want of his signature in the memorandum of the contract, there ought not only to be a plain reference and connexion between the writings, apparent from their context or superscription, or the like, without the aid of intrinsic evidence, but the letter itself ought to recognise and adopt the agreement as concluded and binding. 10 East, 107; 3 B. & P. 233; 3 Atk. 503; 11 Ves. 591. In the case of *Tawney v. Crowther*, 3 Bro. C. C. 318, an agreement for the purchase of a house had been reduced into writing, and the defendant promised to sign it on a particular day; in consequence of his delay the plaintiff wrote a letter, in answer to which the defendant said, "there would be time to settle everything before the day for delivering possession, and that his word should always be as good as any security." *Lord Thurlow* considered the defendant's letter as clearly referring to the unsigned memorandum of agreement, which was then in his possession, and that it contained a promise to perform the agreement; he admitted, "that if the defendant had meant only to treat further, it would not have taken the case out of the statute." The doubt in this case seems to have been whether the letter referred sufficiently to the paper containing the terms, and whether the defendant's word was that he would execute the agreement. *See* 1 Sugd. V. & P. 93.

An entire contract, void as to part, is void altogether. *Thomas v. Williams*, 10 B. & C. 664.

After verdict, it will be presumed the contract was in writing. *Price v. Seaman*, 4 B. & C. 525; 7 D. & R. 14.

[1] As the statute expressly requires the writing to be signed, it will not be sufficient to show that the draft of the agreement was read over to the defendant at his desire (*Cooper v. Smith*, 15 East, 103. *Wright v. Dannah*, 2 Camp. 203), or even that the defendant perused and altered the draft. *Shippey v. Denison*, 5 Esp. 190. *Hawkins v. Holmes*, 1 P. Wms. 770. But if there be a signing, it is in general immaterial whether the party sign at the beginning or at the end of the instrument. *Knight v. Crockford*, 1 Esp. 189. And in the case of *Saunderson v. Jackson*, 2 B. & P. 238, *Lord Eldon* is reported to have said, "If a man draw up an agreement in his own handwriting, beginning 'I, A. B., agree, &c.,' and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute; and yet," he adds, "it is impossible not to see that the insertion of the name at the beginning was not intended to be the signature, and that the paper was meant to be incomplete, until it was further signed." See *Right d. Carter v. Price*, 1 Dougl. 241. Whether it will be sufficient that the defendant's name is mentioned in the body of the

IV. As to Contracts for the Sale of Goods.

(A) *In Contracts for the Sale of Goods above the value of* 10*l. the Purchaser must accept part, or give something in earnest, and there must be a Written Contract.*[1]

In contracts for the sale of goods above the value of

The 29 Car. 2, c. 3, s. 17, enacts, "that no contract for the sale of any goods, wares, or merchandise, for the price of 10*l.* sterling or upwards, shall be allowed to be good, unless the buyer shall accept part of the goods so sold,

memorandum of agreement, even supposing the memorandum to be drawn up by the defendant himself, seems to be rather doubtful. 9 Ves. 253.

A memorandum of agreement written by defendant, with his name printed, will be as binding as if his name were written. *Saunderson v. Jackson*, 2 B. & P. 238. *Schneider v. Norris*, 2 M. & S. 286.

The 4th sect. requires the note or memorandum of the contract to be signed "by the party to be charged;" the signature of the person seeking to enforce the contract is therefore not necessary. *Laythorp v. Bryant*, 2 Bing. N. S. 735. *See ante*, p. 544; and *Liverpool Bank v. Eccles*, 28 L. J. Ex. 122.

A vendee is bound by signing a memorandum on the particulars to the conditions of sale of land at an auction, although not signed by the vendor. *Laythorp v. Bryant, supra.*

A memorandum of agreement naming both parties, but signed by one alone, will bind the party who signs. *Egerton v. Mathews*, 6 East, 307. *Coleman v. Upcott*, 5 Vin. Abr. p. 527, pl. 17. *Wain v. Warlters*, 5 East, 10. *Saunderson v. Jackson*, 2 B. & P. 239. *Williams v. Lake*, 29 L. J. Q. B. 1. But unless the memorandum state both the contracting parties (the purchaser as well as the seller), it will not, of itself, be sufficient to bind the one named who has signed it. *Champion v. Plummer*, 1 N. R. 252. *Klinitz v. Surry*, 5 Esp. 267. As where a person makes a minute of a contract in the common memorandum-book of the buyer, stating himself to be the seller, and signs, but does not name the other person, this will not be sufficient to bind him in an action brought by the other as a buyer. *Allen v. Bennett*, 3 Taunt. 169. However, this omission of the signature of the other party may, in many cases, be supplied by his letter, or other papers referring to the same transaction. *Western v. Russell*, 3 Ves. & B. 187. *Fellhouse v. Bindly*, 31 L. J. C. P. 204. And in the case of *Allen v. Bennett, supra*, if the memorandum of the contract had been inserted in the regular order-book of the plaintiff (the buyer), and if the person to whom it belonged, the place in which it was kept, and the purpose for which it was employed, had been consonant and consistent, perhaps it would not have been too much to infer, that the entry was made by the authority of the owner of the book, for the purpose of evidencing the sale. 3 Taunt. 175, by *Mansfield, C. J.*

As to the person by whom it must be signed. — It has been held that under the 4th and 17th sects. the agent may derive his authority from his principal by parol. *Rucker v. Cammeyer*, 1 Esp. 106; *see* 1 Sch. & Lef. 22; 7 T. R. 217. See *Graham v. Musson*, 5 Bing. N. C. 603; 7 Scott, 769; *see* 9 Ves. 250; 2 Taunt. 48. But such agent must be a third person, and cannot be one of the contracting parties. *Wright v. Dannah*, 2 Camp. 203.

And a memorandum written by a clerk of the plaintiff, that the defendant has called to say that he would be responsible for goods supplied to a third person, is not a sufficient undertaking within the statute. *Dixon v. Broomfield*, 2 Chit. Rep. 205.

If the auctioneer or auctioneer's clerk write down the purchaser's name in the sale-book, opposite the lot for which he is the highest bidder, it is a sufficient signature to satisfy the Statute of Frauds, and binds the purchaser. *Emerson v. Heelis*, 2 Taunt. 38. *Hinde v. Whitehouse*, 7 East, 558. *Shelton v. Livius*, 2 Tyr. 436; 2 C. & J. 411. And it is the same if the name be written by his clerk. *Bird v. Boulter*, 4 B. & Adol. 443. *Gosbell v. Archer*, 2 Ad. & E. 556. But it has been said that such an entry by the auctioneer will not be within the statute, where the auctioneer himself sues the purchaser. *Fairbrother v. Simmons*, 5 B. & A. 333; but see *Bird v. Boulter, supra.* The auctioneer's authority, however, ends with the sale, and his signature to a contract afterwards entered into will not be sufficient to satisfy the Statute of Frauds. *Mews v. Carr*, 1 H. & N. 488; 26 L. J. Ex. 39. *See* vol. ii. p. 65, n.[1]; and *Warlow v. Harrison*, 29 L. J. Q. B. 14.

If an agent has signed a contract without authority, and the principal subsequently adopts the contract or ratifies the transaction, he is bound by the agent's signature. *Fitzmaurice v. Bailey*, 6 E. & B. 868; 26 L. J. Q. B. 114. *Bigg v. Strong*, 4 Jur. N. S. 983. *Fitzgerald v. Dressler*, 29 L. J. Q. B. 113.

An agent's authority in these cases may be countermanded at any time before it has been exercised and actually executed by him. *Farmer v. Robinson*, 2 Camp. 339, n.

The authority of the agent to sign and execute leases exceeding three years in duration, and assignments and surrenders of such leases, must be constituted by writing under seal. 8 & 9 Vic. c. 106. See *Barkworth v. Young*, 26 L. J. Ch. 156.

[1] A contract by the master of a ship, that on the delivery of the cargo he will procure goods at A., and deliver them at B. for the plaintiff, was held not to be within the statute. *Cobbola v. Caston*, 1 Bing. 399.

10*l.* the purchaser must accept part or give something in earnest, and there must be a written contract.

and actually receive the same, or give something in earnest to bind the bargain, or that some note or memorandum in writing of the said bargain, to be made and signed by the parties to be charged by the said contract, or their agents thereunto lawfully authorised."

(*a*) *What Contracts are within the Section.*[1]

(*b*) „ *Delivery and Acceptance sufficient to satisfy the Statute.*[2]

[1] Upon the construction of the 17th sect. it was held by the courts not to apply to contracts for the making and manufacture of goods, that is, contracts to make and complete, and deliver at some subsequent period, goods not in existence, and consequently not capable of delivery or of part acceptance at the time of the making of the contract; such as contracts to build a ship or make a chariot, &c., and which were considered to be contracts for work and labour and the supply of materials, rather than agreements of sale. *Groves v. Buck*, 3 M. & S. 178. The statute 9 Geo. 4, c. 14, s. 7, was in consequence passed, extending the provisions of the Statute of Frauds respecting the sale of goods to all contracts for the sale of goods of the value of 10*l.* and upwards, "notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, and rendering the same fit for delivery." The two sections of these statutes must be read together, and the consequence is that the word "value" in the later act is substituted for the word "price" in the earlier. *Harman v. Reeve*, 18 C. B. 595.

A contract for the sale of a quantity of flour not in a state capable of immediate delivery was, even previous to the 9 Geo. 4, c. 14, held to be within the act, the agreement being substantially for the sale of goods, although the flour was unground. *Garbutt v. Watson*, 5 B. & A. 613. *Rondeau v. Wyatt*, 2 H. Black. 63. And although the price of goods be enhanced by the addition of carriage, a contract to purchase them is within the provisions of the statute. *Astey v. Emery*, 4 M. & S. 262.

If a party at one time order and purchase successively several articles under the price of 10*l.*, but collectively of a larger amount, it is considered as one entire contract, and therefore within the act, although a separate price for each article was agreed upon. *Baldey v. Parker*, 2 B. & C. 37; 3 D. & R. 220. *Bigg v. Whisking*, 14 C. B. 195. A contract to make a set of artificial teeth to fit the mouth is within the act. *Lee v. Griffin*, 1 C., B. & S. 272; 30 L. J. Q. B. 252.

An agreement for shares in a banking company is not a contract for goods, wares, &c. within the Statute of Frauds. *Humble v. Mitchell*, 3 Per. & D. 141.

So railway shares, and shares in the profits of a mine, are neither interests in land nor goods and chattels; consequently contracts for the purchase and sale of them are not within the statute, and do not require to be authenticated by writing. *Humble v. Mitchell*, 11 Ad. & E. 205. *Bradley v. Holdsworth*, 3 Mee. & W. 422. *Tempest v. Kilner*, 3 C. B. 249. *Bowlby v. Bell*, id. 284. And this applies to the transfer of shares in mines worked upon the cost-book principle (*Watson v. Spratley*, 24 L. J. Ex. 53; 10 Ex. 243), for the shareholders have merely a right to the divisible share of the profits of the adventure; but if the partners or shareholders in the mine have a joint interest in the land itself, then the case will be within the statute, and a contract for the transmission of that interest can only be effected by writing. *Powell v. Jessop*, 18 C. B. 354. *Watson v. Spratley*, *supra*. A contract for the sale of foreign stock is not within the act. *Hezeltine v. Siggers*, 1 Ex. 856.

[2] The acceptance and actual receipt of goods which make a written memorandum unnecessary, are not such an acceptance and receipt as will preclude the purchaser from questioning the quantity or quality of the goods, or in any way disputing the fact of the performance by the vendor. The effect of such statutory acceptance is merely to dispense with the necessity of a written memorandum of the contract. *Morton v. Tibbett*, 15 Q. B. 428; 19 L. J. Q. B. 382. *Hunt v. Hecht*, 8 Ex. 814; 22 L. J. Ex. 293. But there can be no acceptance and actual receipt of goods within the 17th section of the Statute of Frauds, unless the vendee has had an opportunity of judging whether the goods sent correspond with the order. (Id.) Therefore, where the defendant had agreed to purchase of the plaintiff bones of a particular kind, to be separated from a heap of various bones, and gave the plaintiff a note addressed to a wharfinger to receive and ship the bones, and the plaintiff accordingly sent to the wharf some bones which, on inspection, the defendant refused to accept, on the ground that they were not what he had bargained for, it was held that, although there was a receipt, there was no acceptance within the statute. (Id.) *See* 12 Ad. & E. 632; 2 Man. & G. 650; 2 Q. B. 218; 5 C. B. 301; 8 id. 449; 19 L. J. C. P. 57. The acceptance may be prior to the actual receipt, as where sent to a wharf for the purchaser. 30 L. J. Q. B. 261; id. 310; 31 id. C. P. 204; 30 id. 150.

The delivery of part of goods within the meaning of the section must be with the intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with a similar intent. *Phillips v. Bistolli*, 2 B. & C. 511; 3 D. & R. 822. *Kent v. Huskinson*, 3 B. & P. 235. Hence where goods are sold by sample, and the specimen is accepted as a part of the purchase, this may constitute a part acceptance within the statute. *Hinde v. Whitehouse*, 7 East, 558; 3 Smith, 628. But the

effect will be otherwise when the sample is delivered merely as a specimen, and not taken in part of the goods. *Cooper v. Elston*, 7 T. R. 14. *Talver v. West*, Holt, N. P. C. 178. There is no acceptance of goods until the buyer has control over them. *Bentall v. Bunn*, 3 B. & C. 423; 5 D. & R. 284. *See* 31 L. J. C. P. 28.

Where a mare was sold for 20*l.*, and if in foal to be returned on repayment of part of the price:—*Held* not a conditional contract, and that the acceptance of the mare took the case out of the statute. *Williams v. Burgess*, 2 Per. & D. 422. *See* 10 B. & C. 446; 31 L. J. C. P. 204.

Where a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole. *Elliott v. Thomas*, 3 Mee. & W. 170; 7 L. J. Ex. 129. *Bigg v. Whisking*, *ante*, 546, n. *See* 9 C. B. (N. S.) 843: 30 L. J. C. P. 150.

It has been said, acceptance of part of goods made to order is not an acceptance within the act. *Thompson v. Maceroni*, 3 B. & C. 1; 4 D. & R. 619. See *Elliott v. Thomas*, *supra*. *Lucy v. Mouflet*, 29 L. J. Ex. 110. *Scott v. Eastern Counties Railw.* 12 Mee. & W. 53: 13 L. J. Ex. 14. The marking by the vendor of casks of wine lying in the docks, with the initials of the purchaser, at his request and in his presence, the terms of payment not having been settled at the time, and consequently the contract not being complete, is not an acceptance under the 17th section of the Statute of Frauds. *Proctor v. Jones*, 2 C. & P. 532. *See*, as to delivery to a carrier not named by vendee, *Coats v. Chaplin*, 2 Gale & D. 552.

A written order given by the seller to the purchaser, directing the person in whose care the goods are to deliver them to the latter, is a sufficient delivery within the statute. *Searle v. Keeves*, 2 Esp. 598. But in such case the assent of the agent or party to whom the order is addressed appears to be essential (*Bentall v. Bunn*, 3 B. & C. 423; 5 D. & R. 284. *Lucas v. Dorrien*, 1 Moore, 29; 7 Taunt. 278), though it has been ruled that such assent is not indispensable, and that an action would lie without evidence of acquiescence on the part of the agent. *Searle v. Reeves*, *supra*. See 29 L. J. Ex. 235.

When goods are ponderous there need not be an actual delivery; it may be effected by what is tantamount, as by the delivery of the key of the warehouse in which the goods are deposited. *Chaplin v. Rogers*, 1 East, 194. So a jury may infer a delivery to and acceptance by the vendee, where he sells part of the commodity to another person, and in other respects deals with the property as if it were in his actual possession. *Chaplin v. Rogers*, 1 East, 192. So it has been intimated, that if the goods are weighed and delivered by order of the buyer (*Simon v. Metivier*, or *Motivos*, 1 Bl. Rep. 601. *Per Heath, J.*, in *Elmore v. Stone*, 1 Taunt. 459), or the buyer write his name upon the goods at the time of the purchase (*Hodgson v. Le Bret*, 1 Camp. 233. *Anderson v. Scott*, id. 235); or requests the vendor to keep them for him, and the latter changes the place of deposit, and makes a profit by so keeping them (*Elmore v. Stone*, 1 Taunt. 458); but the obtaining of a profit seems in such case essential. *Carter v. Toussaint*, 5 B. & A. 855; 1 D. & R. 515. And where it is agreed that ready money shall be paid for the chattel, and the buyer requests the vendor to keep it till the money is paid, no property passes to the vendee till payment. *Tempest v. Fitzgerald*, 3 B. & A. 680. *See* 31 L. J. C. P. 204.

It has been ruled that the shipping of goods in the same manner as in previous dealings, is an acceptance and actual receipt by the purchaser within the Statute of Frauds; and when the purchaser gives an order to send the goods bought by a particular carrier, the delivery to that carrier takes the case out of the statute. *Hart v. Sattley*, 3 Camp. 528.

The removal of goods in the vendor's own boat to another warehouse of his own, or his agent's, on a stage towards the defendant's residence by the direction of the latter, will not amount to a sufficient delivery. *Astey v. Emery*, 4 M. & S. 262. And where goods are knocked down to a bidder at an auction, and are handed to him, and remain in his possession for some minutes, until he refuses to take them, we have seen, it is a question for the jury to determine whether there has been a complete delivery. *Phillips v. Bistolli*, 2 B. & C. 511; 3 D. & R. 822. But where a merchant in London, who had been in the habit of sending goods to B., resident in the country, and of delivering them to a wharfinger in London to be forwarded to B. by the first ship, delivered goods in the same manner to the wharfinger to be forwarded in the usual manner, and they were lost, this was holden not to be an acceptance by the buyer within the act (*Hanson v. Armitage*, 5 B. & A. 557. *Hart v. Bush*, 27 L. J. Q. B. 271), it being quite clear that an action for goods sold and delivered cannot be supported without proof of an order to send them by a particular carrier. *Anderson v. Hodgson*, 5 Price, 630.

In debt for goods (a fire-engine), upon the question under the Statute of Frauds as to the defendant having accepted it, it appeared that he had once brought a person to the plaintiff's yard to look at the engine, and being asked what he meant to do with it, he mentioned two or three parties who were likely to want it, and at another time he said he had a concern in the engine:—*Held*, that if the jury were satisfied that the defendant treated and dealt with it as his own, the plaintiff was entitled to recover. *Bains v. Jevons*, 7 C. & P. 288. *See* further, as to acceptance and delivery of goods within the statute, *Beaumont v. Brengeri*, 5 C. B. 301. *Acraman v. Morrice*, 8 id. 449; 19 L. J. C. P. 57. *Farina v. Home*, 16 Mee. & W. 119; 16 L. J. Ex. 73. *Bushell v. Wheeler*, 15 Q. B. 443, n.; 8 Jur. 532. *Morton v. Tibbett*, 15 Q. B. 428; 19 L. J. Q. B. 382. *Holmes v. Hoskins*, 9 Ex. 753. *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J.

(*c*) *What a sufficient Part-Payment or Acceptance of Earnest.*[1]
(*d*) ,, *Memorandum of Sale of Goods to satisfy the Statute.*[2]
(*e*) *What Signature of the Memorandum is sufficient.*[3]

Q. B. 401. *Cunliffe v. Harrison*, 6 Ex. 903; 20 L. J. Ex. 325. *Norman v. Phillips*, 14 Mee. & W. 277; 14 L. J. Ex. 306; and 30 L. J. C. P. 150; 31 id. 204; 30 id. Q. B. 261; and *see post*, Sale of Goods.

[1] After earnest given upon the sale of goods, the vendor cannot sell them to another without a default in the vendee; hence it is said that earnest given upon the sale of goods does not absolutely alter the property in the chattel contracted for, but only binds the bargain. *Langfort v. Administratrix of Tiler*, 1 Salk. 113; 6 Mod. 162; Skin. 647. *Per Lord Ellenborough*, 7 East, 571; Bull. N. P. 50. *See* 1 Saund. 320.

To constitute a payment as earnest there must be an actual transfer or delivery of the thing or money agreed to be given as earnest or part payment. *Blenkinsop v. Clayton*, 7 Taunt. 597; 1 Moore, 328.

The delivery of a bill of exchange or promissory note in part payment would take a case out of the statute. See *Walker v. Hussey*, 16 Mee. & W. 302.

[2] If there is not any acceptance of part of the goods, nor anything given in earnest to bind the bargain, the statute requires that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by the contract, or their agents thereunto lawfully authorised. The only difference between this and the fourth section is, that by the fourth the memorandum of the agreement is to be in writing, and signed by the party to be charged, or by some person authorised by him; here, the memorandum of the bargain is to be in writing, signed by the parties to be charged, or their authorised agent. The term "agreement" in the former has been understood in its correct legal sense, including the consideration for the promise, as well as the promise itself; but in the construction of this clause the term "bargain" is taken in a more general and common sense. The memorandum must have been made before the commencement of the action (*Kill v. Boment*, 9 Mee. & W. 36), and express every essential element of the bargain. 7 Jur. N. S. 999; 30 L. J. C. P. 150.

In an action for not accepting goods ordered by the defendant, if the memorandum specify the quantity of goods purchased, that suffices without also specifying the price to be paid (*Egerton v. Matthews*, 6 East, 307; 2 Smith, 389); in this case, however, it is to be observed, the rate of payment, namely, so much per pound, was stated.

Any memorandum under the hand of the party made before action brought (*Bill v. Bament*, 9 Mee. & W. 36), and which contains, either expressly or by reference, the terms of the agreement, is sufficient, although it be merely a recognition or adoption of a prior written statement of such terms, not signed by the party (*De Beil v. Thompson*, 3 Beav. 469); for it is in all cases sufficient, if the terms of the agreement can be collected or fairly inferred from several distinct writings having reference to the same agreement, and from subsequent letters, whereby the transaction is admitted. *Jackson v. Lowe*, 1 Bing. 9; 7 Moore, 219. *Saunderson v. Jackson*, 2 B. & P. 238; *see* 1 Bing. 196; 2 B. & A. 680; 4 Camp. 188. *Felthouse v. Bindly*, 31 L. J. C. P. 204. But where there is a contract the plaintiff cannot recognise the terms in part and renounce the remainder. *Cooper v. Smith*, 15 East, 103.

If a broker employed both by seller and buyer negotiate a sale, but by mistake deliver to the several parties sale-notes differently describing the goods, no contract arises. *Thornton v. Kempster*, 5 Taunt. 786. *Thornton v. Meux*, 1 Mee. & W. 43. *Groom v. Alflato*, 6 B. & C. 117. *Grant v. Fletcher*, 5 id. 436. *See* 29 L. J. Ex. 36.

[3] With respect to the signature, the same construction has been put upon this section as upon the fourth. A memorandum of the bargain naming both parties, and signed by the defendant, will be sufficient to bind him, although the other party has not signed, and consequently is not bound. *Laythorp v. Bryant*, 3 Scott, 238. *See ante*, p. 544. *Rucker v. Cameyer*, 1 Esp. 105. Thus a memorandum in the defendant's handwriting, beginning "Sold J. D." so many pockets of hops, and signed by the plaintiff's agent, was held to bind the defendant. *Johnson v. Dodgson*, 2 Mee. & W. 653. But it is doubtful whether this would be a sufficient signature, if it appeared from the writing itself that it really was intended to be afterwards signed by the party. *See per Tindal, C. J.*, and *Maule, J.: Hubert v. Turner*, 4 Scott, N. R. 486, 506, 508. And if the memorandum in which the name of the party to be charged occurs be not in his handwriting, the fact that his name being written in the body of it will not bind him as a signature within the meaning of the statute, at least unless there be evidence that the party who wrote the instrument had authority so to deal therewith as to make the mention of the party's name in the body thereof equivalent to the actual signature. *Hubert v. Turner*, *supra*.

Where a broker acts between a buyer and seller, his signature is the signature of both parties (7 East, 569; 3 Taunt. 173. *Heyman v. Neale*, 2 Camp. 337); and an entry in his book stating the sale of the goods from one to the other, and signed by him, is a binding contract between the parties. *See* 4 Scott, N. C. 25; 7 id. 769; 5 Bing. N. C. 603. The notes of the contract, called the bought-and-sold notes, which the broker usually copies out of his book, are intended as notices to inform the parties of the terms of the sale; but the contract is binding from the original entry made by the broker. *Heyman v. Neale*, *supra*. *Thornton v. Charles*, 9 Mee. & W. 802. As to alteration in such notes, *see* 5 C. B. 181; 17 L. J.

FRAUDULENT Conveyance.[1] *See* Bill of Sale, vol. ii. p. 494; Bankruptcy, id p. 201; Consideration, vol. iii. p. 177; Deed, *ante*, p. 12; Fraud, *ante*, p. 528; *post*, Marriage Settlement; Vendor and Purchaser.

C. P. 47; 4 Q. B. 737. But a memorandum of a sale of goods, written and signed by the seller's traveller, in the presence of, and at the desire of the buyer, but in his own name, has been held insufficient to satisfy the statute. *Graham v. Musson*, 7 Scott, 769. *See* 30 L. J. Ex. 396; 31 id. 337.

In the case of *Wright v. Dannah*, 2 Camp. 203, *Lord Ellenborough, C. J.*, held that a note of sale written by the plaintiff under the defendant's inspection, and containing the defendant's name, would not bind the defendant as a memorandum signed by his agent. There was not the least evidence in this case that the seller of the goods had been authorised as agent to write down the name of the defendant (the purchaser). The contract must, under the 17th section of the act, be signed by the parties "to be charged therewith." It is sufficient that the defendant, whether he be the vendor or the vendee, has signed the contract; and it is no objection that he has no remedy thereon against the plaintiff, inasmuch as the latter has not signed it. 6 East, 306; 2 Smith, 389; 3 Taunt. 169. *Durrell v. Evans*, 31 L. J. Ex. Ch. 337. A contract might subsist, which by reason of the Statute of Frauds could be enforced by one party, although they could not be enforced by the other party; the Statute of Frauds, in that respect, throws a difficulty in the way of the evidence: the objection does not interfere with the substance of the contract; and it is the negligence of the other party that he did not take care to obtain and preserve admissible evidence to enable himself also to enforce it. *Per Cur.* 5 Taunt. 788. The agent must be a third person, and not the other contracting party.

It is not necessary that an agent, in signing on behalf of his principal within the 17th section, should obtain his authority by a written instrument. *Rucker v. Cammeyer*, 1 Esp. 106. The factor of the seller cannot be the agent of the buyer, except by the express appointment of the latter. *Darrell v. Evans*, 6 H. & M. 660; 30 L. J. Ex. 254; S. C. Ex. Ch. id. 337. But an auctioneer's signature of the vendee's name in the catalogue is not sufficient if the conditions of sale be not annexed to the catalogue, or referred to thereby, *Kenworthy v. Schofield*, 4 D. & R. 556. *See ante*, vol. ii. p. 65.

[1] *Conveyances in Fraud of Creditors, contrary to* 13 *Eliz. c.* 5.—There are two statutes against *fraudulent conveyances* and *deeds*, and other acts, the 13 Eliz. c. 5, made perpetual by 29 Eliz. c. 5 (*see* these statutes with notes, Chit. Col. Stat. 385 to 391), for the protection principally of *creditors*, and the 27 Eliz. c. 4 (*see* id.), for the protection of *purchasers*. The first (*see* 13 Eliz. c. 5, and notes, Chit. Col. Stat. Fraudulent Conveyances, 585. The party himself cannot take advantage of the act, but all *creditors* may. 4 East, 1; 5 B. & C. 560; 6 Q. B. 166; 14 L. J. Q. B. 70; 21 L. J. C. P. 185) enacts, "that every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, *goods and chattels*, or of any lease, rent, common, or other profit or charge out of the same, made *with intent* to defraud *creditors* and others of their just debts, &c., shall be utterly void, but *only* so as against those creditors and others (*see* id.), and expressly declares (sect. 6) that estates or interests conveyed or created on *good consideration and bonâ fide* in favour of persons *not having any notice of such fraud*, shall be valid." Deeds made to defraud creditors are void, even though made for a valuable consideration. 18 Beav. 408; 21 id. 511. *See* Smith's R. & P. 774; Fraud, *ante*, p. 528.

This statute extends not only to fraudulent conveyances of *land* but of *personal* property (7 Q. B. 892); but it has been questioned whether it extends to land of *copyhold* tenure (1 Cox's Rep. 278; Ellis, 155; but *see* Cowp. 705), and to render a conveyance fraudulent within this statute, the party, at the time of making it, *must have been indebted to the extent of general insolvency* (3 B. & Adol. 362; 5 Ves. 384; 1 Sim. & Stu. 315; 7 Jur. N. S. 531), or at least the deed or act must have been *without* an adequate *consideration*, and with *intent* to defraud one or *more particular* creditors or persons, in which case it would be void even at common law. If the party executing were not indebted at all, or not insolvent, so that abundant other property to satisfy any then existing debts be left, then even a *bonâ fide gift* of *personal* property would be valid against *creditors*, or even a subsequent purchaser (*Twyne's case*, 3 Co. 82, a; 1 Mad. Cha. 275; 1 Sim. & Stu. 315; 19 L. J. Ch. 30); but not so as to *land*, with regard to subsequent purchasers thereof, in consequence of the enactment of 27 Eliz. But a party not subject to the bankrupt laws may *convey all or part of his property to a particular creditor in preference to others.* (*Wood v. Dixee*, 7 Q. B. 892. *Harland v. Binks*, 15 id. 713; 20 L. J. Q. B.; 5 T. R. 235, 420; 8 id. 528; Newl. on Contr. 381, 382; 3 M. & S. 371; 4 East, 1; 5 Moore, 19), and even in part for his own benefit, and the deed will protect the part for the benefit of creditors, but not that for his benefit. *Cailland v. Estwick*, 2 Anstr. 381; 5 T. R. 420, S. C. But a conveyance or other act, in preference of a particular creditor, must have been made *bonâ fide* with intent to pass the property, and really to satisfy a just debt. 2 Y. & J. 304. The fraud must, in general, be determined by a jury (5 B. & C. 666; 8 D. & R. 442; 4 L. T. (N. S.) 1), but it may sometimes be decided upon affidavits and motion. 8 B. & C. 217. An assignment in fraud of creditors is valid as between the parties to the deed, and as between either party and a stranger. *Bessey v. Windham*, 6 Q. B. 166; 14 L. J. Q. B. 7. *See* 11 C. B. 1015; 30 L. J. Ex. 402. A pro-

viso to continue the trade will not render the deed void. *Jones v. Whitwood*, 11 C. B. 406; 20 L. J. C. P. 217; 21 id. Ex. 16.

It has been supposed that a voluntary conveyance in favour of creditors is void if they do not execute (3 Sim. Rep. 1; 1 Mac. & G. 364; 19 L. J. Ch. 30), and if *no creditor* assented to the deed it would be so; but otherwise if creditors accept the benefit (8 T. R. 521; 6 East, 257); and if even one of several trustees executes, that would suffice to vest the property. 9 B. & C. 300. In case of a conveyance of real property, or a chattel real, the circumstance of the conveying party remaining in possession thereof would not be deemed a badge of fraud, as in the case of an assignment of mere personalty (Chit. Col. Stat. 385, n. c.), because, as there are usually title-deeds applicable to *real* property and interest therein, creditors ought not to be deceived by the bare possession thereof (5 Taunt. 212. *Baker v. Horn*, 9 East, 59; but *see* 2 B. & A. 551); and the same rule even extends to some fixtures and annexations to the freehold, even for the purposes of trade, and although in the possession of a trader who has become bankrupt, and notwithstanding the enactment in the 6 Geo. 4, c. 16, s. 72.

Voluntary Conveyances in Fraud of Purchasers, against 27 *Eliz. c.* 4.—The 27 Eliz. c. 4, intituled "An Act against Covinous and Fraudulent *Conveyances*," enacts, that every conveyance, grant, charge, lease, incumbrance, and limitation of any use, of, to, or out of any *lands, tenements, or other hereditaments*, had or made for the intent and purpose to deceive and defraud such person as shall *purchase* the same for money, or other good consideration, the same shall be deemed and taken only as against that person, his heirs, &c. to be *utterly void;* but the 4th sect. declares that deeds upon *good* consideration and *bonâ fide* shall not be affected (*see* the sect. Chit. Col. Stat. 388; and *see* 1 Dowl. Rep. N. S. 17; and *see* in general Cro. Jac. 454; 3 Coke, 82, b; 9 East, 59; Cowp. 705, 711; 1 N. R. 332; 2 Beav. 340; 4 id. 58; 19 L. J. Ch. 30; 20 id. Q. B. 507); but voluntary deeds are, by the same terms of the act, good against the party conveying; and indeed it is a general maxim, that no one shall be allowed to allege his own fraud (2 B. & A. 367); besides, a gift without consideration, if under seal, is valid against the party himself, and this, and the stat. 13 Eliz., were merely intended to protect *purchasers* and *creditors*. Conveyance void against creditors is void against assignees in insolvency. 11 Mee. & W. 531. Smith's P. & R. P. p. 776. Copyhold estates are, it is supposed, not within this act (1 Cox, 278; Cowp. 765); and every prior conveyance, without *pecuniary* consideration or adequate value, excepting settlements before marriage, or in fulfilment of a contract *before* marriage, is considered voluntary, fraudulent, and void, as against a *bonâ fide* purchaser (*see* several cases, Chit. Col. Stat. 387, n); and *Lord Hardwicke* said, "I hardly know an instance where a *voluntary* conveyance has not been held fraudulent against a purchaser." 3 Atk. 377; *see* 21 L. J. Q. B. 139. Thus, a voluntary settlement of lands made in consideration of natural love and affection for very near relations, is void against a subsequent purchaser, though he *had notice* of the settlement before his purchase. 9 East, 59; Cowp. 260. So a voluntary settlement *after* marriage may be set aside in favour of a subsequent legal *mortgagee*, though he had notice of the settlement. Cowp. 278; 9 Bing. 76. So a settlement by tenant in fee for maintenance of herself and children for her life, to raise portions for younger children, and the surplus to her heir-at-law, she then having many sons and daughters, is a voluntary settlement, and void against a purchaser (2 Black. Rep. 1019); and the title of a purchaser for a valuable consideration cannot be defeated by a prior voluntary settlement, of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud the purchaser was ignorant. 1 N. R. 332. But *marriage settlements before* marriage, or in pursuance of a previous agreement, are valid (id. sect. 4; Cro. Jac. 454; Cowp. 278; 30 L. J. Ch. 642); and the giving up a previous voluntary bond, in consideration of a settlement or conveyance, would prevent it from being considered voluntary. 19 Ves. 218; 2 Taunt. 69. This act only protects persons who can, in the terms of the statute, be deemed *purchasers*. 1 Dowl. Rep. N. S. 17. But it extends to *legal* mortgages (Cowp. 278; 15 L. J. Ch. 336; 21 L. J. Ex. 41; 7 Ex. 41); and a lessee at rack-rent has been considered as a *purchaser* for valuable consideration, protected by this act (2 Black. Rep. 1019); and a purchaser of an *equitable* interest is as much protected as a purchaser of a legal interest. *Buckle v. Mitchell. Palverton v. Palverton*, 18 Ves. 90, 100; 1 Ves. & B. 183, 184. *Otley v. Manning*, 9 East, 69; 2 Taunt. 69. But, at least *at law*, a mere *equitable mortgagee*, by a *deposit* of title-deeds, is not a purchaser within the act, and therefore trustees under a voluntary settlement after marriage may, at law, recover such deeds from such mortgagee, leaving him to resort to a court of equity. 9 Bing. 76. So if a purchase has been made at an *under-value*, it would not invalidate a previous voluntary conveyance. Cowp. 705; 1 Ves. & B. 184; 16 East, 212. So where a purchaser with notice took a collateral security, the previous voluntary advancement to a child was holden good and effectual against such purchase (1 Vern. 467); and to entitle a person to the protection of this statute, he must be a purchaser *bonâ fide*, and for a valuable consideration (Cowp. 785); but the release of an adverse claim is a sufficient consideration. 2 Taunt. 69. If the party taking under a voluntary conveyance himself sell the same for a valuable consideration, the prior conveyance cannot afterwards be treated as void, so as to defeat the right of such purchaser. 2 Vern. 44; 1 Meriv. 638; 19 Ves. 218. The act does not apply to a purchaser from the heir or devisee of one

FRAUDULENT Preference. *See* Bankruptcy, vol. ii. p. 201.

FREE-BENCH.[1]

who has made a voluntary conveyance in his lifetime. *Doe v. Rasham*, 21 L. J. Q. B. 139.

[1] Copyholders not having the freehold of the land, their widows are not entitled to dower. But in most manors there is a custom that the widows of copyholders shall have a certain portion of their husbands' lands for their support, which is generally called the widow's free-bench. 1 Cruise, T. 10, c. 3, s. 22; 2 Bl. Com. 132; Burton, s. 1311. In most manors free-bench consists of one-half of the husband's copyhold, in others of a third or a fifth, and in some few of the whole. It is generally an estate for life, and in many manors it is forfeited by incontinency or a second marriage. 1 Cruise, T. 10, c. 3, s. 23; Burton, s. 1311. Free-bench differs in other respects from dower at the common law; as for instance, the right of the wife does not attach in the case of free-bench till the husband's death, whereas the privilege of dower by the common law became a vested right immediately on marriage. *Benson v. Scott*, Carth. 275; 4 Mod. 253; 1 Salk. 185; Skin. 406; Holt, 160; Comb. 233; 12 Mod. 49; 3 Lev. 385. *Rex v. the Inhabitants of Lopen*, 2 T. R. 577. *Right v. Bawden*, 3 East, 260. *Fisher v. Wiggs*, 12 Mod. 296; 1 Salk. 391; 3 id. 206; Holt, 569; 1 Ld. Raym. 622; Com. 88; 1 P. Wms. 14. And even if the husband make a lease for years, though by license of the lord, the widow shall not avoid it. *Salisbury d. Cook v. Hurd*, Cowp. 481. Another important difference between free-bench and dower is, that to entitle the wife to the latter the husband must be seised of an estate of inheritance, whereas by the custom of some manors the widow of a copyholder is entitled to free-bench for the whole estate. *Chantrell v. Randall*, 1 Lev. 20. And as free-bench is a customary right *nomine dotis*, it must belong to the custom to prescribe both the quantity and duration of the estate: thus, in some manors the widow shall have the whole lands of which the husband died seised, and in others only a portion of them. *Chapman v. Sharpe*, 2 Show. 184. Again, with respect to the duration of her estate, she shall by the custom of some manors have the lands of her husband in fee (*Newton v. Shafto*, 1 Leon. 172; 1 Sid. 267), in others only during widowhood, and in some under the additional restriction of chastity. *Doe v. Askew*, 10 East, 522. If, however, the lord admit an unchaste widow, he cannot afterwards expel her from the tenancy, although he had no notice of her incontinence at the time of admission. 4 Leon. 240. With respect to emblements, if a woman, where free-bench is limited to a chaste widowhood, marry, or commit fornication, the lord is the proper person to take advantage of the forfeiture, and he will be entitled to the crops sown, because the estate was determined by the widow's own act; but if she had made a lease for a year, and then took a husband, the lessee would be entitled to emblements, for the lessor's act could not prejudice a third person. *Oland v. Burdwick*, Cro. Eliz. 460; 1 Roll. Abr. 227.

As a further illustration of the nature of free-bench and dower, it may be stated that free-bench is regarded as a continuation of the husband's estate (*Clarke v. Caudle*, 2 Sid. 165); where, therefore, the widow takes the whole of the lands as her free-bench, she may enter immediately upon them before any admittance. *Vaughan v. Atkins*, 5 Burr. 2764. The rule generally being, that where an estate is created by custom, that shall be an admittance in law. 6 Vin. Abr. 77.

Any alienation by the husband alone to take effect in his lifetime, though without any concurrence of the wife, whether it be by surrender in court (Carth. 275), or by forfeiture (1 Freem. 516); or in consequence of enfranchisement (Cro. Jac. 126), will effectually and utterly bar the claim of the widow.

If, however, the husband actually surrender and die before the admittance of the surrenderee, she shall be barred; for the subsequent admittance of the surrenderee, though after the death of the husband, shall relate to the time of the surrender, and so precede the title of the wife (1 Freem. 516, e. a. 692); and, by consequence, the widow of the surrenderee shall have her free-bench, if he die before admittance. *Parker v. Bleek*, Cro. Jac. 568; W. Jones, 451.

On the principle that those persons are not bound by an agreement who do not claim wholly from any party thereto, but have an independent and substantive interest prior to the contract, it was in one case said to have been decided that where a copyholder for life agreed to sell his estate for his own life and the widowhood of his relict, the widow should not be bound by this agreement; and it was likened to the case of a joint tenant who agrees to alien, and dies without accomplishing his engagement, in which case it is admitted that the survivor cannot be compelled to perform the agreement. 3 Wood. Lect. 471, citing *Musgrave v. Dashwood*, 2 Vern. 45, 63.

From what has been said it will be therefore evident, that a copyholder cannot defeat his wife's claim to free-bench merely by devise, as the devise cannot take effect till his decease, when the free-bench attaches. See *Hill v. Hill*, Co. Ent. 123, a. 125, a. But this devise must be understood of a devise good by special custom without a surrender to will; for if a surrender be made, which must be of necessity, if at all, in his lifetime, the claim of the widow will be defeated and gone. See *Vaughan v. Atkins*, Co. Litt. 59, b.; 5 Burr. 2736. *Forder v. Wade*, 4 Bro. C. C. 521.

A jointure, whether legal or equitable, is a

FREEHOLD.[1] *See* Fee and Fee-Simple, *ante*, p. 441.

FREIGHT. *See* also Bill of Lading, vol. ii. p. 490; Charter-Party, vol. iii. p. 91.

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I. Relative to the Definition of.[2]

II. „ what it is Payable on.

(A) *As to Goods.*[3]

(B) „ *Living Animals.*[4]

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good bar to the claim of a widow to free-bench, of a copyhold, as well as to dower. 1 Ves. 54; Ambl. 299; 3 P. Wms. 229; 2 Atk. 525; 4 Bro. Ch. C. 525. And *Lord King* held a widow bound by a pecuniary provision made before marriage, though she was an infant, and no party to the articles, and though the jointure settled on her was not made expressly in lieu of free-bench, but only mentioned to be so in a proviso. *Jordan v. Savage*, 2 Eq. C. Abr. 101. The widow, however, in this case, had taken possession of the lands limited to her by the articles, which was a decided act of election. 2 Eden. 66; 1 Rop. Bar. and Fem. 476; 2 Byth. Prec. 491. And a jointure of copyhold lands before marriage, though no actual bar of dower, would, it is apprehended, put the widow to her election.

[1] An estate in fee simple, or in tail or for life, is an estate of freehold, and as such, each of these estates is larger in contemplation of law than any term of years however long. This distinction arose out of the feudal system, which regarded a life estate as worthy the acceptance of a free man, but a less estate was not so considered. Watk. Desc. 113, 4th ed.; 2 Bl. Com. 104. The consequence of this legal doctrine is, that if any of these estates should happen to be vested in any person who at the same time is possessed of a term of years in the same land, and no other estate should intervene, the estate of freehold will infallibly swallow up the term, and yet be not enlarged. The term will be merged in the estate of freehold. 3 Prest. Com. 219; Wms. Real Pro. 374, 6th ed. See *ante*, p. 441.

[2] Freight is the money paid for carriage of goods by sea; or, in a larger sense, it is taken for the price paid for the use of a ship to transport goods, and for the cargo or burthen of the ship. 3 Kent, Com. 196. Ships are freighted either by weight or by the bulk; and in respect of time, the freight is agreed for at so much per month, or at a certain sum for the whole voyage. The party by whom a vessel is engaged or chartered, is called the freighter or charterer. 2 Steph. Com. 148. In French law, the owner of a vessel is called a freighter (*fréteur*); the merchant who hires it is called the affreighter (*affréteur*). Emerig. Tr. des, ch. 11, sect. 3. Freight is the mother of wages. Smith, M. L. 430. Where a voyage is broken up by *vis major*, and no freight earned, no wages, *eo nomine*, are due. 2 Show. 283; 3 Bl. Com. c. 86; Molloy, b. 2, c. 3, s. 10; 5 Esp. 6.

[3] Freight being the reward which the law entitles a person to recover for bringing goods lawfully upon a legal voyage, if the voyage be illegal by reason of any cause freight cannot be recovered. *Muller v. Gernon*, 3 Taunt. 394. *Blanck v. Solly*, 1 Moore, 53; 8 Taunt. 89.

[4] With respect to living animals, whether

III. Relative to the Parties Entitled to.[1]
IV. „ „ Liable for.

(A) *In General.*

Moorsom v. Kymer, 2 M. & S. 303.

A ship was chartered on a voyage out and home for a specified time, at a certain rate of payment on the homeward cargo in full, for the hire of the ship for the said time, to be paid in part by an advance on the ship's clearing for the outward voyage, and the rest on her return, by bills payable at a future day; and on the loading the homeward cargo, a bill of lading was signed to deliver the goods to the charterers or their assigns, he or they paying freight for the said goods as per charter-party. The bill of lading being indorsed for a valuable consideration, whether the indorsees were not liable to the shipowner upon an implied *assumpsit* to pay the freight arising out of the receipt of the goods under the bill of lading, was the question. See *Douglas v. Kemble*, 3 Bing. 383; and 2 Show. 443; Abbott, by Shee, 345.

The transferee of the bill of lading is liable for freight, unless his liability is inconsistent with the charter-party.[2]

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men or cattle, which may die during the voyage, without any fault or neglect of the persons belonging to the ship, it is said, (Dig. 14, 2, 10; Roccus. n. 76–78; Molloy, b. ii. c. 4, s. 8; *see* also *Moffat v. East India Co. ante*), that if there be no express agreement whether the freight is to be paid for the lading, or for the transporting them, freight shall be paid as well for the dead as for the living: if the agreement be to pay freight for the lading them, their death certainly cannot deprive the owners of the freight; but if the agreement be to pay freight for transporting them, then no freight is due for those that die on the voyage, because, as to them, the contract is not performed. So, if a pregnant woman be delivered during the voyage, no freight is due for the infant.

[1] The vendee, to whom a chartered ship is sold before the voyage, not the vendor, is entitled to freight. See *Morrison v. Parsons*, 2 Taunt. 407. But the owner with whom a covenant to pay freight has been made will be entitled to the freight, not the vendee, where she has been sold during the voyage. See *Splidt v. Bowles*, 10 East, 279. Abbott, by Shee. 203.

A mortgagee who does not take possession is not entitled to freight. *Chinnery v. Blackburne*, 1 H. Black. 117, n. But the mortgagee may claim to freight accruing subsequently to the mortgage, if he take possession of the vessel during the voyage, but not otherwise. *Dean v. M'Glie*, 4 Bing. 45. *Kerswill v. Bishop*, 2 Tyr. 602; 2 C. & J. 529. See *Brown v. North*, 8 Ex. 1. *Alexander v. Sims*, 5 De Gex, M. & G. 57; and 1 H. Black. 114; 1 Stark. 366; 7 B. & C. 30. As to a power of attorney to receive, *see* 29 L. J. C. P. 196; and as to payment to underwriters on abandonment of ship, *see* 4 H. & N. 455; 28 L. J. Ex. 278.

[2] The consignee, by receiving goods under the usual bill of lading, is responsible for the freight. *Roberts v. Holt*, 2 Show. 443. And the consignee and not the buyer is liable, where there is an immediate sale. *Artaza v. Smallpiece*, 1 Esp. 23; *see* 4 Q. B. 288; 17 L. J. Q. B. 166. Unless where, by the bill of lading, goods are made deliverable to A. or his assignees, he or they paying freight, and A. assigns to B. and B. to C., who accepts the goods, C. is liable for freight. *Cock v. Taylor*, 13 East, 399. And the indorsee of such bill of lading making goods deliverable to order or assigns on payment of freight, although he has paid over the proceeds of the goods to the person who indorsed the bill of lading to him before being called on to pay the freight, will still be liable for it. *Bell v. Kymer*, 5 Taunt. 477; 1 Marsh. 146; 3 Camp. 545. In the preceding cases there was no express stipulation for the payment of freight; but where there is such an express agreement between the owner and charterer, an indorsee under such circumstances is not responsible for freight. *Moorsom v. Kymer*, *supra* in text. If the receipt of the goods be by order from the consignee, and not under a bill of lading, the consignee will be liable. *Wilson v. Kymer*, 1 M. & S. 157. *See* Bill of Lading, vol. ii. p. 493.

Where a cargo was accepted by the indorsee of a bill of lading, under which the goods were deliverable to order "against payment of the agreed freight, and other conditions, as per charter-party," it was held that those were circumstances from which the jury might infer a contract on his part to pay the demurrage stipulated for in the charter-party, notwithstanding his refusal at the time of receiving the goods to pay the demurrage. *Wegener v. Smith*, 15 C. B. 285. But the consignee of a bill of lading, which makes the goods deliverable to him or assigns, "paying freight for the said goods as per charter-party," does not, by taking the goods at the destination, make himself liable to pay demurrage in the port of lading according to the rate stipulated in the charter-party, although there be an express stipulation for a lien on the goods for such demurrage. *Smith v. Sieveking*, 4 E. & B. 945; 5 id. 589. *Fox v. Nott*, 6 H. & N. 630; 30 L. J. Ex. 260. *Santor v. Brice*, id. 108; 6 H. & N. 290. *Shand v. Sanderson*, 4 id. 155.

In *Brown v. Byrne*, 3 id. 703, a bill of lading expressed that the goods were deliverable to order or assigns, he or they

Per Cur. This is a case where there is an express contract under seal; and there is not any case which shows that where an express contract subsists with a third person for the payment of freight, the mere fact of receiving the goods has raised an implied promise by the person who receives them to pay the freight. That would be laying down a very extensive proposition. If the bill of lading refers to the charter-party for the note of payment, it should seem as if it could not enhance its stipulations and vary the position of the parties. But, assuming that the right of lien existed, and that it attached on the goods at the time of their coming into the hands of the indorsees of the bill of lading, the question is, whether there was any contract, express or implied, on the part of the indorsees to pay the freight. It has been suggested that there was not any express contract. Has there been any implied contract? From what facts is it to be implied? The landing the goods and paying the duties seem to be the only facts. It does not appear that there was any forbearance on the one side, or security given on the other; but it is to be implied merely from the indorsees receiving the goods from on board the ship, that they signified their acquiescence to become liable in the terms of the charter-party. But why must a contract be necessarily inferred from that? If, indeed, there had been any previous communication with the defendants as to the plaintiff's right to demand the freight of them, or as to their consent to waive their lien, that might have raised an inference that the defendants undertook to pay it; but in the absence of any such thing we do not see on what basis such an inference can be raised, except this, that wherever a party accepts the goods under a bill of lading, the permitting him to take them shall raise an implied *assumpsit* on his part to pay the freight. We are not prepared to agree to that as a universal proposition, and therefore cannot infer a promise in this case.

(B) *In Particular.*

(*a*) *As to Agents.*[1]

paying freight for the said goods five-eighths of a penny per pound, with five per cent primage and average accustomed; by the usual custom at the port of delivery, three months' interest or discount were deducted from freights payable under bills of lading on goods such as those in question. It was held that the assignee of the bill of lading, who had received the goods, was only liable to pay the freight less the discount, and that the custom was binding, and did not contradict the bill of lading. *See* also *Moeller v. Young*, 5 id. 755.

Even after delivery of the goods to the assignee of the bill of lading, the shipper continues liable on his original contract, and the person receiving the goods may be liable also on a new contract, the consideration for which is the delivery of the goods to him. See *Sanders v. Vanzeller*, 4 Q. B. 288. *Kemp v. Clark*, 12 id. 647.

There is no doubt that where a cargo is received under a bill of lading, that although not necessarily raising a contract in law, it is evidence from which a jury may infer a contract to pay freight, in consideration of the captain giving up his lien on the goods. *Young v. Moeller*, 5 E. & B. 760.

The 18 & 19 Vic. c. 111, s. 2, which places consignees named in bills of lading, and indorsees to whom the property in the goods has passed by the consignment or indorsement, in the same position as if the contract contained in the bill of lading had been made with themselves, expressly enacts that nothing in the act contained shall prejudice or affect any right to claim freight against the original shipper or owner, or any liability of the consignees or indorsees, in consequence of their being such, or of their receipt of the goods by reason or in consequence of the consignment or indorsement.

Where there is no bill of lading, the consignee is not usually liable; but prior payments of freight by him on former occasions of a similar kind are reasonable evidence, even in this case, to show that, on receipt of the goods, he contracts to pay the freight. *Coleman v. Lambert*, 5 Mee. & W. 502.

[1] Where the party declares that he is acting only as agent for another, he does not make himself chargeable with the freight by receiving the goods. *Ward v. Felton*, 1 East, 507.

No promise to pay freight will be implied when, in the face of the bill of lading, the person who receives the goods is merely agent for the consignees; as where the goods were deliverable to "A. B. for the London Gas Company, he or they paying freight," it was held that the promise to be inferred from the receipt of the goods was *primâ facie* a promise as agent only to pay the freight on account of the company. *Amos v. Temperley*, 8 Mee. & W. 798.

Where goods were shipped by merchants at Bombay, and, by the bills of lading, were to be delivered "unto order, or to his or their assigns, on paying freight for the said goods," and the bills were indorsed and forwarded to the defendants in London, who indorsed them in blank to their factors, who

(*b*) *Where Partners Dissolve Partnership.*[1]

V. Relative to the Construction of Contracts concerning.[2]

VI. „ Amount; how Settled and Computed.[3]

VII. „ Time and Manner of Payment.

(A) *In General.*[4]

received the goods under the bills, but without paying freight, and were debited with the amount by the shipowner, who did not know that they were only agents, and afterwards they became bankrupt, upon which the defendant obtained the goods from them, it was held that there was no implied contract by the defendants to pay freight to the shipowner, although the bills of lading had been indorsed without consideration to the factors as agents only for the defendants, and the goods at the time of the delivery to the factors were the property of the defendants; for it was considered that, as the agents were the only actual indorsees and holders of the bills, and the shipowner did not require payment before the delivery of the goods, he must be taken to have given credit to them alone, and that there was nothing to show that the defendants had given any authority to their agents to pledge their credit for the freight. *Tobin v. Crauford*, 5 Mee. & W. 235; 9 id. 716; *see* 3 Bing. 383.

[1] A., B., and C., partners, order goods from abroad, and then dissolve partnership, and assign their property to trustees for their creditors, leaving A. and B. to settle their affairs. In an action against A., B., and C. for the freight:—*Held*, that C. was not liable. *Pinder v. Wilks*, 5 Taunt. 612; 1 Marsh. 248.

[2] In the construction of contracts relating to freight, the court, as a general rule, say it is not to be paid till the voyage has been completed, unless parties stipulate for payment in advance. *Andrew v. Moorhouse*, 5 Taunt. 435; 1 Marsh. 122; *see* 4 M. & S. 37; 4 B. & A. 582; 3 B. & Adol. 445. Hence, a clause in a bill of lading that freight is to be paid at the loading port, does not mean at the time of the shipping. *Mashiter v. Buller*, 1 Camp. 84.

A covenant in a charter-party by the freighter, that a certain part of the outward freight should be paid on the delivery of the ship's outward cargo, has been considered to be conditional. *Storer v. Gordon*, 3 M. & S. 308. And where a charter-party contained no provision for any freight until the arrival of the vessel at the port of destination, the vessel being lost before its arrival, it was holden to be a condition precedent to the owner's right to freight. *Gibbon v. Mendez*, 2 B. & A. 17.

Whether money advanced by the merchant is to be considered as a loan or partial payment of the freight, must depend upon the terms of the contract. *De Silvale v. Kendall*, 4 M. & S. 37. As where the words, "the captain to be supplied with cash for the ship's use," followed a contract for payment of freight, one-half in cash on delivery, and remainder by bill, a bill drawn on the merchant, and paid by him, was held to be a loan. *Manfield v. Maitland*, 4 B. & A. 582. *See* further Charter-party, vol. iii. p. 91; Bill of Lading, vol. ii. p. 493, n.[2].

[3] When goods are sent in a general ship, the amount of the freight is either settled by the agreement of the parties, or by the usage of the trade. In the case of a charter-party, if the stipulated payment is a gross sum for an entire ship, or an entire part of a ship for the whole voyage, the gross sum will be payable, although the merchant have not fully laden the ship.

If an entire ship be hired, and the burthen thereof expressed in the charter-party, and the merchant covenant to pay a certain sum for every ton, &c. of goods which he shall lade on board, but do not covenant to furnish a complete lading, the owners can only demand payment for the quantity of goods actually shipped; and where the merchant covenanted to provide a full and complete cargo, consisting of copper, tallow, and hides, or other goods on which separate rates of freight were to be paid, it was held, that having supplied her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper, although from the want of it the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she otherwise would have done.

If a certain sum be stipulated for every ton, the payment must be according to the number of tons burthen mentioned in the description of the ship. *Hunter v. Fry*, 2 B. & A. 421; *see* 2 B. & C. 556. And if there be a covenant to pay freight on skins by the pound net weight, freight is due on the outside skins. *Moorsom v. Page*, 4 Camp. 103.

Where a specific number of bales, &c. are to be furnished, and the party fails in so doing, he must make good the loss. *Puller v. Staniforth*, 11 East, 232. In estimating which, neither the greatest possible freight nor the least is the proper measure, but an average ought to be taken. *Thomas v. Clarke*, 2 Stark, 450.

Misdescription of the ship in the charter is no defence to the action for not loading. *Reusse v. Meyers*, 3 Camp. 475.

Where a ship hired to go beyond sea to fetch home a cargo, for which a certain rate per ton was to be paid (nothing being payable for the outward voyage), was forced to return in ballast, the merchants' factor having no goods to put on board, the Court of Chancery decreed payment of the freight.

[4] If there be no time fixed for the commencement of the voyage, it will begin from the day she breaks ground. *Beale v. Thompson*, 3 B. & P. 405. *Curling v. Long*, 1 id. 634. And no partial payment can be claimed for goods laden on board if, even without the

fault of the master, the ship is prevented from actually setting forth on the voyage. *Curling v. Long*, *supra*. See *Crozier v. Smith*, 1 Scott, N. R. 338.

Although, in the absence of any express stipulation, there is not even an inception of the right to freight until the ship has broken ground, still, the receiving of the goods is a sufficient consideration for a promise to pay freight, or an equivalent in advance; and if the parties make a distinct contract to this effect, so that it is apparent that the prepayment is an advance of freight, and not a loan, there is no implied undertaking to return the money if the voyage fails; nor can it be recovered back unless there was a distinct agreement that it should be returned. *De Silvale v. Kendall*, 4 M. & S. 37. *Blakey v. Dixon*, 2 B. & P. 321. See *Manfield v. Maitland*, 4 B. & A. 585. *Saunders v. Drew*, 3 B. & Adol. 445. *Hicks v. Shield*, 7 E. & B. 633. *Jackson v. Isaacs*, 3 H. & N. 405.

Where it was agreed by a charter-party that a portion of the freight should be paid "on the final sailing of the vessel from the port of loading," and the ship, being fully equipped for sea, proceeded from the docks down a canal communicating therewith, and being within the limits of the artificial port there grounded, it was held that no freight had become payable, the vessel never having been out of the limits of the port, or at sea. *Roelandts v. Harrison*, 9 Ex. 444. See *Thompson v. Gillespie*, 5 E. & B. 209.

Where the vessel had left the harbour loaded, and in a fit state for sailing, and with the captain on board, but the clearances not being completed, or the bills of lading signed, he afterwards left her, and returned to shore, it was held that no freight was due. *Hudson v. Bilton*, 6 E. & B. 565.

Freight, where it is to be reckoned by the month, week, &c., is payable for the time consumed in necessary repairs. *Havelock v. Geddes*, 10 East, 555. Or a detention for a supposed breach of blockade. *Moorsom v. Greaves*, 2 Camp. 627.

The term "month" means calendar month. *Jolly v. Young*, 1 Esp. 186.

Where freight is reserved monthly to be paid in proportions, it is earned at the end of each month, and the payment only postponed. *Havelock v. Geddes*, *supra*. But where freight so reserved is payable on the arrival of the ship in port of discharge, an offer by the owner to perform the voyage, and a refusal by the freighter, &c., are not equivalent to actual performance. *Smith v. Wilson*, 8 East, 437; *see* 1 H. Black. 254; 10 East, 295.

As to Cases of Transhipment. — If the ship is wrecked, or otherwise disabled, during the voyage, and cannot be repaired, or cannot be repaired without too great a delay and expense, the master may procure another vessel to carry on the goods, and earn the freight; or if other means to forward the cargo can be procured, the master must procure them, or lose his freight. 3 Kent, Com. 210.

Where goods were shipped in a general ship, under a bill of lading, in which the freighter was named as the consignee, and the completion of the voyage was prevented by damage done to the ship by tempest, but the goods were forwarded by the master to their destination by another ship, under a bill of lading, making another person consignee, it was held that the freighter was liable, on the receipt of the goods, for the whole freight originally contracted for, although they were carried by the second conveyance at a less freight. *Shipton v. Thornton*, 9 Ad. & E. 316; *see* 13 Mee. & W. 230.

As a general rule, freight is payable on the quantity shipped, not on the quantity delivered. *Gibson v. Sturge*, 10 Ex. 622.

[1] Freight, as between British subjects, is due where the master is prevented from bringing home the intended cargo by the embargo of a foreign state. *Blight v. Page*, 3 B. & P. 295, n. And the consignee, after acceptance, cannot object to pay freight on the ground that the cargo is damaged. *Shiels v. Davis*, 6 Taunt. 165. So, where a ship is re-captured, and reaches her port of destination, freight is payable. *Bergstrom v. Mills*, 3 Esp. 37; *see* 3 B. & P. 298; 3 M. & S. 267.

And where the delivery is prevented by one of the perils, either expressly or impliedly excepted, it seems freight is payable. So it seems impliedly due where, by a charter-party, the freight is payable on arrival at the port of delivery, though the cargo be accepted by the consignee elsewhere. *Christy v. Row*, 1 Taunt. 300; *see* 13 East, 565; 5 B. & Adol. 521.

With regard to capture and ransom, the author of the *Guidon*, speaking of when the goods only are taken by pirates, and the ship discharged, and the goods are afterwards ransomed, says, that if the master will not contribute to the ransom he shall lose his whole freight; but if he contributes, he shall be paid freight as far as the place of capture, as well in the case of a freightment by charter-party as otherwise; and if he furnishes another ship to retake the goods, he shall be paid his entire freight. Guidon, c. 6, art. 7. Upon this subject the French ordinance provides, "that if the ship and goods are ransomed, the master shall be paid his freight as far as the place of capture; even his whole freight, if he convey the goods to the place of destination, he contributing to the ransom." L. 8, t. 3; et Code de Com. 303. Although ransom is now prohibited by the law of England, yet this may apply to case of capture and re-capture.

In some cases freight is to be paid, or rather an equivalent recompense made to the owners, although the goods have not been delivered at the place of destination, and so the contract for conveyance is not strictly performed. Thus, if part of the cargo be thrown overboard for the necessary preservation of the ship and the remainder of the goods, and the ship afterwards reach the place of destination, the value of this part is to be answered to the merchant by way of general average, and the value

(C) *When Payable* pro Ratâ.

Hunter v. Prinsep, 10 East, 378.

Freight *pro ratâ* cannot be claimed where, by the terms of the charter-

The ship "Young Nicholas" was chartered for a voyage from Falmouth to Honduras, to fetch a cargo of mahogany and other wood from there to London, the freight to be calculated upon the quantity of wood, and to be paid one-third upon a right and true delivery of the cargo, and two-thirds by a bill at three

thereof allowed to the owner. If, in time of war, a merchant vessel, carrying goods belonging to the subjects of one of the belligerent powers, be taken by those of the other (in which case, the goods are a lawful prize, but the ship is to be restored) the captor pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods *jure belli;* and although the whole freight has not been earned by the completion of the voyage, yet as the captor, by his act of seizure, has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight. 1 Rob. 289. This, however, is to be understood of such goods only as a neutral vessel may convey by the law of nations, and of a trade ordinarily allowed to the neutral nation by the government to whose subjects the goods belong. If the goods are contraband according to the law of nations, such as naval stores, &c., no freight is to be paid by the captor (id. 288); and this whether the master know the quality of the goods or no; for in time of war he is bound to know the contents of his cargo, and cannot be permitted to aver that he was ignorant of them (2 id. 101; 4 id. 199): nor is any freight to be paid by the captor, if the ship is employed in bringing the produce of the colony of a belligerent power to the mother country, or in the coasting trade, between one port and another of the same country (1 id. 296), or in carrying the goods even of neutrals, directly from its mother country to its colony (2 id. 186); or from one hostile nation to the colony of another hostile nation in alliance with it (id. 206); if these trades were not, in time of peace, open to the neutral nation whose ship is so employed, because in all these cases it is evident that the trade is opened in the time of war merely for the convenience of the belligerent power, and to relieve that power from a part of the difficulties occasioned by the war; and the neutral vessel so employed thereby furnishes direct assistance to the belligerent power. But as trade from a port of one nation to a port of another is in general open to all countries, freight is to be paid to the owners of a neutral vessel employed in carrying the goods of an enemy from a port of one nation hostile to the captor, to a port of another nation equally hostile. (Id. 101.) Again, if a ship be taken and retaken, and carried by the captors into a port short of the place of destination, and the ship be there restored before the cargo is restored, either by reason of a delay on the part of the merchant to claim the cargo, or of doubt or litigation upon his right to restitution, the Court of Admiralty does not require the ship to wait the doubtful event of the claim of the cargo in order to convey it to the place of destination, but gives the owners their whole freight, subject only to the deduction of salvage upon the amount of it. *See* Abb. on Ship. 290. As it may frequently happen that goods brought in specie to the place of destination may be so deteriorated during the course of the voyage as to be of no value to the merchant, it is important to consider whether the merchant is bound to pay the freight under such circumstances; or, to state the question more correctly, whether he is bound to receive the goods, or is at liberty to abandon them for the freight. Upon this question, as to the right of the merchant to abandon his goods when brought to the place of destination, and, by so doing, to discharge himself from the freight, different doctrines and opinions have prevailed, and there is no judicial decision in our books; although in some cases between the merchant and his insurer it has been admitted that the freight was payable, notwithstanding the goods were so much damaged that their value fell short of its amount. 2 Stra. 1065; Park, 160; Marsh. 143. But it is necessary to distinguish the causes from which the deterioration may have proceeded. If it has proceeded from the fault of the mariners or master, the merchant is entitled to a compensation, and may recover it by an action at law against the owner or master; but if he has received the goods, he cannot insist upon the damage as a defence to an action brought against himself for the freight, even although he has offered to return them. *See* 7 East. 479. And, in general, the right and true delivery of goods, upon which freight is made payable by the terms of a charter-party or bill of lading, means only a delivery of the entire quantity of chests or bales. If the goods have been damaged by the fault of the master or crew in the voyage, the remedy for the merchant who has received them is an action for the damages. 12 East, 381; 4 Camp. 119; 6 Taunt. 65. On the other hand, if the deterioration have proceeded from an intrinsic principle of decay, naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of a ship, the merchant must bear the loss, as well as pay the freight, for the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event.

party, the cargo is to be delivered and freight paid at a specified place.[1]

months' date from such delivery. The ship took in her cargo, but through a storm put in at Savannah to repair, and sold part of her cargo to defray the expense. She sailed again from thence, but was taken by a French privateer, and carried towards Guadaloupe, but was retaken by a British sloop of war and sent to St. Kitt's, and was there driven ashore and wrecked. The remainder of the cargo was saved, and was afterwards sold at the instance of the master, without communication with the merchant, and the proceeds remitted to the owner of the ship. The merchant sued the owner for the recovery of this money; the owner insisted that he was entitled to retain the whole or some part in respect of freight. The master had acted to the best of his judgment, but the sale was held unwarrantable. The form of the action was such as to admit of the owner's claim, if it could be substantiated; and in argument before the court, it was questioned whether any freight was payable in respect of the goods sold at St. Kitt's; and if any, then whether such freight were to be calculated on the portion of the voyage performed in point of time or distance, or only on the proportionable diminution of expense between the rate of freight from St. Kitt's to London, and from Honduras to London, and whether the freight should be allowed on the quantity of the goods sold, or in the proportion which the clear produce of the sale bore, either to the prime cost or to the value in London. But the court being of opinion that the owner was not entitled in this case to any freight *pro ratâ* proceeded as follows:—The principles which appear to govern the present action are these: the shipowners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the sea or other unavoidable casualties; and the freighter undertakes that if the goods be delivered at the place of destination he will pay the stipulated freight; but it was only on that event that he engaged to pay anything. If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded, unless the forwarding them be dispensed with, or unless there be some *new bargain* on the subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the shipowner has no right to withhold the possession from him, unless he has either earned his freight or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession.

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[1] The contract for the conveyance of merchandise is in its nature an entire contract; and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will in general derive no benefit from the time and labour expended in a partial conveyance, and consequently be subject to no payment whatever, although the ship may have been hired by the month or week. The cases in which a partial payment may be claimed are exceptions to the general rule, founded upon principles of equity and justice, as applicable to particular circumstances. On the other hand, an interruption to the regular course of the voyage, happening without the fault of the owner, does not deprive him of his freight, if the ship afterwards proceed with her cargo to the place of destination.

In the case of a general ship, or of a ship chartered for freight to be paid according to the quantity of the goods, there can be no doubt that freight is due for so much as shall be delivered, the contract in these cases being distinct, or at least divisible in its own nature. But suppose a ship chartered at a specific sum for the voyage, without relation to the quantity of the goods (in which case the contract, as observed by *Lord Chancellor Hardwicke*, in *Paul v. Birch*, 2 Atk. 621, is more properly a contract for the use of the ship than for the conveyance of the merchandise), should lose part of her cargo by a peril of the sea, but convey the residue to the place of destination, in this case, I do not find any authority for apportioning the freight. And it seems to have been the opinion of Maline, *Lex Merc.* 100, that nothing would be due: and the case of *Bright v. Cowper*, Brownl. 21, which will be mentioned hereafter, may be considered as an authority in support of that opinion. But probably,

VIII. Relative to the Right of Lien connected with. *See post*, Lien.

IX. Relative to the Action connected with.[1] *See* Charter-Party, vol. iii. p. 94; Covenants, id. p. 443; *post*, Ship and Shipping.

FRIENDLY SOCIETIES.

I. Constitution and Powers of Friendly Societies Registered previous to 18 & 19 Vic. c. 63, p. 560.

if the question should arise again, the determination of it would depend upon the particular words of the charter-party; for without a very precise agreement for that purpose, it seems hard that the owners should lose the whole benefit of the voyage when the object of it has been in part performed, and no blame is imputable to them. *See* 8 Taunt. 354.

The apportionment of freight usually happens when a ship, by reason of any disaster, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage. In this case the master may, if he will and can do so, hire another ship to convey the goods, and so entitle himself to his whole freight; but if he is unable, or declines to do this, and the goods are then received by the merchant, the general rule of the ancient maritime law is that freight shall be paid according to the proportion of the voyage performed, *pro ratâ itineris peracti*. 2 Magens. 104, art. 147.

If the original contract has not been performed, no claim can arise under it; but if there is a voluntary acceptance of the goods at a point short of their destination in such a mode as to raise a fair inference that the further carriage was intentionally dispensed with, a new contract will be implied to pay compensation commensurate with the benefit actually received; that is to say, to pay freight for that portion of the voyage which has actually been performed. See *per Parke, B.: Vlierboom v. Chapman*, 13 Mee. & W. 238. The carriage of the goods, so far as it actually takes place, must also be the act of the shipowners in order to entitle them to freight *pro ratâ*. *Mitchell v. Darthez*, 2 Bing. N. C. 555. *See* 1 P. & D. 216.

Where by a charter-party freight is payable at so much per ton on delivery of the cargo, and the delivery of part is prevented by act of the consignee, or by one of the perils excepted against, freight is due *pro ratâ* for that part delivered. *Christy v. Row*, 1 Taunt. 300. And it has been held, that where a ship is wrecked the merchant is liable to freight *pro ratâ*. *Lutwidge v. Grey*, cited Abb. on Shipp. 307. *See* 9 Ad. & E. 314.

So, where the ship in her voyage was arrested by capture and recaptured, and the freighter does not abandon, the master will be entitled to freight *pro ratâ itineris*. *Luke v. Lyde*, 2 Burr. 882; 1 Black. 190. However, whatever right to freight *pro ratâ itineris* may arise on a capture, it cannot be enforced pending the suit in the Admiralty for a condemnation. *Mulloy v. Backer*, 5 East, 316. But the rule *pro ratâ itineris* does not hold where, by the express agreement of the parties, the cargo is to be delivered and paid for in a specified place. *Cook v. Jennings*, 7 T. R. 381. *Hunter v. Prinsep*, *supra* in text. In fact, the right to freight *pro ratâ itineris* must arise out of some new contract between the master and the merchant, either expressly made by them, or to be inferred from their conduct. The right cannot possibly exist when the original contract has been performed; for then the master has another and more beneficial claim. Where an inference is to be drawn from the conduct of the parties, the rule of the maritime law will probably have great weight.

A promise to pay the master *pro ratâ itineris* will not be implied unless the cargo is voluntarily accepted by the consignee at the place of destination. *Osgood v. Groning*, 2 Camp. 466.

A cargo had been shipped at Batavia to be delivered to the plaintiff at Rotterdam; the vessel was compelled by stress of weather to put in at the Mauritius, where the cargo was found to be so damaged that it was of necessity sold by the master, who acted in this respect *bonâ fide*, but without the knowledge of either the shipper or of the shipowner. The court held, that these facts afforded no presumption that the owner of the cargo had agreed to receive it at the intermediate port, and consequently that no freight had become due. *Vlierboom v. Chapman*, 13 Mee. & W. 230.

If the goods are carried and delivered to the merchant he is not entitled to abandon them, or resist the payment of freight by reason of their being damaged, unless there is some stipulation to this effect in the contract. The injury to the goods, if caused by the negligence of the master, would only afford matter for a cross-action. *Hotham v. East India Co.* 1 Dougl. 271. *Stimson v. Hall*, 1 H. & N. 831. *Alston v. Herring*, 11 Ex. 822. *Garrett v. Melhuish*, 4 Jur. N. S. 943.

[1] Where there is a contract under seal between the master and the freighter, the owner cannot support *assumpsit*. *Schack v. Anthony*, 1 M. & S. 573.

The captain of a ship may sue on an implied *assumpsit* for freight. *Brouncker v. Scott*, 4 Taunt. 1.

In a declaration on a contract for freight it must be shown that the freight is due. *Blakey v. Dixon*, 2 B. & P. 321. *See* Form, B. & L. Pl. 75, s. 79.

A plea in answer for a demand for freight, that the vessel was out of repair, must show that it was occasioned through the owner's neglect. *Havelock v. Geddes*, 10 East, 555.

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I. Constitution and Powers of Friendly Societies Registered Previous to 18 & 19 Vic. c. 63.[1]

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[1] This act repeals all former acts relating to Friendly Societies, but provides by sect. 2, "that, notwithstanding the repeal of the said several statutes, every Friendly Society now subsisting, which heretofore had been formed and established under the said acts, or any of them, shall still be deemed to be and shall continue to be a subsisting so-

II. Objects for which Society may be Constituted.

By 18 & 19 Vic. c. 63, s. 9,[1] "it shall be lawful for any number of persons May be formed

ciety, as fully as if this act had not been made, unless and until such society shall be dissolved, or united with some other society, as hereinafter mentioned."

And by sect. 3 it is provided, "that the rules of every such subsisting society hitherto formed and established, which have been hitherto confirmed, registered, or certified under the said acts or any of them, shall be deemed valid and in force until the same shall be altered or rescinded as hereinafter mentioned; and all transcripts of any of such rules which are now filed with the rolls of the sessions of the peace of any county, riding, or division, city or borough, liberty or place, shall be taken off the file, and shall be transmitted on or before the 1st of November, 1855, to the registrar under this act, to be by him kept, in such manner as shall be directed from time to time by one of her majesty's secretaries of state in that behalf."

And by sect. 4, "all contracts and engagements by or with any of the said societies now valid and in force, and all bonds and securities heretofore given by any trustee, treasurer, or other officer of any such society, shall continue and be valid and in force notwithstanding the repeal of the said acts."

And by sect. 5, "all such substituting societies whose rules have heretofore been confirmed, registered, or certified under the said acts or any of them, shall, so long as they shall not hereafter affect an insurance to any member thereof, or other person, of any sum exceeding 200*l.*, or of any annuity exceeding 30*l.* per annum, enjoy all the exemptions and privileges by this act conferred on societies to be established under the provisions of this act, as fully as if they had been registered and certified under this act, as hereinafter mentioned."

And by sect. 46, reciting, "that under the provision of the acts hereby repealed, or some of them, certain associations or societies have been formed in England and Ireland for the provident and charitable purpose of securing annual payments to the nominees of the members thereof, contingent upon the death of such members, and have invested their funds in the manner provided by such acts, and doubts may arise whether such associations or societies will be entitled to the exemptions and privileges by this act conferred in the event of such annual payments amounting in the aggregate to more than 30*l.*; and it is expedient to remove such doubts, and to give protection to such associations or societies, and to the funds thereof: enacts, that notwithstanding anything in this act contained to the contrary, all such associations or societies as were founded and subsisting under the provisions of the said acts previously to the 15th of August, 1850, shall enjoy the exemptions and privileges by this act conferred on societies to be established under the provisions of this act, as fully as if they had been registered and certified under this act, and notwithstanding that the contingent annual payments to which the nominees of the present or future members of such associations or societies may become entitled shall exceed in the aggregate the sum of 30*l.*"

By sect. 47, "in any case where the rules of any society already enrolled or certified have provided that a member shall be deprived of any benefit by reason of his enrolment or service in the militia, it shall be lawful for the trustees of such society to require of any member a contribution exceeding the rate of contribution hitherto payable by such member, to an amount not exceeding one-tenth of such rate, during the time such member shall be serving out of the United Kingdom, or to suspend all claim of such member during the time he may be serving in the militia out of the United Kingdom, provided that such suspension shall cease so soon as the said member shall return to the United Kingdom, and he shall thereupon be placed upon the same footing as before he went abroad with the regiment to which he belongs."

By sect. 48, "all the provisions of this act shall apply to all societies constituted under the Industrial and Provident Societies Acts, 1852, in the same manner as the laws in force relating to friendly societies at the date of the passing of the said Industrial and Provident Societies Act, 1852, are by the said last-mentioned act directed to apply to societies constituted thereunder, and the limitation hereinbefore contained of the amount of the annuities and sums payable on the death of any person, or on any other contingency, in the case of societies established under this act, shall apply to all societies constituted under the said Industrial and Provident Societies Act, 1852."

By sect. 12 of 18 & 19 Vic. c. 63, the act 39 Geo. 3, c. 79, and the act 57 Geo. 3, c. 19, and also the act 14 & 15 Vic. c. 48, relating to unlawful oaths in Ireland, shall not extend to any society established under this act, or any of the acts hereby repealed, or to any meeting of members or officers thereof, in which society or at which meeting no business whatever is transacted other than that which directly and immediately relates to the objects of the society as declared in the rules thereof, and set forth in the certified copy thereof: Provided that the trustees or other officers of the society, when required under the hands of two of her majesty's justices of the peace, shall give full information to such justices of the nature, objects, proceedings, and practices of such society, and in default thereof the provisions of the acts herein recited shall be in force in respect of such society."

[1] This act extends to Great Britain and

for payments on death, for relief in sickness, &c. For other purposes authorised by secretary of state.

to form and establish a Friendly Society[1] under the provisions of this act, for the purpose of raising, by voluntary subscriptions of the members thereof, with or without the aid of donations, a fund for any of the following objects; (that is to say,)

"1. For insuring a sum of money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the wife or child of a member:[2]

"2. For the relief or maintenance of the members, their husbands, wives, children, brothers or sisters, nephews or nieces, in old age, sickness, or widowhood, or the endowment of members, or nominees of members, at any age:

"3. For any purpose which shall be authorised by one of her Majesty's principal secretaries of state, or in Scotland by the Lord Advocate, as a purpose to which the powers and facilities of this act ought to be extended:

"Provided that no member shall subscribe or contract for an annuity exceeding 30*l.* per annum, or a sum payable on death, or on any other contingency, exceeding 200*l.*

"And if such persons so intending to form and establish such society shall transmit rules for the government, guidance, and regulation of the same, to the registrar aforesaid, and shall obtain his certificate that the same are in conformity with law as hereinafter mentioned, then the said society shall be deemed to be fully formed and established from the date of the said certificate."

(A) *Certificate Extending certain Provisions of Act to Societies for Relieving Physical Wants of Poor, Improving their Dwellings, or Granting Pensions.*

Benevolent societies may, in certain cases, be entitled to benefit of act.

Sect. 11 — reciting that many provident, benevolent, and charitable institutions and societies are formed, and may be formed, for the purpose of relieving the physical wants and necessities of persons in poor circumstances, or for improving the dwellings of the labouring classes, or for granting pensions, or for providing habitations for the members or other persons elected by them; and it is expedient to afford protection to the funds thereof — enacts, that "if two copies of the rules of any such institution or society, and from time to time the like copies of any alterations or amendments made in the same, signed

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Ireland, and the Channel Isles and the Isle of Man. 18 & 19 Vic. c. 63, s. 50.

[1] By the interpretation clause the word "society" shall extend to and include every branch of a society, by whatever name it may be designated. 18 & 19 Vic. c. 63, s. 49.

By 18 & 19 Vic. c. 63, s. 15, there is no limit with respect to the number of members. A person under the age of twenty-one may be elected or admitted as a member of any society established under this act, or any of the acts hereby repealed, the rules of which do not prohibit such election, and may and he is hereby empowered to execute all necessary instruments, and to give all necessary acquittances: Provided always, that during his nonage he shall not be competent to hold any office of the director, trustee, treasurer, or manager of such society.

[2] In any society in which a sum of money may be insured, payable on the death of a child under the age of ten years, for the funeral expenses of such child, it is not lawful to pay any sum so insured unless the person who applies for such payment produces a certificate signed by a qualified medical practitioner, stating the probable cause of the death of such child. The sum payable on the death of a child for funeral expenses is limited to 6*l.* in the case of a child under the age of five, and to 10*l.* where the child is under ten years of age. 20 & 21 Vic. c. 101, s. 2.

A society established for raising shares at stated periods by the subscriptions of its members, and enabling such members to receive the value of their shares in advance on payment of a bonus, and entering into security for the payments of the subscriptions, fines, forfeitures, and interest (the privilege of receiving such advances being put up to auction and sold to the highest bidder), was held not to be a friendly society under the repealed acts 10 Geo. 4, c. 56, and 4 & 5 Wm. 4, c. 40. *Reg. v. Scott*, 13 L. J. M. C. 70; 8 Jur. 473. See *Burbidge v. Cotton*, 21 L. J. Ch. 201.

by three members and the secretary thereof, shall be transmitted to the registrar aforesaid, such registrar shall, if he shall find that the same are not repugnant to law, give a certificate to that effect; and thereupon the following sections of this act (that is to say, the 17th, 18th, 19th, 20th, 21st, 22d, 40th, 41st, 42d, and 43d) shall extend and be applicable to the said institution and society, as fully as if the same were a society established under this act."

By 21 & 22 Vic. c. 101, s. 3, ss. 16 and 24 are also to extend to societies under sect. 11.

III. Of the Officers of the Society, their Appointment and Duties.

(A) *Of the Trustees.*[1]

(*a*) *Appointment of.*

(*b*) *Powers and Duties of the Trustees.*[2]

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[1] By 18 & 19 Vic. c. 63, s. 17, "every friendly society established under this act shall, at some meeting of its members, and by a resolution of a majority of the members then present, nominate and appoint one or more person or persons to be trustee or trustees for the said society, and the like in the case of any vacancy in the said office, and a copy of the resolution so appointing such person or persons to the office of trustee, and signed by such trustee or other trustee, and by the secretary of the said society, shall be sent to the registrar, to be by him deposited with the rules of the said society in his custody: Provided always, that where no trustee shall have been appointed in any society established under any one of the acts hereby repealed, the treasurer thereof, or other person who has custody of the monies of such society, shall be taken to be a trustee within the meaning of this act."

[2] By sect. 18, "all real and personal estate whatsoever belonging to any such society established under this act, or any of the acts hereby repealed, shall be vested in such trustee or trustees for the time being, for the use and benefit of such society and the members thereof, and the real or personal estate of any branch of a society shall be vested in the trustees of such branch, and be under the control of such trustee or trustees, their respective executors or administrators, according to their respective claims and interest, and upon the death or removal of any such trustee or trustees, the same shall vest in the succeeding trustee or trustees for the same estate and interest as the former trustee and trustees had therein, and subject to the same trusts, without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of Great Britain and Ireland, which shall be transferred into the name or names of such new trustee or trustees; and in all actions, or suits, or indictments, or summary proceedings before magistrates, touching or concerning any such property, the same shall be stated to be the property of the person or persons for the time being holding the said office of trustee, in his or their proper name or names as trustee of such society, without any further description."

By sect. 19, "the trustee or trustees of any such society are hereby authorised to bring or defend, or cause to be brought or defended, any action, suit, or prosecution in any court of law or equity, touching or concerning the property, right, or claim to property of the society for which he or they are such trustee or trustees as aforesaid; and such trustee or trustees shall and may, in all cases concerning the real and personal property of such society, sue and be sued, plead and be impleaded, in any court of law or equity, in his or their proper name or names, as trustee or trustees of such society, without other description; and no such action, suit, or prosecution, shall be discontinued or shall abate by the death of such person, or his removal from the office of trustee, but the same shall and may be proceeded in, by, or against the succeeding trustee or trustees, as if such death or removal had not taken place; and such succeeding trustee or trustees shall pay or receive the like costs as if the action, or suit, or prosecution had been commenced in his or their name or names, for the benefit of or to be reimbursed from the funds of such society."

By sect. 20, "provided, nevertheless, that no trustee or trustees of any such society shall be liable to make good any deficiency which may arise or happen in the funds of such society, but shall be liable only for the monies which shall be actually received by him on account of such society."

By sect. 45, "the trustees of friendly societies established under this act, or under any of the repealed acts, or the officer thereof appointed to prepare returns, shall once in every year, in the month of January, February, or March, transmit to the registrar a general statement of the funds and effects of such society during the past twelve months, or a copy of the last annual report of such society, and shall also within three months after the expiration of the month of December, 1855, and so again within three months after the expiration of every five years succeeding, transmit to the said registrar a

(c) May acquire Building for holding Meetings.[1]

return of the rate or amount of sickness and mortality experienced by such society within the preceding five years, in such form as shall be prepared by the said registrar, and an abstract of the same shall be laid before parliament ; and the registrar shall also lay before parliament every year a report of his proceedings in his office of registrar, and of the principal matters transacted by friendly societies which have come under his cognisance during the past year."

A., who was a trustee of a friendly society, was appointed, by a resolution of the society, to receive money from the treasurer and carry it to the bank. He received the money from the treasurer's clerk, but instead of taking it to the bank he applied it to his own purposes. He was indicted for stealing as bailee the money of the treasurer, and also for a common larceny, the money being laid as that of the treasurer: it was held that under these counts A. could not be convicted either as a trustee or of a common law larceny, sect. 18 vesting the property in the trustees. *Reg. v. Loose*, Bell, C. C. 259; 29 L. J. M. C. 132; but see *Reg. v. Fletcher*, 6 L. T. (N. S.) 545.

By 23 & 24 Vic. c. 68, s. 7, "if default shall be made in transmitting to the registrar, before the 1st of June in each year, the general statement or copy of the last annual report of any society in compliance with the provisions of sect. 45 of the act 18 & 19 Vic. c. 63, the officer making such default shall be liable to a penalty not exceeding 20*s.* to be recovered with costs, at the suit of the registrar, before two or more justices: as to England, in manner directed by an act 11 & 12 Vic. c. 43, intituled 'An Act to Facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales, with respect to Summary Convictions and Orders:" and as to Scotland, before two or more justices or the sheriff of the county, in manner directed by the act 17 & 18 Vic. c. 104, intituled, 'An Act to Amend or Consolidate the Acts relating to Merchant Shipping as regards Offences in Scotland against that Act, not being Offences by that Act described as Felonies or Misdemeanors:' and as to Ireland, in manner directed by the act 14 & 15 Vic. c. 93, intituled 'An Act to Consolidate and Amend the Acts regulating the Proceedings of Petty Sessions and the Duties of Justices of the Peace out of Quarter Sessions in Ireland:' or any act passed for the amendment of the above-mentioned acts; and the justices or sheriffs imposing any penalty under this act may direct the whole or any part thereof to be applied in or towards payment of the costs of the proceedings; and subject to such direction, all penalties shall be paid into the receipt of her majesty's Exchequer, in such manner as the treasurer may direct, and shall be carried to and form part of the Consolidated Fund of the United Kingdom of Great Britain and Ireland." 23 & 24 Vic. c. 58, s. 7.

If the accounts and returns required from certain friendly societies by the Commissioners for the Reduction of the National Debt, pursuant to sect. 34 of the said act, be not made within thirty days after the same have been required, the account of the said society shall be closed by the said commissioners, and thenceforth no interest shall be credited to such society thereon until such accounts and returns shall be furnished to the said commissioners, or the money be withdrawn. Id. s. 8.

[1] 18 & 19 Vic. c. 63, s. 16. "It shall be lawful for the trustee or trustees for the time being of any friendly society formed and established under this act, or under any of the acts hereby repealed, with the consent of the majority of the members thereof present at a special or general meeting of the society, to purchase, build, hire, or take upon lease, any building for the purpose of holding such meetings, and to adapt and furnish the same, and to purchase or hold upon lease any land, not exceeding one acre, for the said purpose of erecting thereon a building for holding the meetings of the society, and such trustee or trustees shall thereupon hold the same in trust for the use of such society; and, with the like consent as aforesaid, such trustee or trustees may mortgage, sell, exchange, or let such building, or any part thereof; and the receipt in writing of such trustee, or one of such trustees for the time being, shall be a legal discharge for the money arising from such mortgage, sale, exchange, or letting; and no mortgagee, purchaser, tenant, or assignee, shall be bound to inquire into, or ascertain, or prove the consent aforesaid, to verify his title: Provided always, that any building purchased or appropriated for the purpose aforesaid, already belonging to or in the possession of any friendly society heretofore formed and established under the said repealed acts or any of them, may be holden and dealt with as if it had been acquired under this act; and the lands or buildings which may be vested in the treasurer, trustee, or other officer thereof for the time being, shall thereupon vest in the trustee or trustees for the time being of such society, for the same estate and interest as the said treasurer, trustee, or other officer, may have therein, without any conveyance or assignment whatever: Provided nevertheless, that all money spent in purchasing, building, hiring, or taking upon lease, any building for the purpose of holding such meetings, and in adapting and furnishing the same, be raised according to the rules of the society on such behalf inserted; and this section shall apply to any society registered under the Industrial and Provident Societies Acts, 1852, and to any building or land to be purchased, built, hired, or taken on lease, for the pur-

(B) *Of the Treasurer, his Appointment and Duties.*

(*a*) *Must give Security for duly Accounting, &c.*[1]

(*b*) *Must Account when required.*[2]

(*c*) *In case of his Bankruptcy, &c.*[3]

poses of the labour, trade, or handicraft, of such society, in all respects as hereby enacted with regard to any building or land for the holding the meetings of any friendly society."

By sect. 28, "whenever any friendly society established under this act, or under any of the acts hereby repealed, shall change its place of business, notice of such change, under the hands of two of the trustees, or three members and secretary or other officer, shall within fourteen days thereafter be sent to the said registrar."

[1] 18 & 19 Vic. c. 63, s. 21. "The treasurer of every such society, and every treasurer hereafter appointed in any society established under any of the repealed acts, or any other officer who is required by the rules to give security, shall, before he take upon himself the execution of his office, become bound with one sufficient surety, in a bond according to the form set forth in the third schedule to this act, or give the security of a guarantee society established in London, in such penal sum as the society or the committee of management shall direct and appoint, conditioned for his just and faithful execution of his said office of treasurer, and for rendering a just and true account of all monies received or paid by him on account of the said society, at such times as the rules of the said society shall direct and appoint, and at such times as he shall be so required so to do by the trustee or trustees of the said society, or by a majority of the said committee of management, or by a majority of the members present at any meeting of such society; and every such bond shall be given to the trustee or trustees for the time being to sue upon such bond for the use of such society; and in Scotland such bond shall have the same force and effect as a bond there in use duly attested and completed, and containing a clause of registration for execution as well as for preservation, in the books of council and session and other judges' books competent, and shall be registered in such books accordingly, with a view to diligence.

[2] By sect. 22, "every such treasurer or other officer, whether appointed before or after the passing of this act, at such times as by the rules of such society he should render such account as aforesaid, or upon being required so to do by the trustee or trustees of such society, or by a majority of the said committee of management, or by a majority of the members present at a meeting of the said society as aforesaid, within seven days after such requisition, shall render to the trustee or trustees of the society, or to the said committee of management, or to the members of such society at a meeting of the society, a just and true account of all monies received and paid by him since he last rendered the like account, and of the balance then remaining in his hands, and of all bonds or securities of such society, which account the said trustee or trustees, or committee of management, shall cause to be audited by some fit and proper person or persons by them to be appointed; and such treasurer, if thereunto required, upon the said account being audited, shall forthwith hand over to the trustee or trustees the balance which on such audit shall appear to be due from him, and shall also, if required, hand over to such trustee or trustees all securities and effects, books, papers, and property of the said society, in his hands or custody; and if he fail to do so, the trustee or trustees of the said society may sue upon the bond aforesaid, or may sue such treasurer in the county court of the district, or in any of the superior courts of common law, or in any other court having jurisdiction, for the balance appearing to have been due from him upon the account last rendered by him; and for all the monies since received by him on account of the said society, and for the securities and effects, books, papers, and property, in his hands or custody, leaving him to set off in such action the sums, if any, which he may have since paid on account of the said society; and in such action the said trustee or trustees shall be entitled to recover their full costs of suit, to be taxed as between attorney and client."

It was held on the construction of the similar provision of the 10 Geo. 4, c. 56, ss. 22, 23, that that enactment had not the effect of increasing the responsibility of the treasurer beyond that of a bailee, in respect of the loss of money immediately after its receipt. *Walker v. British Guarantee Association*, 21 L. J. Q. B. 257.

[3] By sect. 23, "if any person already appointed or employed, or hereafter to be appointed or employed, to or in any office in any friendly society established under this act, or under any of the acts hereby repealed, whether such appointment or employment was before or after the legal establishment of such society, and having in his hands or possession, by virtue of his office, any monies or property whatsoever of such society, or any deeds or securities belonging to such society, shall die or become bankrupt or insolvent, or have any execution or attachment or other process issued against him or any part of his property, or shall have any action or diligence raised against his lands, goods, chattels, or effects, or property or other estate, heritable or moveable,

IV. Of the Rules of the Society.

(A) *What they must contain.*

Before society can be established, rules are to be made according to directions of act.

By 18 & 19 Vic. c. 63, s. 25, "before any friendly society shall be established under this act, the persons intending to establish the same shall agree upon and frame a set of rules for the regulation, government, and management of such society; and in such rules they may, amongst other things, make provision for appointing a general committee of management of such society, and delegating to such committee all or any of the powers given by this act to the members of friendly societies, formed or established under or by virtue of the same; and such rules shall set forth—

"1. The name of the society, and place of meeting for the business of the society.

"2. The whole of the objects for which the society is to be established, the purposes for which the funds thereof shall be applicable, and the conditions under which any member may become entitled to any benefit assured thereby; and the fines and forfeitures to be imposed on any member of such society.

"3. The manner of making, altering, amending, and rescinding rules.

"4. A provision for the appointment and removal of a general committee of management, of a trustee or trustees, treasurer, and other officers.

"5. A provision for the investment of the funds, and for an annual or periodical audit of accounts.

"6. The manner in which disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be settled.

"And the rules of every such society shall provide, that all monies received or paid on account of each and every particular fund or benefit assured to the members thereof, their husbands, wives, children, fathers, mothers, brothers or sisters, nephews or nieces, for which a separate table of contributions payable shall have been adopted, shall be entered in a separate account, distinct from the monies received and paid on account of any other benefit or fund, and also that a contribution shall be made to defray the necessary expenses of management, and a separate account shall be kept of such contributions and expenses."[1]

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or shall make any assignment, disposition, assignation, or other conveyance, for the benefit of his creditors, the heirs, executors, administrators, or assignees of such officer, every such officer, and every other person having or claiming right to the property of such officer, and the sheriff or other person executing such process, and the party using such action or diligence respectively, shall, upon demand in writing made by the treasurer or by the trustee, or any two of the trustees of such society, or any person appointed at some meeting of the society to make such demand, deliver and pay over all such monies, property, deeds, and securities, belonging to such society, to such person as such treasurer or trustees shall appoint, and shall pay out of the estate, assets, or effects, heritable or moveable, of such officer, all sums of money due which such officer shall have received, before any other of his debts are paid, and before any other claims upon him shall be satisfied, and before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process, or using such diligence; and all such assets, lands, goods, chattels, property, estates, and effects, shall be bound to the payment, discharge, and satisfaction of such claims."

Where the rules of a friendly society provided that the treasurer, retaining upwards of 10*l.* more than seven days after he was required to pay it over, should be excluded from the society; they also provided that a particular firm should be the bankers of the society, with power for a general meeting to appoint other bankers: it was held that the bankers for the time being were not officers so as, upon their bankruptcy, to entitle the society to payment in full. *Ex-parte Harris*, 1 De Gex, 162.

[1] Where the rules of a society empower the governing body to borrow money for the purposes of the society, and provide that certain formalities shall be complied with, the society cannot repudiate a debt merely upon the ground that the prescribed formalities had not been complied with, although the want of such formalities may

(B) *Transmission of Rules to, and Certificate of Registrar.*[1]

(C) *Amendment of Rules.*[2]

V. Of the Conduct of Business of the Society.

affect the priorities of the different creditors. *Park v. Clegg*, 30 L. J. Ch. 742; 7 Jur. N. S. 1136.

[1] By sect. 26, "two printed or written copies of such rules, signed by three of the intended members and the secretary or other officer, shall be transmitted to the registrar aforesaid, and the said registrar shall advise with the secretary or other officer, if required, for the purpose of ascertaining whether the said rules are calculated to carry into effect the intentions and object of the persons who desire to form such society; and if the registrar shall find that such rules are in conformity with law and with the provisions of this act, he shall give a certificate in the form set forth in the second schedule to this act, and shall return one of the said copies to the said society, and shall keep the other in such manner as shall from time to time be directed by one of her majesty's principal secretaries of state, and for which certificate no fee shall be payable to the said registrar; and all rules, when so certified as aforesaid, shall be binding on the several members of the said society: Provided always, that it shall not be lawful for the said registrar to grant any such certificate to a society assuring to any member thereof a certain annuity or certain superannuation, deferred or immediate, unless the tables of contributions payable for such kind of assurance shall have been certified under the hand of the Actuary to the Commissioners for the Reduction of the National Debt, or by an actuary of some life assurance company established in London, Edinburgh, or Dublin, who shall have exercised the profession of actuary for at least five years, and such certificate be transmitted to the registrar, together with the copies of the rules aforesaid."

By 18 & 19 Vic. c. 63, s. 6, "for the purposes of this act there shall be three registrars of friendly societies, one for England, one for Scotland, and one for Ireland, who shall hold their respective offices during the pleasure of the Commissioners for the Reduction of the National Debt; and upon the death, resignation, or removal of any one of them, the said commissioners shall appoint another, being a barrister in England or Ireland, and in Scotland an advocate, of not less than seven years' standing, to the said office." As to their salaries, *see* sect. 7.

In an action on a promissory note by the treasurer of a friendly society, the declaration alleged that the rules of the society were filed before the making of the promise at the trial. It appeared that the rules were not filed until after the making the note, but before it became due; this was held to be no variance. *Margett v. Parkes*, 1 D. & L. 582; 13 L. J. Ex. 87.

[2] By sect. 27, "after the rules of a friendly society shall have been so certified by the registrar as aforesaid, it shall be lawful for such society, by resolution at a meeting specially called for that purpose, to alter, amend, or rescind the same or any of them, or to make new rules: Provided always, that two copies of the proposed alterations or amendments, and of such new rules, signed by three members of such society, and the secretary or other officer, shall be transmitted to the said registrar, to one of which shall be attached a declaration by the secretary, or one of the officers of such society, that in making the same the rules of such society respecting the making, altering, amending, and rescinding rules, or the directions of the acts under which such society was established, have been duly complied with, and if the said registrar shall find that such alterations, amendments, or new rules are in conformity with law, he shall give to the society a certificate in the form set forth in the schedule to this act, and return one of the copies to the society, and shall keep the other, with the rules of such society, in his custody, and for which certificate no fee shall be payable to the said registrar, and as and against such member or person such certificate shall be conclusive of the validity thereof; and all rules, alterations, and amendments, when so certified as aforesaid, shall be binding on the several members of the said society, and all persons claiming on account of a member or under the said rules: but unless and until the same shall be so certified as aforesaid, such rules, alterations, and amendments, shall have no force or validity whatsoever."

By sect. 29, circulating false copies of rules, &c. is a misdemeanor.

By sect. 30, "all rules and tables of any society established under this act, or any of the said repealed acts, and all alterations and amendments thereof, and all copies thereof or abstracts therefrom, and all writings and documents relating to a friendly society, and purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received in all courts of law and equity, and elsewhere, without proof of the signature thereto."

"Any friendly society may, with the approval of the registrar, change its name; but no such change shall affect any rights or obligations of the society, or any member thereof, and any legal proceedings may be continued or commenced, by or against the trustees of the society, or any officer or the committee thereof, by and notwithstanding the new name." 21 & 22 Vic. c. 101, s. 4.

(A) *Investment of Funds.*[1]

(B) *Payment of Amount Assured to Nominee, &c. of Deceased Member.*[2]

(C) *Member of several Societies must not Assure on the Aggregate more than* 200*l.*, *or receive Annuity exceeding* 30*l. a-year.*[3]

(D) *Funds may be Subscribed to other Institutions from which Member may derive a Benefit.*[4]

(E) *Exemption from Stamp-Duty.*[5]

VI. Settlement of Disputes between Members, &c.

(A) *In manner by Rules directed; if Rules silent, by County Court.*

As to the determination of disputes according to the rules.

By 18 & 19 Vic. c. 63, s. 40, "every dispute between any member or members of any society established under this act, or any of the acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties without appeal." See *Hoey v. M'Farlane*, 4 C. B. 718; 4 Jur. 785. *Grinham v. Card*, 7 Ex. 833; 21 L. J. Ex. 321.

By 21 & 22 Vic. c. 101, s. 5, "where the rules of any society established under the 18 & 19 Vic. c. 63, or any of the acts thereby repealed, shall direct disputes to be referred to justices, then any justice of the peace acting in the county or borough in which the place of business of such society shall be situated, upon complaint made by any member, his executors or administrators, nominee or assigns, or by any person claiming under the rules of the society, of any matter in dispute between him or them and the society, may summon the party against whom such complaint is made, at a time and place to be named in such summons, and any two justices present at the time and place mentioned in such summons shall proceed to hear and determine the said complaint,[6] which complaint shall be heard and determined, in England in manner directed by the act 11 & 12 Vic. c. 43, and in Ireland in the manner directed by the act 14 & 15 Vic. c. 93, and such justices may make such order thereupon, either for the payment of money or otherwise, together with costs not exceeding 10*s.* as they shall think fit; and where the order made shall be for the doing of some act other than the payment of money, the said justices may order the payment of a sum of money in default of the doing of such act; and any monies which shall be paid by any officer of the society, so levied on his property under any order or warrant of the justices, shall be repaid, with all damages accruing to him, by the society: Provided always, that in Scotland the sheriff within his county shall have the same jurisdiction as is hereby given to a justice of the peace."[7]

[1] The 18 & 19 Vic. c. 63, s. 32, directs how funds are to be invested. By sect. 33, may be invested with the Commissioners of the National Debt.

[2] By sect. 31, on death of member sums under 50*l.* may be paid without administration: directs as to indemnity to trustees.

[3] By sect. 38, no member to receive more than 200*l.*, or 30*l.* a-year, from any number of societies.

[4] By sect. 39, trustees may subscribe to a hospital or provident institution.

[5] By sect. 37, power of attorney, &c. not liable to stamp-duty; and condition of exemptions to societies not assuring above 200*l.*

[6] See *Reg. v. Grant*, 14 Q. B. 43; 19 L. J. M. C. 59. *Hammond v. Dendyshe*, 13 Q. B. 869; 18 L. J. M. C. 219.

[7] The judge of the sheriff's court of London has the same jurisdiction for settling disputes as the judges of the county courts. 21 & 22 Vic. c. 101, s. 1.

By 18 & 19 Vic. c. 63, s. 41, in certain cases disputes to be determined by the county court.

Sect. 42 directs how orders of county court are to be enforced.

By sect. 43, the chancellor may make orders for regulating the process in this respect.

By sect. 44, in the case of societies whose rules are not certified, disputes between the society and its own members to be settled as in cases of certified societies.

VIII. Incorporation and Dissolution of Societies.

(A) *Incorporation of Societies.*

By 18 & 19 Vic. c. 63, s. 14, societies may unite with others, or one society may transfer its engagements to another. Societies may be united with others.

(B) *Dissolution of Societies.*

By sect. 13, "it shall be lawful for the members of any society heretofore formed and established, or hereafter to be formed and established, at some meeting thereof to be specially called in that behalf, to dissolve or determine the same by consent: Provided that no society established under this, or any act relating to friendly societies, shall be dissolved or determined without obtaining the votes or consent of five-sixths in value of the then existing members thereof, including the honorary members (if any), to be ascertained in manner hereinafter mentioned, nor without the consent of all persons (if any), then receiving or then entitled to receive, any relief, annuity, or other benefit from the funds thereof, to be testified under their hands individually and respectively, unless the claim of every such person be first duly satisfied, or adequate provision made for satisfying such claim; and for the purpose of ascertaining the votes of such five-sixths in value of the numbers as aforesaid, every member shall be entitled to one vote, and an additional vote for every five years that he may have been a member, but no one member shall have more than five votes in the whole; and the intended appropriation or division of the funds or other property shall be fairly and distinctly stated in the agreement for dissolution prior to such consent being given; and the agreement for such dissolution, duly signed as aforesaid, accompanied with a statutory declaration by one of the trustees, or by three How dissolved.

Sect. 40, transfers to the county courts all the powers previously possessed by the Court of Chancery in settling disputes in friendly societies. The judge has power in such cases to restrain by injunction (*Hoey v. Macfarlane*, 4 Jur. N. S. 785; 4 C. B. 718), or to reinstate a member improperly expelled. *Ex-parte Wooldridge*, 31 L. J. Q. B. 122.

Sects. 40 and 44 extend and are applicable to disputes between the executors, nominee, or assigns of a member and the trustees, treasurer, or other officer, or the committee of a society. 21 & 22 Vic. c. 101, s. 6.

It is sufficient to make the secretary, or other officer of the society, at the time of the plaint or the complaint being entered or made, the defendant in such proceedings, by his name and the title of the office he holds in the society; and the proceedings in such plaint or complaint shall be commenced and carried on against such officer on behalf of the society, and shall not be abated or prejudiced by the death, resignation, or removal, or by any act of such officer after the commencement thereof; and the summons to be issued to such officer may be served by leaving the same at the usual place of business of the society. Id. s. 7.

A county court has, under sect. 40, jurisdiction to determine a dispute between the committee of management of a friendly society and any of its members, as to the propriety of the mode of convening, and the manner and place of holding special general meetings for the purposes of altering or amending the rules of the society. *Hoey v. Macfarlane*, *supra*. *See ante*, *ex-parte Wooldrigde*.

It was held that the county court had not jurisdiction where the rules of a society which had not been certified were deposited with the registrar after the dispute arose, but before the plaint was entered in the county court. *Smith v. Pryse*, 7 E. & B. 339; 26 L. J. Q. B. 95.

The county court has no jurisdiction unless the application be made by or on behalf of a person interested in the matter. *Hall v. Macfarlane*, 3 Jur. N. S. 1262.

The trustees of a burial society, who, by the constitution of the society, are not and cannot be members, are not "persons interested" within the meaning of the 18 & 19 Vic. c. 63, s. 41, so as to enable them of their own accord to institute proceedings against the society in the county court, for the purpose of controlling them in a proposed alteration of their rules. *Hull v. Macfarlane*, 2 C. B. (N. S.) 796; 27 L. J. C. P. 41. *See* further, as to the jurisdiction of the county courts, *Grinham v. Card*, 7 Ex. 833; 21 L. J. Ex. 321.

For the rules and forms of proceedings in the county court under the Friendly Societies' Act, *see* County Court, vol. iii. pp. 424, 425.

Trustees of a friendly society may sue in a superior court to recover from the treasurer of the society monies received by him and not paid over, and they are not confined to the summary procedure before justices. *Sinden v. Banks*, 7 Jur. N. S. 910.

members and the secretary, taken before a justice of the peace, that the provisions of this act have been complied with, shall be forthwith transmitted to the registrar, to be by him deposited with the rules of the society; and such agreement shall thereupon be an effectual discharge at law and in equity to the trustees, treasurers, and other officers.[1] And it shall not be lawful in any society to direct a division or appropriation of any part of the stock thereof, except for the purpose of carrying into effect the general interests and objects declared in the rules as originally certified, unless the claim of every member is first duly satisfied, or adequate provision be made for satisfying such claims; and in case any member of such society shall be dissatisfied with such provision, it shall be lawful for him or her to apply to the judge of the county court of the district within which the usual place of business of the society is situated, for relief or other order; and the said judge shall have the same powers to entertain such application, and to make such order or direction in relation thereto, as he may think the justice of the case may require, as hereinafter is enacted in regard to the settlement of disputes. And in the event of the dissolution or determination of any society, or the division or appropriation of the funds thereof, except in the way hereinbefore provided, any trustee or other officer, or person aiding or abetting therein, shall, on conviction thereof by two justices, be committed to the common gaol or house of correction, there to be kept to hard labour for any term not exceeding three calendar months, as to such justices shall seem meet."

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[1] Instead of stating in the agreement the intended appropriation or division of the funds or property, it may be by the agreement referred to arbitration. *See* 23 & 24 Vic. c. 58, ss. 1–5. See *Reg. v. Grant*, 14 Q. B. 43; 19 L. J. M. C. 59.

Sect. 1. "In case application shall be made in writing by the members of a society, not being less in number than five-eighths of the whole body thereof, setting forth that the funds of such society are insufficient to meet the claims thereon, with the ground upon which such insufficiency can be proved, it shall be lawful for the registrar to investigate the same, and if, upon such investigation, he shall find that the said society is in an insolvent condition, and that it would conduce to the interests of all parties concerned that the affairs of the society should be wound up and brought to a termination, he shall make an award to that effect, and shall direct in what manner the funds and property of the society shall be divided or appropriated, and it shall not be necessary in such case that the provisions of the said 13th section of the 18 & 19 Vic. c. 63, be complied with: Provided that, previous to such investigation, the registrar shall give not less than twenty-one days' notice in writing, to be sent by post to the trustees, secretary, or other officer of such society, at the place where such society holds its meetings."

"Every award so made as aforesaid by the registrar shall be final and conclusive on all members and other persons having any claim on the funds of the said society, without appeal, and shall be enforced in the same manner as by sect. 41 of the said act is provided for enforcing the award of arbitrators; and the expenses of such award, and of publishing the notice of dissolution in the *Gazette*, shall be paid out of the funds of the society before any appropriation thereof shall be made. 23 & 24 Vic. c. 58, s. 2.

"When an agreement for the dissolution of a society authorised by sect. 13 of the 18 & 19 Vic. c. 63, shall be transmitted to the registrar, and when any award authorised to be made by this act shall be made by the registrar, notice thereof shall, within twenty-one days after the same shall have been transmitted or made respectively, be advertised by the registrar, as respects societies in England in the *London Gazette*, as respects societies in Scotland in the *Edinburgh Gazette*, and as respects societies in Ireland in the *Dublin Gazette;* and unless within three calendar months from the date of the gazette in which such advertisements shall appear, a member or other person interested in, or having any claim on the funds of the society, shall commence proceedings to set aside the dissolution of the society consequent upon such agreement or award, the society shall be considered for all intents and purposes, and in all courts of law and equity, as legally dissolved; and the requisite consents to such agreements, or, as the case may be, the application to the registrar, to have been duly obtained, without proof of the signatures thereto." Id. s. 3.

"The registrar in his next annual report submitted to parliament shall set forth the particulars of every award made under the provisions of this act which he may have made during the preceding twelve months." Id. s. 4.

"In regard to societies which have been dissolved before the passing of this act, if notice of any agreement for the dissolution of such society, already transmitted to the registrar, or of any award made under

VIII. Obtaining Money, &c. of Society by False Representation, or Misappropriating the same.[1]

FRUIT, or Vegetable Production growing in a Garden, &c., Stealing. 24 & 25 Vic. c. 96, s. 36; *post*, Larceny.

FRUSTRA legis auxilium quærit qui in legem committit. 2 Hale, P. C. 386. *He who has offended against the law invokes its aid in vain.*[2]

FRUSTRA petis quod statim alteri reddere cogeris. Gen. Cent. 256. *See* Circuity of Action, vol. iii. p. 119.

FURIOSI nulla voluntas est. Dig. 50, 17, 5. *See post*, Insanity.

FURIOSUS solo furore punitur. Co. Litt. 247, b. *A Madman is only punished by his madness.* 4 Bl. Com. 24. *See post*, Lunatic.

FURNACE. *See* Nuisance.

FURZE Growing, setting Fire to. 24 & 25 Vic. c. 97, s. 17. *See* Arson, vol. i. p. 539.

G.

GAME. *See* Deer, *ante*, p. 30; *post*, Poaching.

I. As to what is or is not considered Game, p. 574.

II. Places Privileged as to Game, p. 574.

(A) *Decoys*, vol. iii. p. 574.

(B) *Franchises in General*, *ante*, p. 528.

(C) *Forests*, p. 574.

(D) *Chase*, p. 575.

(E) *Free Warrens*, p. 575.

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(G) *Parks*, p. 575.

(H) *Hare or Rabbit Warren*, p. 575.

(I) *Manors*, p. 575.

III. Statutory Enactments as to Offences respecting Game, p. 576.

(A) 9 *Geo.* 4, *c.* 69, *Provisions of*, p. 576.

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sect. 13 of the said act, shall, within three months after the passing of this act, be advertised in such gazette as aforesaid, the provisions of sect. 3 of this act shall apply in the same way as if such agreement and award had been transmitted and made subsequent to the passing of this act." Id. s. 5.

[1] 18 & 19 Vic. c. 63, s. 24, provides for the punishment of fraud in withholding money, &c.

Any application authorised by this section to be made by any person on behalf of a society, may be made by the registrar. 23 & 24 Vic. c. 58, s. 9.

[2] An executor *de son tort*, therefore, will not obtain that assistance which the law affords to a rightful executor. See *Carmichael v. Carmichael*, 2 Phill. 101. *Paull v. Simpson*, 15 L. J. Q. B. 382. A. shall not have an action of trespass against B., who lawfully enters to abate a nuisance caused by A.'s wrongful act. See *Perry v. Fitzhowe*, id. 239. See *post*, *Nullus commodum capere potest de injuria sua propria.* For further illustrations of this principle *see* vol. iii. p. 158, n.[1]; id. p. 530, n.[2].

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I. As to what is or is not considered Game.[1]

II. Places Privileged as to Game.

(A) *Decoys.* *See* Decoy, vol. iii. p. 574.

(B) *Franchise in General.* *See* Franchise, *ante,* p. 528.

(C) *Forests.*[2]

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[1] The word "game," in its common acceptation, comprehends all birds or prey got by fowling and hunting, as contradistinguished from tame animals: such as horses, cows, sheep, and the like; which, by reason of their sluggishness and unaptness for motion, do not fly the dominion of mankind, but generally keep within the same pastures and limits, and may be easily pursued and overtaken, if by accident they should escape; and therefore the owner has the same kind of property in them as he has in inanimate chattels. But the term "game," in its legal signification, applies only to that species of wild animals which the arbitrary constitutions of positive law have distinguished from others. It would be impossible to state, as a general rule, what animals are game within the legal meaning of that term, and therefore, where the term "game" is mentioned in a statute, it is necessary to attend to the object of the legislature in passing the particular provision, in order to ascertain what animals are included within it.

Hares, pheasants, partridges, grouse, heath or moor game, black game and bustards, are game within the 9 Geo. 4, c. 69, s. 13, and the 1 & 2 Wm. 4, c. 32, s. 2. And any one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse and black or moor game, are game within the 25 & 26 Vic. c. 114, s. 1, the recent act for the prevention of poaching. The Revenue Act, 23 & 24 Vic. c. 90, also places woodcocks, snipes, and rabbits, with pheasants. Foxes (1 T. R. 334), hawks (11 Hen. 7, c. 17; 34 Edw. 3, c. 22; 37 id. c. 19; 5 Eliz. c. 21; 23 id. c. 10), pigeons and doves, quails and landrails (5 Anne, c. 14; 52 Geo. 3, c. 93), are not game. But hares, grouse, partridges, and pheasants (5 Wm. & M. c. 23; 5 Anne, c. 14), and moor game or hill game (2 Jac. 7, c. 27; 5 Anne, c. 14), are game.

[2] A forest is a certain territory of woody grounds and fruitful pastures privileged for wild beast, and fowls of forest, chase, and warren, to rest and abide there in safe protection of the king for his delight and pleasure, which territory of ground so privi-

(D) *Chase.*[1]

(E) *Free Warrens.*[2]

(F) *Purlieus.*[3]

(G) *Park.*[4]

(H) *Hare or Rabbit Warren.*[5]

(I) *Manors.*[6]

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leged, meered, and bounded, with unremovable marks, meers, and boundaries, either known by matter of record or by prescription; and also replenished with wild beasts of venery or chase, and with great coverts of vert for the succour of the said beasts, there to abide; for the preservation and continuance of which there are particular officers, laws, and privileges belonging to the same, requisite for that purpose, and proper only to a forest, and to no other place. *See* Manw. 143.

[1] (From *chasser*, to chase) is a privileged place for receipt of deer and beasts of the forest, and is of a middle nature betwixt a forest and park. It is commonly less than a forest, and not endowed with so many liberties, as officers, laws, courts; yet is of a larger compass than a park, having more officers and game than a park. Every forest is a chase, but every chase is not a forest. It differs from a park in this respect, that it is not inclosed; for if it be inclosed, it is a good cause of forfeiture, though it must have certain metes and bounds: but it may be in other men's grounds as well as one's own. Manw. 49, 147. Beasts of chase are buck, doe, fox, martin, and roe. Id. 144.

[2] A warren is a place privileged by prescription or grant of the king for the preservation of the beasts and fowl of the warren; viz. hares, conies, partridges, and pheasant. (Id. 44.) A free warren may lie open, there being no necessity of inclosing it. *See* also 7 B. & C. 39; 2 Ld. Raym. 1409; 1 Stra. 637; 4 Inst. 301.

[3] Purlieu comes from the French *pur*, clear, entire, and exempt, and *lieu*, a place; that is, a place entire, clear, or exempt from the forest, and signifies those grounds which Henry the Second, Richard the First, or King John, added to their ancient forests, over other men's grounds, and were disafforested by the statute *Charter de Forestir.* 4 Inst. 303; Manw. 242. But nevertheless the purlieu, as to some purposes, is forest still, and is disafforested as to the particular owners of the land, and for their benefit, and not generally to give liberty to any man to hunt the wild beasts, and spoil the vert. And if those beasts escape out of the forest into the purlieu, the king hath a property in them still, against any man but the owners of the woods and lands in which they are; and such owners have a special property in them, *ratione loci*, but yet so that they hunt them fairly, and not forestall them in their return towards the forest. Manw. 292. But a purlieu man may not hunt in every man's lands within the purlieu, but in his own lands only; and therefore, if he find the beast of the forest in his woods or lands in the purlieus, in such case he hath property in them against any other man, *ratione soli.*

[4] A park (from the French *parquer*, to inclose) is a large parcel of ground, privileged for wild beasts of chase by the king's grant, or by prescription. The beasts of park properly extend to the buck, doe, fox; but, in a common and legal sense, to all the beasts of the forests. (Id.) A park must be enclosed; for if it lie open, it is a good cause of seizure into the king's hands as a thing forfeited; and the owner cannot have an action against those who hunt in his park if it lies open. (Id.)

[5] A warren of this nature is different from a free warren, which cannot be made without a license from the Crown, as any person may make a warren on his own land, and trespass lies for entering and killing the conies. *Sutton v. Moody*, 1 Ld. Raym. 250. But though the lord may put conies on the common, an action will lie against him if he surcharge. *Cooper v. Marshall*, 1 Burr. 259.

[6] At common law it does not appear that there is any particular privilege with respect to game annexed to a manor (2 Bl. Com. 90); over those parts of the manor which were reserved by the lord in his own hands, either as private inclosures, or as waste, he had at common law the same and no greater interest in game than any private person had over his own estate. *Keble v. Hickringill*, 11 Mod. 74. The first regulation relating to game which creates distinction in favour of manors is 22 & 23 Car. 2, c. 25; Dougl. 28; by which lords of manors or other royalties are authorised to appoint gamekeepers within their respective manors or royalties, who may take and seize the guns and dogs of unqualified persons, kept or used for the purpose of destroying game, for the use of the lord of the manor or royalty. It has been observed (2 Bl. Com. 418, n.) that the common, but erroneous opinion, that the lord of a manor has a peculiar right to the game within his manor, probably owes its rise to the power which this statute gives the lord of appointing a gamekeeper. But it gave no power to a gamekeeper to kill game, nor did it extend the common-law right of the lord of the manor so as to enable him to commit trespasses on the lands of others. And the

III. Statutory Enactments as to Offences respecting Game.

(A) 9 *Geo.* 4, *c.* 69, *Provisions of.*

(*a*) *Punishment of Persons taking Game by Night.*

For taking game by night on land: first offence three months; second offence six months; third liable to transportation.

By the 9 Geo. 4, c. 69, it is enacted by sect. 1, "that if any person shall, after the passing of this act, by night, unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game,[1] such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties, by recognisance, or in Scotland by bond of caution, himself in ten pounds, and two sureties in five pounds each, or one surety in ten pounds, for his not so offending again for the space of one year next following, and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties, by recognisance or bond as aforesaid, himself in twenty pounds, and two sureties in ten pounds each, or one surety in twenty pounds, for his not so offending again for the space of two years next following, and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time he shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner as is hereby provided in each case."

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statutes 5 Anne, c. 14, s. 4, and 9 id. c. 25, which enabled lords of manors to appoint one gamekeeper to kill game within each manor, did not enable him to sport over the lands of others.

A manor may retain its privileges as a preserve, though only one by reputation. *Soane v. Ireland*, 10 East, 259.

[1] A conviction set forth that C. did by night "unlawfully enter certain inclosed lands with a net, for the purpose of taking game." It was held that this was bad, for not stating that the entry was for the purpose of taking game there. *Fletcher v. Calthorp*, 6 Q. B. 880. *Ex parte Fletcher*, 1 D. & L. 726; 14 L. J. Q. B. 95.

A warrant of commitment, reciting an order of sessions confirming a conviction under the 1st sect. of the Night Poaching Act, 9 Geo. 4, c. 69, ordering the prisoners, at the expiration of their term of imprisonment, to find sureties not to offend again, instead of not so to offend again, is ill. *Ex parte Reynolds*, 8 Jur. 192; 13 L. J. M. C. 65, B. C. And where an indictment under the above statute alleged that on the 26th of December, 1854, C. was convicted before, &c., for that he, within the space of six calendar months then last past, to wit, on &c., by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise (that is to say, about the hour of, &c.), did, by night, then and there unlawfully enter a certain close, &c. with a gun, for the purpose of then and there taking and destroying game, contrary, &c., and that he was then sentenced to be imprisoned for the period of three calendar months; that afterwards, to wit, on the 27th of November, A. D. 1858, he was duly convicted before, &c., for that he, within six calendar months next before, &c. to wit, on the 24th of November, in the year aforesaid, in the night of the same day, city, &c., by night unlawfully did enter and be in and upon certain inclosed land, in, &c., with certain instruments, for the purpose of killing, taking, and destroying game thereon, this being his second offence, contrary, &c., and was then adjudged to be imprisoned for six calendar months, &c. It then alleged a third offence, which by the terms of the statute is made a misdemeanor:—*Held*, that the indictment was good, as it sufficiently showed upon the face of it that two previous convictions of offences within the terms of the act had taken place. *Cureton v. The Queen*, 30 L. J. M. C. 149.

(*b*) *Owners and Occupiers of Land may apprehend Offenders.*

By sect. 2, 9 Geo. 4, c. 69, "where any person shall be found upon any land, committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right, or reputed right, of free warren or free chase therein, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize[1] and apprehend such offender upon such land, or, in case of any pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault, or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner."

Occupiers of land may apprehend offenders;

and offender offering violence to be guilty of a misdemeanor.

(*c*) *The above Enactment extended by the* 7 *&* 8 *Vic. c.* 29, *s.* 1,

Which recites the 9 Geo. 4, c. 69, s. 1, and that the provisions of that act have been evaded and defeated by the destruction, by armed persons at night, of game or rabbits, not upon open or inclosed lands, as described in the said act, but upon public grounds and highways, and other roads and paths leading through such lands, and also at the gates, outlets, and opening between such lands and roads, highways and paths, so that not only has the destruction of game and rabbits not been prevented, but the risk of murder and other grievous offences contemplated by the said act has been increased, &c.; and enacts that "from and after the passing of this act, all the pains, punishments, and forfeitures imposed by the said act upon persons by night unlawfully taking or destroying any game or rabbits in any land open or inclosed, as therein set forth, shall be applicable to and imposed upon any person by night unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all the persons authorised by the said acts, to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said act or this act; and the said act, and all the powers, provisions, authorities, and jurisdictions therein or thereby contained or given, shall be as applicable for carrying this act into execution as if the same had been here specially set forth."

The above enactment is now extended to public roads, paths, &c.

(*d*) *Justices may issue Warrants.*

By sect. 3, 9 Geo. 4, c. 69, power is given to justices to issue warrants for apprehension of offenders.

(*e*) *Limitation of Prosecutions.*

By sect. 4, "offence punishable on summary conviction must be prosecuted

[1] See *Rex v. Ball*, 1 M. C. C. 330, 333. The arrest may be made without any previous notice. *Rex v. Payne*, id. 378.

within six calendar months; an offence punishable upon indictment, within twelve calendar months."[1]

(*f*) *Form of Conviction.*

Sect. 5, 9 Geo. 4, c. 69, gives form of summary conviction.[2]

(*g*) *Appeal to Quarter Sessions.*

Sect. 6 provides for an appeal to the general or quarter sessions.

(*h*) *No* Certiorari.

Sect. 7. No conviction can be quashed for want of form, or to be removed by *certiorari.*

(*i*) *Convictions to be Registered.*

Sect. 8. Convictions to be returned to the quarter sessions and registered, and may be given in evidence.

(*j*) *Three Armed at Night guilty of a Misdemeanor.*

Three or more persons armed at night entering land guilty of a misdemeanor.[3]

Sect. 9. "If any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and being convicted

[1] Where the offence was committed on the 4th of December, 1845, and on the 19th December information was laid before magistrates, who on that day granted warrants to apprehend A. and B. two of the offenders; on one of these warrants A. was apprehended and committed for trial on the 16th September, 1846; B. being apprehended on the other warrant and committed for trial on the 21st October, 1846; the indictment was preferred and found on the 5th April, 1847: it was held that the prosecution was commenced "within twelve calendar months after the commission" of the offence, and that it was commenced by the information and warrants to apprehend, or at all events by the apprehension of the prisoners. *Reg. v. Brooks*, 2 Car. & K. 462; 1 Den. C. C. 217. See *Rex v. Killminster*, 7 C. & P. 228. *Till-Adam v. Inhabitants of Bristol*, 2 Ad. & E. 389. *Reg. v. Austin*, 1 C. & Kir. 621.

[2] Be it remembered, that on the day of in the year of our Lord at in the county of [*or* riding, division, liberty, city, &c. *as the case may be*], A. O. is convicted before us [*naming the justices*], two of his majesty's justices of the peace for the said county [*or* riding, &c.], for that he the said A. O. did [*specify the offence, and the time and place when and where the same was committed, as the case may be, and on a second conviction state the first conviction*]; and we the said justices adjudge the said A. O. for his said offence to be imprisoned in the and there kept to hard labour for the period of and at the expiration of such period to find sureties, by recognisance, or bond of caution in Scotland, himself in the sum of ten pounds, and two sureties in the sum of five pounds each, or one surety in the sum of ten pounds, conditioned that he the said A. O. shall not so offend again for the space of one year next following; and we further adjudge the said A. O., in case he shall not find such sureties as aforesaid, to be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties shall be sooner found.

Given under our hands, the day and year first above-mentioned.

[3] Under this section, the indictment must show that the entry and the arming were by night; where, therefore, an indictment stated that the defendants, on, &c., did by night enter divers closes, and were then and there in the said closes armed, &c., the judgment was arrested, because the word "night" was confined to the first branch of the sentence, and the words "then and there" referred only to the day and place before stated. *R. v. Davies*, 10 B. & C. 89; See *Cureton v. Reg.* 30 L. J. M. C. 149. This offence is of a local nature, and the indictment must describe the land by name or occupation. *R. v. Ridley*, R. & R. 515. But it is not necessary to state both the name and the occupation of the land; though if both be stated, both must be proved, and a variance will be fatal. *R. v. Owen*, 1 M. C. C. 118. "A certain cover in the parish of A." was held too general a description. *R. v. Crick*, 5 C. & P. 508. The indictment need not specify whether the land was open or inclosed. *R. v. Andrews*, 2 M. & Rob. 37. *See* also *Reg. v. Uezzell*, 2 Den. C. C. 274; 3 C. & Kir. 150. The indictment is sufficient if it alleges that the defendants were together on the land by night, armed,

thereof before the justices of gaol delivery, or of the court of great sessions of the county or place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported beyond seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in Scotland, any person so offending shall be liable to be punished in like manner."

(*k*) *Jurisdiction to Sheriffs in Scotland.*

Sect. 10 gives to sheriffs in Scotland accumulative jurisdiction with the justices of the peace.

(*l*) *In Scotland, Third Offences to be Tried before High Court.*

Sect. 11. In Scotland, third offences to be tried before the high court.

(*m*) *Definition of "Night."*

Sect. 12. "That for the purposes of this act, the night shall be considered and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise."

(*n*) *Definition of "Game" within* 9 *Geo.* 4, *c.* 69.

Sect. 13. "That for the purposes of this act the word 'game' shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards."

(B) 1 & 2 *Wm.* 4, *c.* 32, *Provisions of.*

(*a*) *Penalty for killing Game out of Season.*

May not kill game on a Sunday or Christmas-day, or between the days and seasons during which game may be killed.[1]

By 1 & 2 Wm. 4, c. 32, s. 3, "if any person whatsoever shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking any game, on a Sunday or Christmas-day, such person shall, on conviction thereof before two justices of the peace, forfeit and pay for every such offence such sum of money, not exceeding five pounds, as to the said justices shall seem meet, together with the costs of the conviction; and if any person whatsoever shall kill or take any partridge between the first day of February and the first day of September in any year, or any pheasant between the first day of February and the first day of October in any year, or any black game (except in the county of Somerset or Devon, or in the New Forest in the county of Southampton) between the 10th day of December in any year and the 20th day of August in the succeeding year, or in the county of Somerset or Devon, or in the New Forest aforesaid, between the 10th day of December in any year and the 1st day of September in any succeeding year, or any grouse, commonly called 'red game,' between the 10th day of December in any year and the 12th day of August in the succeeding year, or any bustard between the 1st day of March and the 1st day of September in any year, every such person shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every head of game so killed or taken such sum of money, not exceeding one pound, as to the said justices shall seem meet, together with the costs of the conviction."[2]

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for the purpose of destroying game, without a distinct averment, in the earlier part of it, that the defendants being armed did together unlawfully enter, &c. *R. v. Kendrick*, 7 C. & P. 184; but see *R. v. Wilks*, id. 812.

[1] Under the 4 & 5 Anne, c. 14, a person would only incur one penalty for any amount of game he might kill. (*Reg. v. Matthews*, 10 Mod. 26); and so for keeping and using a gun, and also a dog, on the same day. *R. v. Lovet*, 7 T. R. 152. One conviction may include several offences. *R. v. Swallow*, 8 T. R. 284.

[2] A conviction under the 1 & 2 Wm. 4, c. 32, s. 3, adjudged the defendant to pay five shillings, "to be paid and applied according

(b) Penalty for putting Poison to destroy Game.

Putting poison to destroy game; penalty for.

By sect. 3, 1 & 2 Wm. 4, c. 32, "if any person, with intent to destroy or injure any game, shall at any time put or cause to be put any poison or poisonous ingredient on any ground, whether open or inclosed, where game usually resort, or in any highway, every such person shall, on conviction thereof before two justices of the peace, forfeit and pay such sum of money, not exceeding ten pounds, as to the said justices shall seem meet, together with the costs of the conviction."

(c) Penalty for Possession or Sale of Game after Time limited.

Possession or sale of game illegal after ten days in dealers,

By sect. 4, "if any person licensed to deal in game by virtue of this act, as hereinbefore mentioned, shall buy or sell, or knowingly have in his house, shop, stall, possession, or control, any bird of game after the expiration of ten days (one inclusive and the other exclusive)[1] from the respective days in each year on which it shall be unlawful to kill or take such birds or game respectively as aforesaid; or if any person, not being licensed to deal in game by virtue of this act as hereinafter mentioned, shall buy or sell any bird of game after the expiration of ten days (one inclusive and the other exclusive) from the respective days in each year on which it shall be unlawful to kill or take such birds of game respectively as aforesaid, or shall knowingly have in his house, possession, or control, any bird of game (except birds of game kept in a mew or breeding-place) after the expiration of forty days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; every such person shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every head of game so bought or sold, or found in his house, shop, possession, or control, such sum of money, not exceeding one pound, as to the convicting justices shall seem meet, together with the costs of the conviction."

and forty days in other persons.

(d) Penalty for Occupier killing when Landlord entitled to.

Where landlord, &c. has right to the

By sect. 12, "that where the right of killing the game upon any land is by this act given to any lessor or landlord, in exclusion of the right of the occupier of such land. or where such exclusive right hath been or shall be

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to law," and in default of payment to be imprisoned for two months:—*Held*, that the justices had no jurisdiction to order the defendant to be imprisoned, as the imprisonment was conditional on the non-payment of the penalty, and they had not by the conviction directed the manner in which the penalty should be paid, as required by sect. 21 of the 5 & 6 Wm. 4, c. 20. *Ex-parte Hyde*, 15 Jur. 803, B. C. And a conviction under this section adjudged defendant to pay a fine of 5*s*., "to be paid and applied according to law, and also to pay G. T., who prosecuted in this case," his costs, and in default of payment, to be imprisoned:—*Held*, that sect. 17 of the 11 & 12 Vic. c. 42, provided a form of conviction for all cases, and therefore the conviction being in that form was good. *Reg. v. Hyde*, 16 Jur. 337; 21 L. J. M. C. 94, Q. B. A conviction for killing a pheasant contrary to this section, following the form given in schedule (1, 2) to the 11 & 12 Vic. c. 43, adjudged the offender to forfeit and pay a penalty, "to be paid and applied according to law." By the 1 & 2 Wm. 4, c. 32, s. 37, and by the 5 & 6 Wm. 4, c. 20, s. 21, the penalty is directed to be paid, one-half to the informer and one-half to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish in which the offence shall have been committed:—*Held*, that the conviction was sufficient by virtue of sects. 17 and 32 of the 11 & 12 Vic. c. 43, being in the form given by the schedule to that act referred to in sect. 17, though it did not in terms distribute the penalty, nor name the informer or the overseer to whom the penalty was to be paid. *Reg. v. Hyde*, 7 El. & Bl. 859, n; 21 L. J. M. C. 94.

[1] It would appear the game killed within the prescribed limits is not within the meaning of this section. *Simpson v. Unwin*, 3 B. & Adol. 134. But it is incumbent on the defendant to show such possession was justifiable. *Hennings v. Haltey*, Har. Dig. 4134. The possession means as owner. *Warneford v. Kendall*, 10 East, 19. *Walker v. Mills*, 2 B. & B. 1. *Rex v. Turner*, 5 M. & S. 206. This section extends to live birds, and a dealer is therefore liable to penalties for selling live pheasants after the 11th of February. *Loome v. Baily*, 30 L. J. M. C. 31.

specially reserved by, or granted to, or doth or shall belong to, the lessor, landlord, or any person whatsoever other than the occupier of such land, then and in every such case, if the occupier of such land shall pursue, kill, or take any game upon such land, or shall give permission to any other person so to do, without the authority of the lessor, landlord, or other person having the right of killing the game upon such land, such occupier shall, on conviction thereof before two justices of the peace, forfeit and pay for such pursuit such sum of money, not exceeding two pounds, and for every head of game so killed or taken such sum of money, not exceeding one pound, as to the convicting justices shall seem meet, together with the costs of the conviction."

game, the occupier may not kill.

(e) *Penalty for Trespassing in Daytime in Pursuit of Game.*[1]

By sect. 30, "if any person whatsoever shall commit any trespass, by entering or being in the daytime upon any land in search of or pursuit of game, or woodcocks, snipes, quails, landrails, or coneys, such persons shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding two pounds, as to the justice shall seem meet, together with the costs of the conviction; and that, if any persons, to the number of five or more together, shall commit any trespass, by entering or being in the daytime upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or coneys, each of such persons shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding five

Penalty on persons trespassing in daytime in search of game.

[1] In such case the person entitled to the game may proceed as if he had occupation of the land to obtain a summary conviction, but he cannot bring an action of trespass. Deac. G. L. 66. Where a person goes out sporting with his friends and purposely leads them on to another's land, he is equally guilty of a trespass, although he may remain off the land whilst his friends go on it. *Hill v. Walker*, Peake's Add. Cas. 234. *Baker v. Berkeley*, 3 Car. & P. 32. But it has been holden that a person may justify a trespass in following a fox with hounds over the grounds of another, if he does no more than is necessary to kill the fox (*Gundry v. Feltham*, 1 T. R. 334; 3 id. 259, n. *Earl of Essex v. Capel*, Stark on Ev. vol. ii. p. 505; Christian, G. L. 114), but if they enter for mere amusement the sportsmen may be warned off, and the plaintiff have full costs, though the damages be under 40s. *Earl of Essex v. Capel*, Chit. G. L. 31. *Bowyer v. Cook*, 4 C. B. 236; 16 L. J. C. P. 180. *Hume v. Oldacre*, 1 Stark, R. 351. *Baker v. Bechley*, 3 C. & P. 32. If a man send his dog on the land of another he will be a trespasser, but not so if the dog go there against his will. *Dimmock v. Allenby*, 2 Marsh. 582. If a party being in one parish shoot into another, the offence is committed in the parish in which he stands. *Rex v. Alsop*, Show. 339. The defendant may be convicted on his own confession. *Rex v. Gage*, 1 Stra. 546. *Robinson v. Vaughton*, 8 C. P. 252; *in re Pratt*, 7 Ad. & E. 27. Parol evidence of what a party said before a magistrate on the hearing of a case of trespass is admissible, although what he stated was taken down, as this is not one of the cases in which it is the magistrate's duty to record what is said. *Robinson v. Vaughton, supra.* A conviction for trespassing in search of game in the daytime, under the 1 & 2 Wm. 4, c. 32, s. 30, included four persons, and adjudicated that "each of them," the said J. C., J. B., W. W., and J. S., so making default, should be imprisoned for one month, unless the said several sums, and the costs and charges of conveying each of them, the said J. C., J. B., W. W., and J. S., so making default to gaol, shall be sooner paid: — *Held*, that it made each to be imprisoned until the costs of conveying all to gaol had been paid, and therefore was bad, inasmuch as the 11 & 12 Vic. c. 43, s. 23, only made each liable for the costs of conveying him to gaol. *Reg. v. Cridland*, 3 Jur. N. S. 1213, Q. B. A complaint of trespass in pursuit of game, under the 1 & 2 Wm. 4, c. 32, s. 30, need not be made by a person having an interest in the land. *Morden v. Porter*, 7 C. B. (N. S.) 641; 29 L. J. M. C. 213; 6 W. R. 262; 1 L. T. (N. S.) 403. The license of the occupier, to be an answer to such complaint, must precede the act of trespass. (Id.) And it would seem that the party trespassing is not the less guilty of the offence because he *bonâ fide* believes that he has the license of the occupier to shoot over the land. (Id.) Where an information was laid against a defendant for trespassing in pursuit of game contrary to 1 & 2 Wm. 4, c. 32, s. 30, and he set up a right to shoot, but offered no evidence in support of his claim, the justices dismissed the information, on the ground that a question of right was thus raised, on which they had no power to adjudicate. On appeal: — *Held*, that, as the justices believed there was a *bonâ fide* question of title in question they came to a proper conclusion. *Legg v. Pardoe*, 3 L. T. (N. S.) 371; 30 L. J. C. P. 112; M. C. 108.

pounds, as to the said justice shall seem meet, together with the costs of the conviction: Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and license of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person, shall have the right of killing the game upon such land by virtue of any reservation, or otherwise, as hereinbefore mentioned; but such landlord, lessor, or other person shall, for the purpose of prosecuting for each of the two offences herein last before mentioned, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or license; and that the lord or steward of the Crown of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, shall be deemed to be the legal occupier of the land, of the wastes or commons within such manor, lordship, or royalty, or reputed manor, lordship, or royalty."

(f) Penalty on Persons so Trespassing not giving their Names, &c.

Trespassers in search of game may be required to quit the land, and to tell their names and abodes, and in case of refusal may be arrested;

By sect. 31, 1 & 2 Wm. 4, c. 32, "that where any person shall be found on any land, or upon any of his majesty's forests, parks, chases, or warrens, in the daytime, in search or pursuit of game, or woodcocks, snipes, quails, landrails, or coneys, it shall be lawful for any persons having the right of killing the game upon such land, by virtue of any reservation or otherwise, as hereinbefore mentioned, or for the occupier of the land (whether there shall or shall not be any such right by reservation or otherwise, or for any gamekeeper or servant of either of them, or for any person authorised by either of them, or for the warden, ranger, verderer, forester, master-keeper, under-keeper, or other officer of such forest, park, chase, or warren, to require the person so found forthwith to quit the land whereon he shall be so found, and also to tell his Christian name, surname, and place of abode, and in case such person shall, after being so required, offend by refusing to tell his real name or place of abode, or by giving such a general description of his place of abode as shall be illusory for the purpose of discovery, or by wilfully continuing or returning upon the land, it shall be lawful for the party so requiring as aforesaid, and also for any person acting by his order, or in his aid, to apprehend such offender, and to convey him, or cause him to be conveyed, as soon as conveniently may be, before a justice of the peace; and such offender (whether so apprehended or not), upon being convicted of any such offence before a justice of the peace, shall forfeit and pay such sum of money, not exceeding five pounds, as to the convicting justice shall seem meet, together with the costs of the conviction: Provided always, that no person so apprehended shall, on any pretence whatsoever, be detained for a longer period than twelve hours from the time of his apprehension until he shall be brought before some justice of the peace, and that if he cannot, on account of the absence or distance of the residence of any such justice of the peace, or owing to any other reasonable cause, be brought before a justice of the peace within such twelve hours as aforesaid, then the person so apprehended shall be discharged, but may nevertheless be proceeded against for his offence by summons or warrant, according to the provisions hereinafter mentioned, as if no such apprehension had taken place."

and fined any sum not exceeding 5*l.*

(g) Penalty on Persons found Armed using Violence.

Penalty on persons found armed using violence, &c. not exceeding 5*l.*

By sect. 32, "where any persons, to the number of five or more together, shall be found on any land, or in any of his majesty's forests, parks, chases, or warrens, in the daytime, in search or pursuit of game, or woodcocks, snipes, quails, landrails, or coneys, any of such persons being then and there armed with a gun, and such persons, or any of them, shall then and there by violence, intimidation, or menace, prevent or endeavour to prevent any person authorised as hereinbefore mentioned from approaching such persons so found, or any of them, for the purpose of requiring them, or any of them, to quit the land whereon

they shall be so found, or to tell their or his Christian name, surname, or place of abode respectively, as hereinbefore mentioned, every person so offending by such violence, intimidation, or menace as aforesaid, and every person then and there aiding or abetting such offender, shall, upon being convicted thereof before two justices of the peace, forfeit and pay for every such offence such penalty, not exceeding five pounds, as to the said justices shall seem meet, together with the costs of the conviction, which said penalty shall be in addition to, and independent of, any other penalty to which any such person may be liable for any other offence against this act."

(*h*) *Penalty for Trespassing in Daytime on King's Forests.*

Penalty for trespass in daytime on king's forests.

By sect. 33, "if any person whatsoever shall commit any trespass by entering or being in the daytime upon any of his majesty's forests, parks, chases, or warrens, in search or pursuit of game, without being first duly authorised so to do, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding two pounds, as to the said justice shall seem meet, together with the costs of the conviction."

(*i*) *What deemed Daytime.*

Meaning of "daytime."

By sect. 34, "that, for the purpose of this act, the daytime shall be deemed to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour after sunset."

(*j*) *Persons Hunting, &c. not deemed Trespassers.*

By sect. 35, provisions as to trespassers not to apply to persons hunting, &c.

(*k*) *Game may be taken from Trespassers.*

By sect. 36 game may be taken from trespassers not delivering up the same when demanded.[1]

(*l*) *Application of Penalties.*

By sect. 37 penalties for offences against this act to be paid to the overseer, &c. for the use of the general county rate, &c.

(*m*) *As to the Payment thereof.*

By sect. 38 time for payment of penalties, and scale of imprisonment for non-payment, are provided for.

(*n*) *Form of Conviction.*

By sect. 39 a form of summary conviction for any offence under this act is provided.[2]

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[1] If, in trespass against a party acting under the authority of this section, such party, for the purpose of narrowing the issue to be tried, pleads specially, instead of availing himself of the general issue under the 47th section, care must be taken to show that the demand was made upon the premises, and also to state such facts as show that the seizure was necessary. *Wisdom v. Hodson*, 3 Tyr. 811. It was there intimated by *Bayley, B.*, that such plea should state the game to be wrongfully in the plaintiff's possession, and that the defendant apprised the plaintiff that he demanded it by the authority of the owner or occupier of the land. Id. 817, n.

[2] The form is to be as follows, or to the like effect:—

——— } Be it remembered that, on the
to wit. } day of in the year of our Lord at in the county of [*or* riding, division, franchise, liberty, city, &c. *as the case may be*], A. O. is convicted before me, J. P., one [*or* us, J. P. and J. J. P., two, *as the case may require*] of his majesty's justices of the peace for the said county [*or* riding, &c.] for that he the said A. O. did, on at kill [*or* take] game [*or* did use a dog, &c. for the purpose of killing game], he the said A. O. not being authorised to do so for want of a game certificate, contrary to the statute in such case made and provided [*or* did, *here specify any other offence, and the time and place when and where the same was committed, as the case may be*]; and I [*or* we] do adjudge that the said A. O.

(*o*) *Power to summon Witnesses, and Penalty for Disobedience.*

By sect. 40 power is given to a justice to summon witnesses, and a penalty, not exceeding 5*l.*, is imposed for disobedience.

(*p*) *Limitation of Time in which Proceedings may be taken.*

Prosecution to be within three months.

Mode of obtaining appearance of party charged.

By sect. 41, "the prosecution for every offence punishable on summary conviction by virtue of this act, shall be commenced within three calendar months after the commission of the offence; and that where any person shall be charged on the oath of a credible witness with any such offence before a justice of the peace, the justice may summon the party charged to appear before himself, or any one or two justices of the peace, as the case may require, at a time and place to be named in such summons; and if such party shall not appear accordingly, then (upon proof of the due service of the summons by delivering a copy thereof to the party, or by delivering such copy at the party's usual place of abode to some inmate thereat, and explaining the purport thereof to such inmate), the justice or justices may either proceed to hear and determine the case in the absence of the party, or may issue his or their warrant for apprehending and bringing such party before him or them, as the case may be, or the justice before whom the charge shall be made may, if he shall have reason to suspect from information upon oath that the party is likely to abscond, issue such warrant in the first instance, without any previous summons."

(*q*) *Prosecutor not required to prove a Negative.*

By sect. 42 prosecutor is not required to prove a negative.

(*r*) *Convictions to be returned to Sessions.*[1]

By sect. 43 convictions to be returned to sessions.

(*s*) *Appeals.*

By sect. 44 appeal may be made to next general quarter sessions.[2]

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shall, for the said offence, forfeit the sum of being at the rate of for every head of game so, &c. or for every egg so, &c.], and shall forthwith pay the said sum, together with the sum of for costs; and that, in default of immediate payment of the said sums, he the said A. O. shall be imprisoned [*or* imprisoned and kept to hard labour] in the of for the space of unless the said sums shall be sooner paid [*or* and I, *or* we, order that the said sums shall be paid by the said A. O. on or before the day of] and in default of payment on or before that day, I [*or* we] adjudge the said A. O. to be imprisoned, [*or* imprisoned and kept to hard labour] in the of for the space of unless the said sums shall be sooner paid; and I [*or* we] direct that the said sum of [*i.e.* the penalty] shall be paid to being one of the overseers of the poor of, &c., and to be by him applied according to the directions of the statute in such case made and provided; and I [*or* we] order that the said sum of for costs, shall be paid to [*the complainant*].

Given under my hand [*or* our hands] the day and year first above mentioned.

J. P. [*or* J. P. and J. J. P.]

The conviction will not be vitiated by unnecessarily stating more than is required. *R. v. Jeffries*, 4 T. R. 767. And in some cases more precise words than those given by the statute may be required. *R. v. Priest*, 6 T. R. 538. *Ex-parte Hawkins*, 2 B. & C. 31.

As to the description of the place where the trespass was committed, see *R. v. Mellor*, 2 Dowl. P. C. 173.

The omission of the latter part of the adjudication is not a ground for quashing the conviction (*R. v. Boultbee*, 6 Nev. & M. 26; 4 Ad. & E. 498); and by sect. 45 of the statute in the text, no conviction shall be quashed for want of form.

The part of the conviction directing the payment of the penalty must now be altered, as a direction to pay the whole of the penalty to the overseer would be bad. *Griffith v. Harris*, 2 Mee. & W. 335; 5 & 6 Wm. 4, c. 20, s. 21.

[1] 11 & 12 Vic. c. 43, s. 14.

[2] In an action against a party for maliciously, and without probable cause, informing against the plaintiff for an offence under the game laws, it is a sufficient answer to show that the plaintiff, having been convicted of trespassing on land in pursuit of game in the daytime, under the above act, underwent the sentence of imprisonment

(*t*) *No* Certiorari.

By sect. 45, "no summary conviction in pursuance of this act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by *certiorari*, or otherwise, into any of his majesty's superior courts of record; and that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same." No *certiorari*.[1]

(*u*) *If Prosecution for Trespass, no Action for Damages.*

By sect. 46, "this act not to preclude actions for trespass, but no double proceedings for the same trespass."

(*v*) *Venue in, and Limitation and Notice of Actions against Persons acting under this Act.*

By sect. 47, "and for the protection of persons acting in the execution of this act be it enacted, that all actions and prosecutions to be commenced against any person for anything done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and the cause thereof, shall be given to the defendant one calendar month, at least, before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought by or on behalf of the defendant." Limitation and notice of actions against persons acting under this act, and venue therein to be local.[2]

(C) 24 & 25 *Vic. c.* 96, *Provisions of.*

(*a*) *Killing Hares or Rabbits in a Warren in the Night-time.*

By sect. 17, "whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanor; and whosoever shall unlawfully and wilfully, between the beginning of the last hour before sunrise and at the expiration of the first hour after sunset, take or kill any hare or rabbit in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or rabbits, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding five pounds, as to the justice shall seem meet: Provided that nothing in this section contained shall affect any person taking or killing in the daytime any rabbits on any sea-bank or river-bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank." Killing or taking any hare or rabbit in a warren, &c. by night made a misdemeanor, and subjects offender to a penalty not exceeding 5*l*.

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according to that conviction without appealing against it within the time and in the manner pointed out by this section. *Mellor v. Baddeley*, 4 Tyr. 692; 2 C. & M. 675; 6 Car. & P. 374.

The notice to be given under this section is exclusive of the day of giving such notice and of the day of the session. *R. v. Justices of Shropshire*, 8 Ad. & E. 173. *Mitchell v. Foster*, 12 Ad. & E. 472.

[1] *Rex v. Boultbee*, 4 Ad. & E. 498.

[2] As to what such notice must contain, see *Martins v. Upcher*, 3 Q. B. 662. *Jacklin v. Fitch*, 14 Mee. & W. 381. *Breese v. Jerdein*, 4 Q. B. 585. *Jones v. Nicholls*, 13 Mee. & W. 361; and *see post*, Notice of Action.

A gamekeeper acting under a deputation granted and registered before this act came into operation, but not afterwards, is not within the protection of this section. *Bush v. Green*, 4 Bing. N. C. 41. *Lidster v. Borrow*, 9 Ad. & E. 654. See *Hopkins v. Crowe*, 4 Ad. & E. 774.

(D) 25 & 26 *Vic. c.* 114, *Provisions of.*

(*a*) *Meaning of the word "Game."*

Meaning of words "game" and "justices" for the purposes of this act.

By sect. 1, "the meaning of the word 'game' in this act shall, for all the purposes of this act, be deemed to include any one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game; and the words 'justice' and 'justices' in this act shall, unless otherwise provided for, mean respectively a justice and justices of the peace respectively of or for the county, riding, division, liberty, city, borough, or place in which any game, gun, part of gun, net, snare, or engine after mentioned, shall be found."

(*b*) *Constable may search Person suspected of coming from Land, &c.*

Constable may search person suspected of coming from land in pursuit of game, or his abettor.

Also any cart suspected to contain such game,

and to seize the game if there, and detain it.

He is then to apply for a a summons under 18 & 19 Vic. c. 126, s. 9.

Proceedings before justices.

By sect. 2, "it shall be lawful for any constable or peace-officer in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets, or engines used for the killing or taking game; and also to stop and search any cart or other conveyance in or upon which such constable or peace-officer shall have good cause to suspect that any such game, or any such article or thing, is being carried by any such person; and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace-officer shall, in such case, apply to some justice of the peace for a summons citing such person to appear before two justices of the peace, assembled in petty sessions, as provided in the 18th & 19th of her present majesty, c. 126, s. 9, as far as regards England and Ireland, and before a sheriff or any two justices of the peace in Scotland; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding five pounds, and shall forfeit such game, guns, parts of guns, nets, and engines, and the justices shall direct the same to be sold or destroyed, and the proceeds of such sale, with the amount of the penalty, to be paid to the treasurer of the county or borough where the conviction takes place; and no person who, by direction of a justice in writing, shall sell any game so seized, shall be liable to any penalty for such sale; and if no conviction takes place, the game, or any such article or thing as aforesaid, or the value thereof, shall be restored to the person from whom it had been seized."

(*c*) *How Penalties to be Recovered.*

How penalties to be recovered.

By sect. 3, "any penalty under this act shall be recovered and enforced in England in the same manner as penalties under the act 1st & 2d William the Fourth, c. 32, and in Scotland, under the act 2d & 3d William the Fourth, c. 68, and in Ireland, under the Petty Sessions (Ireland) Act, 1851, when not otherwise directed in this act."

(*d*) *Provisions of* 11 & 12 *Vic. c.* 43, *to apply to* 25 & 26 *Vic. c.* 114.

11 & 12 Vic. c. 43. to apply to this act.

By sect. 4, "the powers and provisions of the act of the 11th & 12th years of her present majesty, c. 43, shall extend and apply to this act, and to all proceedings, matters, and things to be taken, had, and done, and to all persons to be proceeded against on taking proceedings under this act."

(*e*) *No Conviction to be Quashed for want of Form.*

No conviction

By sect. 5, "no conviction or order made under this act, or adjudication

made on appeal therefrom, shall be quashed for want of form, or be removed by *certiorari*, or otherwise, into any of her majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same." to be quashed for want of form, nor *certiorari* to issue.

(*f*) *Appeal.*

By sect. 6, "any person who shall think himself aggrieved by any such summary conviction, may appeal to the next court of general or quarter sessions, which shall be holden not less than twelve days after the day of such conviction, for the county, riding, division, or borough, wherein the cause of complaint shall have arisen: Provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall within three days enter into a recognisance, or bond of caution in Scotland, with a sufficient surety, before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be awarded by the court: and the court at such sessions shall hear and determine the matter of appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem fit, and shall, if necessary, issue process for enforcing such judgment." Appeal to quarter sessions.

IV. Certificate to Kill Game.

(A) *Any Certificated Person may kill Game.*

By 1 & 2 Wm. 4, c. 32, s. 6, "that every person who shall have obtained an annual game certificate shall be authorised to kill and take game, subject always to an action, or to such other proceedings as are hereinafter mentioned, for any trespass by him committed in search or pursuit of game: Provided always, that no game certificate on which a less duty than three pounds thirteen shillings and sixpence is chargeable under the acts relating to game certificates, shall authorise any gamekeeper to kill or take any game, or to use any dog, gun, net, or other engine or instrument for the purpose of killing or taking game, except within the limits included in his appointment as gamekeeper; but that in any case where such gamekeeper shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking game, beyond such limits as aforesaid, he may be proceeded against under this act, or otherwise, in the same manner and to all intents and purposes as if he had no game certificate whatsoever." Certificated person may kill game, subject to actions for trespass.[1] Proviso as to gamekeeper beyond the limits of his appointment.[2]

(B) *Occupiers and Owners of Land may kill Hares thereon without Certificate.*

By 11 & 12 Vic. c. 29, s. 1, "it shall be lawful for any person, being in the actual occupation of any inclosed lands, or for any owner thereof who has the right of killing game thereon, by himself, or by any person directed or authorised by him in writing, according to the form in the schedule to this act Owners and occupiers of land may kill hares without certificate.[3]

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[1] One who finds game on his own land cannot justify pursuing it on the land of another. *Deane v. Clayton*, 7 Taunt. 489; 1 Moore, 225.

[2] But one gamekeeper cannot seize the dogs of another gamekeeper for merely trespassing out of his proper manor. *Rogers v. Carter*, 2 Wils. 387. But a different rule prevails with respect to privileged places, as ancient parks and warrens. *Wadhurst v. Damme*, Cro. Jac. 44. *Barrington v. Turner*, 3 Lev. 28; 1 Wm. Saund. 84, n.

[3] By 11 & 12 Vic. c. 29, s. 2, such authority to kill hares is to be limited to one person at the same time in any one parish; which authority shall be sent to the clerk of the petty sessions, who shall register the same. If authority revoked, notice to be given.

By sect. 3, persons so authorised are not

annexed, or to the like effect, so to do, to take, kill, or destroy any hare, then being in or upon any such inclosed lands, without the payment of any such duties of assessed taxes as aforesaid, and without the obtaining of an annual game certificate."

(C) *Necessity for, and Penalty for want of Certificate under 23 & 24 Vic. c. 90.*

Every person before he shall take game to obtain certificate on penalty of 20*l.*[1]

By 23 & 24 Vic. c. 90, s. 4, "every person, before he shall in Great Britain take, kill, or pursue, or aid or assist in any manner in the taking, killing, or pursuing by any means whatever, or use any dog, gun, net, or other engine for the purpose of taking, killing, or pursuing any game, or any woodcock, snipe, quail, or landrail, or any coney, or any deer, shall take out a proper license to kill game under this act, and pay the duty hereby made payable thereon; and if any person shall do any such act as hereinbefore mentioned in Great Britain, without having duly taken out and having in force such license as aforesaid, he shall forfeit the sum of twenty pounds."

(D) *Exceptions and Exemptions thereto.*

By sect. 5, the following exceptions and exemptions from the duties and provisions of this act are hereby made and granted; (that is to say),

Exceptions.

(*a*) *Exceptions.*

Taking woodcocks or snipes with nets, &c. or conies by the proprietor of an enclosed warren; or hares by coursing; or deer by hunting, or by owner in inclosed land.

1. The taking of woodcocks and snipes with nets or springs in Great Britain.

2. The taking or destroying of conies in Great Britain by the proprietor of any warren or of any inclosed ground whatever, or by the tenant of lands, either by himself or by his direction or permission.

3. The pursuing and killing of hares respectively by coursing with greyhounds, or by hunting with beagles or other hounds.

4. The pursuing and killing of deer by hunting with hounds.

5. The taking and killing of deer in any inclosed land by the owner or occupier of such lands, or by his direction or permission.

Exemptions. Royal Family. Gamekeeper of Crown.

(*b*) *Exemptions.*

1. Any of the Royal Family.

2. Any person appointed a gamekeeper on behalf of her Majesty by the Commissioners of her Majesty's Woods, Forests, and Land Revenues, under the authority of any act of parliament relating to the land revenues of the Crown.

Person assisting any one duly qualified not acting by deputation.

3. Any person aiding or assisting in the taking or killing of any game, or any woodcock, snipe, quail, landrail, or coney, or any deer, in the company or presence and for the use of another person, who shall have duly obtained, according to the directions of this act, and in his own right, a license to kill game, and who shall by virtue of such license then and there use his own dog, gun, net, or other engine for the taking or killing of such game, woodcock, snipe, quail, landrail, coney, or deer, and who shall not act therein by virtue of any deputation or appointment.[2]

Person authorised to kill hares under 11 & 12 Vic. c. 29, & c. 30.

4. And as regards the killing of hares only, all persons who, under the provisions of the two several acts, 11 & 12 Vic. c. 29 and c. 30 respectively, are authorised to kill hares in England and Scotland respectively, without obtaining an annual game certificate.

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liable to duty unless otherwise chargeable.

By sect. 4, such authority may extend to coursing or hunting.

But by 11 & 12 Vic. c. 29, s. 5, it is not to authorise the laying of poison.

[1] At the hearing before justices of an information under the 1 & 2 Wm. 4, c. 32, s. 23, for unlawfully using engines for the purpose of taking game without being authorised to do so, for want of a game certificate, the defendant is not competent to give evidence. *Cattell v. Ireson*, 4 Jur. N. S. 560 27 L. J. M. C. 167.

[2] This protection will not be sanctioned if it be merely colourable. *Clarke v. Broughton*, 3 Camp. 328.

(E) *Game Certificate to mean License to kill Game.*[1]

(F) *License on behalf of Assessed Servants.*[2]

(G) *Persons having License must produce same when called on.*

Persons doing any act requiring a license to kill game to produce the same on demand, or declare their names, places of residence, &c. on a penalty of 20*l.*

By 23 & 24 Vic. c. 90, s. 10, "if any person shall be discovered doing any act whatever in Great Britain in respect whereof a license to kill game is required under this act, by any officer of inland revenue, or by any lord or gamekeeper of the manor, royalty, or lands wherein such person shall then be, or by any person having duly taken out a proper license to kill game under this act, or by the owner, landlord, lessee, or occupier of the land on which such person shall then be, it shall be lawful for such officer or other person aforesaid to demand and require from the person so acting the production of a license to kill game issued to him; and the person so acting is hereby required to produce such license to the person so demanding the production thereof, and to permit him to read the same, and (if he shall think fit) to take a copy thereof, or any part thereof; or in case no such license shall be produced to the person demanding the same as aforesaid, then it shall be lawful for the person having made such demand to require the person so acting forthwith to declare to him his Christian and surname and place of residence, and the place at which he shall have taken out such license; and if such person shall, after such demand made, wilfully refuse to produce and show a license to kill game issued to him, or in default thereof as aforesaid to give to the person so demanding the same his Christian and surname and place of residence, and the place at which he shall have taken out such license, or if he shall produce any false or fictitious license, or give any false or fictitious name or place, or if he shall refuse to permit any license which he may produce to be read, or a copy thereof, or of any part thereof, to be taken, he shall forfeit the sum of twenty pounds."

SCARTH v. GARDENER, 5 C. & P. 38.

The demand of the certificate need not be made on the land, but should be immediately afterwards, so as to make it one transaction.

In an action for libel, charging the plaintiff with poaching, and with having been convicted for not producing a certificate, and refusing to give his name, &c.; pleas, justifying the libel,—

Tenderden, C. J., held, that although the demand by a gamekeeper, &c. need not be made on the land, yet it must be made immediately after the party has left it, so as to make it one transaction; and that it is not necessary the party demanding should produce his own, and that, if the other refuses, he does so at his peril, if the party demanding it be duly authorised; and that, if the party refuses to give his name, it is unnecessary to go on and ask in what place, if any, he is assessed:—*Held*, also, that the conviction reciting it was sufficient evidence of the information.

See *Molton v. Rogers*, 4 Esp. 215.

(H) *License, how Forfeited.*[3]

(I) *List of Persons Licensed to be Published.*[4]

(J) 5 & 6 *Vic. c.* 81, *relating to Game Certificates in Ireland, to continue in force.*[5]

[1] Nothing in the 23 & 24 Vic. c. 90, to alter the 11 & 12 Vic. cc. 29, 30, except that "game certificate" in said acts, and also in 1 & 2 Wm. 4, c. 32, shall be read as "license to kill game."

[2] By 23 & 24 Vic. c. 90, s. 7, licenses may be taken out on behalf of assessed servants acting as gamekeepers for persons having right to kill game, or under deputation from lords of manors. By sect. 8, on change of gamekeeper or revocation of deputation, license may be continued to successor. And by sect. 9, such license is not available for acts done out of the limits of the manor or lands for which the parties are appointed gamekeepers.

[3] By 23 & 24 Vic. c. 90, s. 11, license is to be void if party convicted of any offence under 1 & 2 Wm. 4, c. 32, or 2 & 3 id. c. 68, s. 12.

[4] By 23 & 24 Vic. c. 90, s. 12, commissioners are empowered to publish lists of persons licensed to kill game.

[5] By 23 & 24 Vic. c. 90, s. 17, the 5 & 6 Vic. c. 81, relating to game certificates in Ireland, is to continue in force.

(K) *Duties on Certificates to kill Game.*[1]

V. Dealing in Game.

(A) *Persons having obtained Certificate to Kill, may Sell to Licensed Dealers.*

Certificated persons may sell game to licensed dealers.

Proviso as to gamekeepers.

By 1 & 2 Wm. 4, c. 32, s. 17, "every person who shall have obtained an annual game certificate shall have power to sell game to any person licensed to deal in game, according to the provisions hereafter mentioned: Provided always, that no game certificate on which a less duty than three pounds thirteen shillings and sixpence is chargeable under the acts relating to game certificates shall authorise any gamekeeper to sell any game, except on the account, and with the written authority, of the master whose gamekeeper he is; but that any such gamekeeper selling any game not on the account and with the written authority of such master, may be proceeded against under this act, in the same manner, to all intents and purposes, as if he had no game certificate whatsoever."

(B) *Justices may grant Licenses to Deal in Game.*

Justices to grant licenses to deal in game.

By sect. 18, justices to hold a special session yearly for granting licenses for persons to deal in game.

(C) *Dealers to put up Board.*

Dealers to put up board.

By sect. 18, dealers in game to put up a board.

(D) *Duty on License to Deal in Game.*

By 23 & 24 Vic. c. 90, s. 2, "the duty shall be, for every license to deal in game in England, Scotland, or Ireland, 2*l.*"

(E) *Partners need not have more than one License.*

Partners do not require more than one license.

By 1 & 2 Wm. 4, c. 32, s. 21, "persons being in partnership, and carrying on their business at one house, shop, or stall only, shall not be obliged by virtue of this act to take out more than one license in any one year to authorise them to deal in game at such house, shop, or stall."

(F) *Licenses, when to become Void.*

Person guilty of offence under 1 & 2 Wm. 4, c. 32, to forfeit license.

By sect. 22, "if any person, licensed by virtue of this act to deal in game, shall, during the period of such license, be convicted of any offence whatever against this act, such license shall thereupon become null and void."

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[1] The 23 & 24 Vic. c. 90, s. 1, repeals the duties imposed by 52 Geo. 3, c. 93, sched. L; 56 id. c. 56; and 1 & 2 Wm. 4, c. 32, on certificates to kill and to deal in game, and substitutes others, which are to be deemed excise duties.

The duties are as follows :—	£	s.	d.
For a license in Great Britain, or a certificate in Ireland, to be taken out by every person who shall use any dog, gun, net, or other engine for the purpose of taking or killing any game whatever, or any woodcock, snipe, quail, or landrail, or any conies, or any deer, or shall take or kill by any means whatever, or shall assist in any manner in the taking or killing, by any means whatever, of any game, or any woodcock, snipe, quail, or landrail, or any coney, or any deer: If such license or certificate shall be taken out after the 5th of April and before the 1st of November,—			
To expire on the 5th of April in the following year	3	0	0
To expire on the 31st of October in the same year in which the license or certificate shall be taken out	2	0	0
If such license or certificate shall be taken out on or after the 1st of November,—			
To expire on the 5th of April following	2	0	0
Provided always, that any person having the right to kill game on any lands in England or Scotland shall be entitled to take out a license to authorise any servant for whom he shall be chargeable to the duty of assessed taxes as a gamekeeper to kill game upon the same lands, upon payment of the duty of	2	0	0

(G) *Penalty for selling Game without License.*

By sect. 25, "if any person not having obtained a game certificate (except such person be licensed to deal in game according to this act), shall sell or offer for sale any game to any person whatsoever, or if any person authorised to sell game under this act, by virtue of a game certificate, shall sell or offer for sale any game to any person whatsoever (except a person licensed to deal in game according to this act), every such offender shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every head of game so sold or offered for sale such sum of money, not exceeding two pounds, as to the said justices shall seem meet, together with the costs of the conviction." Penalty for selling game without license, and on certificated persons selling to unlicensed persons.[1]

(H) *Penalty for Persons buying and selling Game, except from Licensed Dealers.*

By sect. 27, "if any person not being licensed to deal in game according to this act shall buy any game from any person whatsoever (except from a person licensed to deal in game according to this act, or *bonâ fide* from a person affixing to the outside of the front of his house, shop, or stall, a board purporting to be the board of a person licensed to deal in game), every such offender shall, on conviction thereof before two justices of the peace, forfeit and pay for every head of game so bought, such sum of money, not exceeding five pounds, as to the said justices shall seem meet, together with the costs of the conviction." Persons not to buy game of unlicensed persons.

(I) *Penalty on Licensed Dealers buying Game from Uncertificated Persons.*

By sect. 28, "if any person being licensed to deal in game according to this act shall buy or obtain any game from any person not authorised to sell game for want of a game certificate, or for want of a license to deal in game; or if any person, being licensed to deal in game according to this act, shall sell or offer to sell any game at his house, shop, or stall, without such board as aforesaid being affixed to some part of the outside of the front of such house, shop, or stall, or shall sell any game at any place other than his house, shop, or stall, where such board shall have been affixed; or if any person not being licensed to deal in game according to this act shall assume or pretend, by affixing such board as aforesaid, or by exhibiting any certificate, or by any other device or pretence, to be a person licensed to deal in game; every such offender being convicted thereof before two justices of the peace shall forfeit and pay such sum of money, not exceeding ten pounds, as to the said justices shall seem meet, together with the costs of the conviction." No dealing in game allowed between licensed dealers in game and uncertificated persons, under penalty not exceeding 10*l.*

(J) *Persons employed by Licensed Dealer may Buy and Sell on his behalf.*

By sect. 29, "the buying and selling of game by any person or persons employed on behalf of any licensed dealer in game, and acting in the usual course of his employment, and upon the premises where such dealing is carried on, shall be deemed to be a lawful buying and selling, in every case where the same would have been lawful if transacted by such licensed dealer himself: Provided also, that nothing herein contained shall prevent any licensed dealer in game from selling any game which shall have been sent to him to be sold on account of any other licensed dealer in game." Persons employed by licensed dealer may buy and sell on his account.

(K) *Provisions of* 1 *&* 2 *Wm.* 4, *c.* 32, *and* 2 *&* 3 *Vic. c.* 35, *as to Licenses to deal in Game, preserved by* 23 *&* 24 *Vic. c.* 90, *s.* 13.[2]

(L) *Persons Licensed by the Justices must obtain License under* 23 *&* 24 *Vic. c.* 90, *s.* 14.[3]

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[1] By 1 & 2 Wm. 4, c. 32, s. 26, innkeepers selling in their own houses for consumption therein, are exempted from sect. 25.

[2] *See* 23 & 24 Vic. c. 90, s. 13.

[3] *See* id. sect. 14; and by sect. 15, licenses to deal in game under this act are to be granted only to those who have obtained licenses

(M) *By whom Licenses to Kill and Deal in Game are to be granted.*[1]

VI. Gamekeepers.

(A) *Appointment of.*

(*a*) *Commissioners of Woods and Forests may Appoint.*

Commissioners of Woods and Forests may appoint.

By 10 Geo. 4, c. 50, s. 14, the Commissioners for the time being of his Majesty's Woods, Forests, &c. may appoint stewards or other officers to preserve game, and such officers are, by 3 & 4 Wm. 4, c. 113, s. 9, not liable to the duty on game certificates.

(*b*) *Lords of Manors may Appoint.*

Lords of manors may appoint gamekeepers.[3]

By 1 & 2 Wm. 4, c. 32, s. 13, "it shall be lawful for any lord of a manor, lordship, or royalty,[2] or reputed manor, lordship, or royalty, or any steward of the Crown of any manor, lordship or royalty, appertaining to his majesty, by writing under his hand and seal, or in case of a body corporate, then under the seal of such body corporate, to appoint one or more person or persons as a gamekeeper or gamekeepers to preserve or kill the game within the limits of such manor, lordship, or royalty, or reputed manor, lordship, or royalty, for the use of such lord or steward thereof, and to authorise such gamekeeper or gamekeepers within the said limits to seize and take for the use of such lord or steward all such dogs, nets, and other engines and instruments, for the killing or taking of game, as shall be used within the said limits by any person not authorised to kill game for want of a game certificate."

(*c*) *Lords of Manors may grant Deputations.*

Lords of manors may appoint deputation.

By sect. 14, "that it shall be lawful for any lord of a manor, lordship, or royalty, or reputed manor, lordship, or royalty, or any steward of the Crown of any manor, lordship or royalty, appertaining to his majesty, to appoint and depute any person whatever, whether acting as a gamekeeper to any other person or not, to be a gamekeeper for any such manor, lordship, or royalty, or reputed manor, lordship, or royalty, or for such division or district of such manor, lordship, or royalty, as such lord or steward of the Crown shall think fit, and to authorise such person as gamekeeper to kill game within the same for his own use, or for the use of any other person or persons who may be specified in such appointment or deputation, and also to give to such person all such powers and authorities as may by virtue of this act be given to any gamekeeper of a manor; and no person so appointed gamekeeper, and empowered to kill game for his own use or for the use of any other person specified as aforesaid, and not killing any game for the use of the lord or steward of the Crown of the manor, lordship, or royalty, or reputed manor, lordship, or royalty, for which such deputation or appointment shall be given, shall be deemed to be, or shall be entered or paid for as the gamekeeper or male servant of the lord or steward making such appointment or deputation, anything in any act or acts contained to the contrary notwithstanding."

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from the justices, and lists of persons are to be kept for inspection by officers appointed to grant same.

[1] By 23 & 24 Vic. c. 90, s. 16, they are to be granted by the Commissioners of Inland Revenue.

[2] A hundred with a leet is a royalty. Deac. G. L. 24; Com. Dig. vol. iv. Justice of the Peace, b. 46.

[3] If the defendant justify under a deputation from a lord of a manor, it is enough to show exercise of manorial rights and reasonable ground of title. *Blunt v. Grimes*, 4 T. R. 682. *Calcraft v. Gibbs*, id. 681. But evidence of real title may be given to rebut the presumption of a colourable title. *Hunt v. Andrews*, 3 B. & Ald. 341. Evidence of reputation is admissible where there is foundation laid. *Earl of Carnarvon v. Villebois*, 13 Mee. & W. 313; Rushworth, 1; M'Clel. & Y. 417.

It is presumed that the game killed by a gamekeeper is for the use of the lord. *Spurrier v. Vale*, 10 East, 413.

As to trustees appointing gamekeepers, see *Webb v. Earl of Shaftesbury*, 7 Ves. 480.

(*d*) *Regulations as to Appointing Gamekeepers in Wales.*

Regulations as to appointing gamekeepers in Wales.

By sect. 15, "that it shall be lawful for any person who shall be entitled to kill the game upon any lands in Wales, of the clear annual value of 500*l.*, whereof he shall be seised in fee or as of freehold, or to which he shall otherwise be beneficially entitled in his own right, if such lands shall not be within the bounds of any manor, lordship, or royalty, or if, being within the same, they shall have been enfranchised or alienated therefrom, to appoint, by writing under his hand and seal, a gamekeeper or gamekeepers, to preserve or kill the game over and upon such his lands, and also over and upon the lands in Wales of any other person, who, being entitled to kill the game upon such last-mentioned lands, shall, by license in writing, authorise him to appoint a gamekeeper or gamekeepers to preserve or kill the game thereupon, such last-mentioned lands not being within the bounds of any manor, lordship, or royalty, or having been enfranchised or alienated therefrom; and it shall be lawful for the person so appointing a gamekeeper or gamekeepers to authorise him or them to seize and take, for the use of the person so appointing, upon the lands of which he or they shall be appointed gamekeeper or gamekeepers, all such dogs, nets, and other engines and instruments for the killing or taking of game, as shall be used upon the said lands by any persons not authorised to kill game for want of a game certificate."

(*e*) *Every Appointment must be Registered.*[1]

(*f*) *Power to Appoint not Transferable.*[2]

VII. Ownership in Game.

Deane v. Clayton, 7 Taunt. 489.

Whilst *ratione soli.*

Per Cur. The owner has a property in the game *ratione soli* whilst on it; and if game be started and killed there by a third person, this property is not divested. But he cannot pursue it on the land of another.[3]

VIII. Rights of Shooting.

(A) *Can only be granted by Deed.*

Bird v. Higginson, 4 Nev. & M. 505; 2 Ad. & E. 669; 6 id. 824.

The right to shoot over a manor can only be granted by deed.[4]

In *assumpsit*, the declaration stated a special agreement to take a certain messuage, &c., with the right of exclusive shooting over a manor, to hold for a certain time. It alleged, then, that the defendant entered and became "possessed" of the premises for the term granted.

[1] By 1 & 2 Wm. 4, c. 32, s. 16, all appointments of gamekeepers must be registered with the clerk of the peace. *See Bush v. Green*, 4 Bing. 41; S. C. 3 Scott, 289.

[2] A man cannot convey to another the power of appointing a gamekeeper without a conveyance of the manor itself. *Earl of Carnarvon v. Villebois*, 13 Mee. & W. 313.

[3] As soon as they depart his qualified right ceases, unless the animals be started by the wrongful act of another. Hence, if A. starts game in B.'s private grounds, and kills it there, it vests in B. *Sutton v. Moody*, 1 Ld. Raym. 251; S. C. 5 Mod. 376. *Barrington v. Turner*, 3 Lev. 28. But if the animal be killed in the grounds of C., it belongs to A. *Churchward v. Studdy*, 14 East, 248. A person who on his own land shoots a pheasant on the land of another, and goes on such land to pick the bird up, is guilty of a trespass. *Osbond v. Meadows*, 31 L. J. M. C. 238. It is provided by the 1 & 2 Wm. 4, c. 32, s. 7, that under the then existing leases the landlord was to have the game, except in certain cases. By sect. 10 it is provided that the lord or steward or the Crown of every manor, lordship, or royalty, or reputed manor, lordship, or royalty, shall have the right to pursue and kill the game upon the wastes or commons within such manor, lordship, or royalty, or reputed manor, lordship, or royalty, and to authorise any other person or persons who shall have obtained an annual game certificate to enter upon such wastes or commons for the purpose of pursuing and killing the game thereon. And by sects. 8 & 10, nothing in the 1 & 2 Wm. 4, c. 32, is to affect agreements respecting game, or any rights of manor, warren, &c., or cattle-gates, or rights of common. So also 11 & 12 Vic. c. 29, s. 6.

[4] *See* also *Duke of Somerset v. Fogwell*, 5 B. & C. 875. But by 1 & 2 Wm. 4, c. 32, s.

The court held, that the plaintiff could not recover as for use and occupation under this count. The right of shooting over a manor is an incorporeal hereditament, and cannot be granted except by deed.

See Deacon's *Game Laws*, 60.

(B) *Reservation of Rights.*[1]

(C) *When Action can be Maintained for Infringement of.*[2]

11, where the lessor or landlord, having reserved to himself the right of killing the game, he may authorise any person having obtained a game certificate to enter on the land and kill game thereon. And where, in a declaration on a written agreement (not under seal) by plaintiff, to let land to defendant for two years, and by defendant to make satisfaction for damage done to tenants by game on their farms, over which he was to be at liberty to preserve game; the amount of damage to be settled by two referees, one chosen by each party, or by their umpire in case of disagreement. *Averment*, that the defendant entered and enjoyed the exclusive right of shooting during the whole term agreed upon. *Breach*, that, although within a reasonable time W. M. was chosen and nominated on plaintiff's behalf, and notice thereof given to the defendant, who was requested by plaintiff to give the name and address of a referee on his behalf to act with W. M. within ten days, or that, in default, W. M. would express the damage done, yet the defendant did not, nor would give notice to the plaintiff of any person chosen or nominated on his behalf, nor ever made any satisfaction for the damage done; that accordingly W. M. alone assessed the damage, and that the defendant had not paid any compensation to the plaintiff:—*Held*, that the agreement to make compensation was not void, although the right of shooting, being an incorporeal hereditament, did not pass by it. *Thomas v. Fredericks.* 10 Q. B. 775; 11 Jur. 942; 16 L. J. Q. B. 393.

And a landlord was restrained by injunction from interfering with his tenant in the exercise of the exclusive right of sporting, and killing game, according to an agreement not under seal until a lease should be executed, under seal, according to such agreement, pursuant to the decree in the cause. *Frogley v. Lovelace* (*Earl*), 1 Johnson, 333.

The right of hunting, shooting, fishing, and fowling, is an interest in the realty, and a grant of it is a license of a profit *à prendre*. *Ewart v. Graham*, 7 H. L. Cas. 331; 29 L. J. Ex. 88.

[1] Where a lessor had excepted from his demise the right of sporting, hawking, hunting, coursing, and shooting over the land demised, but allowing the tenant to course hares in case he himself did not keep hounds or greyhounds, and then took another person as tenant in room of the first lessee under an agreement, in which there was permission to the new tenant "to sport over the farm and lands:"—*Held*, that a person who was allowed, as a servant to the new tenant, to go and kill a rabbit on the land, was not liable to be proceeded against under sect. 30 of the 1 & 2 Wm. 4, c. 32, as for a trespass in the pursuit of conies. *Padwick v. King*, 7 C. B. (N. S.) 80; 6 Jur. N. S. 274; 29 L. J. M. C. 42.

Upon information under the 1 & 2 Wm. 4, c. 32, s. 30, against the appellants for trespassing on land in search of conies, it appeared that the appellants were employed by the tenant to kill the rabbits; the right of the game was reserved to the landlord:—*Held*, that a conviction of the appellants was wrong, inasmuch as the tenant himself could not have been convicted, and the appellants having acted by his directions, had the same right as he had. *Spicer v. Barnard*, 5 Jur. N. S. 961; 28 L. J. M. C. 176; 7 W. R. 467; 33 L. T. 121, Q. B.

A. occupied land under a parol agreement, as tenant from year to year, the right to the game, and of entering for the purpose of killing and taking it, being reserved to the landlord. The rateable value of the occupation of the land, without such right, was 11*l.* 5*s.* 8*d.*, and with such right was 26*l.* 19*s.* 8*d.* On appeal against a rate for the relief of the poor, in which A. was rated at the higher value:—*Held*, that the effect of the reservation in the agreement, and of 1 & 2 Wm. 4, c. 32, being to separate the right to the game from the other beneficial occupation, he was only liable to be rated at the lower value. *Reg. v. Thurlstone*, 5 Jur. N. S. 820, Q. B.; Ell. & Ell. 502.

Where by deed A. and B. conveyed to D. and his heirs certain lands, excepting and reserving to A., B., and C., their heirs and assigns, liberty to come into and upon the lands, and there to hawk, &c., it was held that this was not a reservation, but a new grant by D. (who executed the deed) of the liberty therein mentioned; and therefore that it might enure in favour of C. and his heirs, though he was not party to the deed. *Wickham v. Hawker*, 7 Mee. & W. 63. See *Pannell v. Mills*, 3 C. B. 625. *Dayrell v. Hoare*, 12 Ad. & E. 356.

Reserving a right of hawking and hunting does not include the liberty of shooting. *Moore v. Lord Plymouth*, 1 Moore, 346; 7 Taunt. 614. *Pickering v. Noyes*, 4 B. & C. 639. *See Pannell v. Mil s*, 16 L. J. C. P. 97.

[2] The plaintiff was lord of a manor, and the defendant's father was owner of portions of land within the manor called the Clint allotment and the Woodside allotment. In 1811 the plaintiff's father, being lord of the manor, there was within, and parcel of it, a tract of uninclosed land, called the Bailey

Hope, having a stinted pasture. The plaintiff's father was owner of the soil of Bailey Hope, and entitled to mines within it, and other rights and liberties, and to the exclusive right of shooting. The plaintiff, who was the heir of his father, and others, were owners of tenements within the manor, and also the shield-rooms upon Bailey Hope, and their tenants were entitled to cattle-gate. In 1811, an inclosure act enacted, that the commissioner should make allotments to the plaintiff's father, and to the other parties entitled to cattle-gates, and that, notwithstanding the inclosure, the plaintiff's father, his heirs and assigns, should be taken to be the owners of the mines, and that nothing therein contained should prejudice, lessen, or defeat, the title of the plaintiff's father, his heirs or assigns, to any seignories, rights, &c., mines, and *also rights of shooting over the stinted pasture*, and every part and allotment thereof. In 1814, the commissioners for allotting Bailey Hope allotted to the plaintiff's father 150 acres therein, in respect of his estate called Woodside; and an allotment was made to the defendant in respect of his estate called the Clint. In 1823, the plaintiff's father and the defendant's grandfather agreed to exchange the Woodside allotment; there was excepted and reserved to the plaintiff's father *the liberty of shooting over that allotment.* The corresponding deed of exchange granted to the plaintiff's father the right of shooting on the Woodside allotment, with covenant that the defendant's grandfather, his heirs and assigns, would give notice to the plaintiff's father, his heirs and assigns, of every trespass on the said allotment. In 1823 the Woodside allotment came to the defendant's father; and in 1846 he bought the Clint allotment. Since 1831 the owner of these allotments shot over them as of right, the plaintiff at the same time exercising the right of shooting concurrently. In 1852 the defendant gave the plaintiff's gamekeeper notice not to trespass on the ground, as under the Game Act, 1 & 2 Wm. 4, c. 32, he was solely entitled to the game:—*Held*, first, that under the deeds of exchange the exclusive right of shooting over the Woodside allotment vested in the plaintiff, and that the plaintiff was entitled to maintain an action against the defendant in respect of the infringement of this right. *Graham v. Ewart*, 11 Ex. 326; 25 L. J. Ex. 42. Affirmed on error in the Exchequer Chamber, 1 H. & N. 550; 26 L. J. Ex. 97:—*Held*, accordingly, that under the Inclosure Act the right of shooting over the Clint allotment belonged to the defendant. (Id.) But held in the Exchequer Chamber, reversing the judgment of the Exchequer, that the exclusive right of sporting over this allotment belonged to the plaintiff, and not to the defendant. (Id.)

Brotherdale Bank is a tract of inclosed pasture land within the manor of Brotherdale, in Westmoreland. Brotherdale Bank has been from time immemorial subject to eighty customary rights, called cattle-gates. The plaintiff was lord of the manor of Brotherdale. The defendant was seised of cattle-gates as a customary estate of inheritance. The plaintiff was also owner of a cattle-gate which came to his predecessor as lord of the manor by seizure *quosque* for non-payment of a fine. Brotherdale Bank is separated from Brotherdale Waste by a fence, which the cattle-gate owners keep in repair with stones got from Brotherdale Bank, and from the adjoining waste. Each cattle-gate gave the owner thereof a right of depasturing on Brotherdale Bank a certain number of cattle and sheep from the 26th of May to the 24th April, but neither cattle or sheep were allowed to pasture there between the 24th of April and the 26th of May. An alteration had been made in the time of stinting, by substituting the 26th of May for the 1st of June; but it did not appear that the lord of the manor had any notice of the alteration, and the contract did not contain any mention of stinting. The whole of the cattle and sheep depastured Brotherdale Bank in common. A frithman was appointed by the cattle-gate owners, whose duty it was to take care that Brotherdale Bank was properly stinted, and he was remunerated for his trouble by the cattle-gate owners. A cattle-gate owner having a house within the manor, had also a right to cut peat for consumption in his house. By a local act of parliament, authority was given to the lord of the manor to enfranchise any copyhold or customary messuages, cottages, lands, tenements or hereditaments, parcels of the manor, and several cattle-gates were enfranchised under the act, but there was no distinction in point of enjoyment between the enfranchised and the customary cattle-gates. From time immemorial the cattle-gates had been held of the lord of the manor as customary estates of inheritance, by payment of fines, certain rents of small amount being payable annually for each cattle-gate, and under dues, duties, suits and services of right accustomed. On the death of a cattle-gate owner, the cattle-gate descended by custom to the heir-at-law, who was admitted at the lord's court when he paid a fine. The cattle-gates also passed by customary deed, followed by admittance at the next lord's court, or, out of court, by the steward of the manor. The deed was brought into court by the alienee, and was presented by the jury, or bourage. A fine was payable on the admittance, but there was no heriot due on the death of the lord. The owners of cattle-gates might, by the custom, enforce their admittance by the new lord, on payment of a fine. The lord was entitled to seize *quosque* for non-payment of fines. On alienation by a *feme covert*, the woman was examined apart from her husband. The lords of the manor had always searched for, pursued, and killed grouse and other game on Brotherdale Bank, no other person having claimed to do so, or ever having done so, except by their license, since 1819. The lords of the manor

GAMING. *See* Horse-Racing; Insurance; Interest; Stock-Jobbing;[1] Wager.

I. Effect of on Contracts, p. 597.

(A) *Wagers not Recoverable at Law, nor Money paid to Stakeholder to abide Event*, p. 598.

(B) *Except Contributions for Winner of Lawful Game*, p. 598.

(C) *Securities given for Gaming Debts to be deemed given for Illegal Consideration*, p. 598.

(D) *Gaming-Houses*, p. 598.

(*a*) *Keeping a Gaming-House is an Indictable Offence*, p. 598.

(*b*) *Form of Indictment*, p. 598.

(*c*) *Person having Management to be deemed the Keeper*, p. 599.

(*d*) *Evidence of House being common Gaming-House*, p. 599.

(E) *Betting-Houses Illegal, and deemed Gaming-Houses*, p. 600.

(F) *Statutory Provisions for Suppression of Gaming-Houses under the* 2 & 3 *Vic. c.* 47; 8 & 9 *Vic. c.* 109; 16 & 17 *Vic. c.* 119; 17 & 18 *Vic. c.* 37, p. 601.

(G) *Billiards*, p. 601.

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had preserved the game. In an action for trespass and trover for shooting grouse on Brotherdale Bank without the plaintiff's permission, the lord having brought an action for trespass against the owner of a cattle-gate for taking and killing grouse on this land, on a special case stating these facts: — *Held* by *Pollock*, *C. B.*, and *Alderson*, *B.*, that the whole surface of the soil in the land in question was a tenement, of which the defendant was one of several joint tenants under the plaintiff, who, not having any exclusive right in the surface of the land, could not maintain the action. *Lonsdale* (*Earl*) *v. Rigg*, 11 Ex. 654; 25 L. J. Ex. 73 (affirmed in the Exchequer Chamber), 26 L. J. 196; 1 H. & N. 924: — *Held* by *Martin*, *B.*, and *Platt*, *B.*, that the facts stated showed that the plaintiff was the owner of, and in possession of the land and soil on which the cattle-gate rights were exercised, and that the interest of the defendant and the other cattle-gate owners was on mere parol right or easement of several and exclusive pasture only; and that, consequently, the plaintiff, as owner and in possession of the soil, had a possessory property in the grouse and other game entitling him to maintain the action. (Id.)

The special case stated, in addition to the preceding facts, that the plaintiff and his father, and their predecessors, as lords of the manor of B., had always, by themselves and their gamekeepers, and other persons authorised by them, searched for and killed grouse and other game on the land in question, without obstruction from the cattle-gate owners; until the defendant shot grouse, no one claimed to do so, or to search for and kill game thereon, or that no one did so except by stealth or by license of the lord of the manor; that one cattle-gate owner asked for and obtained leave from the plaintiff to shoot grouse, and that since 1819 the plaintiff and his father preserved the game, and prevented other persons from searching for and killing game thereon: — *Held* by *Pollock*, *C. B.*, and *Alderson*, *B.*, that these facts did not show that the lord had any exclusive prescriptive right of shooting and killing game over the *locus in quo*, so as to support a claim independently of the right to the soil. (Id.) *Held* by *Martin*, *B.*, that although such exclusive right to kill game may probably be established by grant or by evidence of immemorial user, or prescriptive right, presupposing a grant, yet the facts were too imperfectly stated to admit of an opinion being formed whether such right existed. (Id.) *Held* by *Platt*, *B.*, that there was evidence of such exclusive right in the plaintiff. (Id.)

[1] 23 Vic. c. 28, repeals 7 Geo. 2, c. 8, called "Sir John Barnard's Act," and 10 Geo. 2, which made the former act perpetual.

I. Effect of on Contracts.

(A) *Wagers not Recoverable at Law.*

Wagers are not recoverable by law.

By 8 & 9 Vic. c. 109, s. 18, it is enacted, "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void;[1] and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event in which any wager shall have been made:[2]

[1] At common law, contracts by way of gaming were lawful. *Shirbon v. Colebacke*, 2 Vent. 175. *Good v. Elliot*, 3 T. R. 693. *Cousins v. Nantes*, 3 Taunt. 522. *Hussey v. Cricket*, 3 Camp. 168. *Dalby v. India Assurance Co.* 15 C. B. 365. And this law is still in force in the East Indies, the statute in the text not extending to that country. *Thackoorseydas v. Dhondmull*, 4 Moo. Ind. App. 339; 6 Moo. P. C. C. 300; 12 Jur. 315. In America, all betting and wagering contracts are void. 3 Kent's Com. 178.

A colourable contract for the sale and purchase of railway shares, where neither party intends to deliver or to accept the shares, but merely to pay differences according to the rise or fall in the market, is gaming within the above statute. *Grisewood v. Blane*, 11 C. B. 538. But where to an action for work done and money paid, at the request of the defendant,—plea, that by agreement between the plaintiff and defendant, the plaintiff, as agent to the defendant, contracted with third parties for the pretended purchases and sales of shares in a railway company, under which contracts no shares were actually transferred, and that the contracts of pretended purchase and sale between the parties were by way of wagering only on the market prices of the shares, contrary to the 8 & 9 Vic. c. 109, s. 18; and that the work was done and money paid in pursuance of that agreement, and in making and performing those contracts of pretended purchase and sale, and in and about the paying by the plaintiff of those differences, which payment was made without any request by the defendant to the plaintiff:—*Held*, a bad plea, as disclosing no answer to the count for work done. *Inchbald v. Cockerill*, 4 Jur. N. S. 693, Ex. *Quære* if the plea was an answer to the count for money paid? (Id.) *See* also *Sims v. Harris*, 4 Jur. N. S. 72, Q. B. *Barry v. Croskey*, 2 Johns. & H. 1. *Sims v. Harris*, 4 Jur. N. S. 72. *Ex-parte Ryder*, 1 De Gex & J. 317; L. J. Bank. C. 69. And time-bargains in stock, though they may be "gaming or wagering" within the meaning of the 8 & 9 Vic. c. 109, relating to games and wagers, are not so within the meaning of the Bankrupt Consolidation Act, 12 & 13 Vic. c. 106, s. 201. *Ex-parte Ryder*, 1 De Gex & J. 317; 3 Jur. N. S. 1159; 26 L. J. Bank. 69.

In the course of a bargain between the plaintiff and the defendant for the sale of goods, a dispute arose as to the price of similar goods on a former sale, and the following memorandum was signed:—"The plaintiff states that the goods sold by him to the defendant, and afterwards burnt, were invoiced at 5*s.* 9*d.* per cwt. of 112 lbs. The defendant says the price was 6*s.* per cwt. The losing man is to pay for the winner one gallon of best brandy. The five tons of rags now lying at the Salford station are to be regulated as to price according to the above: viz. the plaintiff says they are invoiced at 5*s.* 9*d.*; the defendant says 6*s.* It is also agreed by both parties that if the plaintiff is wrong they are to be charged at 3*s.* only; if the defendant be wrong he is to pay for the same 6*s.*"—*Held*, that independently of the clause about the brandy, this was a contract by way of wagering within sect. 18 of the 8 & 9 Vic. c. 109, and therefore could not be enforced by the plaintiff in an action for goods bargained and sold. *Rourke v. Short*, 5 E. & B. 904; 2 Jur. N. S. 352; 25 L. J. Q. B. 196.

In an action for money paid, &c. the defendant pleaded that the money was paid for and in respect of differences which the plaintiffs, as the defendants' brokers, contracted to pay for them on account of certain unlawful contracts, by way of gaming and wagering, relating to the public funds, and to railways and shares in railways, and to the then present and future prices thereof respectively, in lieu of and instead of making, accepting, and paying for transfer thereof, partly contrary to the 7 Geo. 2, c. 8, and partly contrary to the 8 & 9 Vic. c. 109:—*Held*, that the plea being no answer as to the money paid in respect of losses on the sale of shares, was bad altogether, and was not made good as to the money paid in respect of losses on sales of consols by being taken distributively by the 75th sect. of the Common Law Procedure Act, 1852. *Lyne v. Siesfield*, 1 H. & N. 278.

In administering the estate of a testator in a cause, A. claimed to be paid money which had been won by the testator on a wager made by him at the request of A. The money won on A.'s account was paid to the testator some time prior to his decease. The chief clerk disallowed the claim. On application to vary the certificate, the court held that the language of the 8 & 9 Vic. c. 109, s. 18, was express, that no action or suit should be brought for recovering any sum of money won upon any wager, and that the certificate of the said clerk must stand. *Beyer v. Adams*, 3 Jur. N. S. 709; 26 L. J. Ch. 841.

[2] Money lent for the purpose of playing an

Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

(B) *Except Contributions for Winner of Lawful Game.*[1]

(C) *Securities given for, to be deemed given for an Illegal Consideration.*[2]

All securities given for gaming debts to be deemed given for an illegal consideration.

By 5 & 6 Wm. 4, c. 41, s. 1, so much of the stat. 9 Anne, c. 14, as provided "that all notes and bills, or mortgages, given for any money or other valuable thing won by gaming, or by betting on the sides of such as do game, or for repaying any money lent for such gaming or betting, or lent at the time or place of such play, to any person so gaming or betting, should be void," is repealed; and instead thereof it is enacted, that every such note or bill, or mortgage, shall merely be deemed and taken to have been made, drawn, accepted, or given for an illegal consideration. *See* Bills and Notes, vol. ii. p. 438.

(D) *Gaming-Houses.*

(*a*) *Keeping a Gaming-House an Indictable Offence.*[3]

(*b*) *Form of Indictment.*[4]

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illegal game cannot be made the subject of an action. *M'Kinnell v. Robinson*, 3 Mee. & W. 434. But money paid at the request of the defendant, on account of a wagering contract lost by him, can be recovered if the contract is merely void and not illegal (*Knight v. Fitch*, 15 C. B. 566. *Knight v. Chambers*, id. 562. *Jessop v. Lutwych*, 10 Ex. 614); though not so if the contract itself were illegal. *Pidgeon v. Barslem*, 3 Ex. 465, 471.

The above section does not preclude a party who repudiates the wager before the event is ascertained from recovering from the stakeholder the amount of his deposit. *Varney v. Hickman*, 5 C. B. 27: 5 D. & L. 364; 17 L. J. C. P. 102. And it has been held that if money be won at play, or lent for the purpose of gambling, in a country where gaming is not illegal, such money may be recovered in the courts of this country. *Quarrier v. Colston*, 1 Ph. 147.

[1] A foot-race is a lawful game within this proviso in the 8 & 9 Vic. c. 109, s. 18, *supra*. *Batty v. Marriott*, 5 C. B. 818. So a horse-race for a sweepstakes of 2*l.* each is lawful. *Applegarth v. Colley*, 10 Mee. & W. 723. And it would seem that the proviso extends to all games of mere skill (*see* 8 & 9 Vic. c. 109, s. 1), and to all games which were made illegal by the 9 Anne, c. 14, such as cricket, chess, bowls, &c. *Hodson v. Terrell*, 1 C. & M. 797. *Jeffreys v. Walter*, 1 Wils. 220. Backgammon is a lawful game. *Segil v. Jebb*, 3 Stark. 1. *Brown v. Leeson*, 2 H. Black. 46. So dominoes. *R. v. Ashton*, 1 E. & B. 286; 17 Jur. 501; 22 L. J. M. C. 1. It is, however, necessary, in order to maintain an action against a stakeholder to recover the amount of stakes deposited with him to abide the determination of certain persons on a legal event; the plaintiff must either have the decision in his favour, or show that it was no longer practicable to obtain it. Thus, where the plaintiff entered a horse for a subscription stakes, and after the race a dispute arose as to who was the winner. Four stewards had been appointed, whose decision was to be final in case of disputes, but only three acted. They could not agree, and separated without coming to any decision, and the next day the defendant, who was stakeholder, being indemnified, paid the stakes to the owner of another horse. Two of the three stewards subsequently signed a written paper, purporting to be an award of the stakes to the plaintiff, but no second meeting of the stewards had taken place:— *Held*, that the plaintiff could not maintain an action to recover any part of the stakes. *Brown v. Overbury*, 25 L. J. Ex. 169; 11 Ex. 715. *Parsons v. Alexander*, 3 E. & B. 263.

[2] This section makes the securities given for gaming debts the same as if they had been given for no consideration, and the effect as regards bills and notes is, that the immediate party in whose favour they are given cannot recover thereon, neither can an indorsee, without value or with notice. *Fitch v. Jones*, 5 E. & B 238; *Hay v. Ayling*, 16 Q. B. 423, 431. *Fisher v. Ronalds*, 12 C. B. 762. *Bingham v. Stanley*, 2 Q. B. 117. But an innocent holder for value, and without notice, may recover, which he could not do when the security was absolutely void. *See* Bills and Notes, vol. ii. p. 438.

[3] Keeping a gaming house is an indictable offence at common law (*Rex v. Rogier*, 1 B. & C. 272. *Rex v. Howell*, 3 Keb. 510. *Rex v. Higginson*, 2 Burr. 1233); and a second party may proceed where an indictment for keeping a gaming-house is removed by *certiorari*, although the original prosecutor requires him to forbear. *Rex v. Wood*, 3 B. & Adol. 657.

[4] The form of the indictment is as follows: [*Commencement as usual.*] At the parish of B. in the county of M. unlawfully did

(*c*) *Person having Management to be deemed the Keeper.*

Person having management of to be deemed the keeper.

By 25 Geo. 2, c. 36, s. 8, "any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management, of any bawdy-house, *gaming-house*, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not, in fact, be the real owner or keeper thereof."

(*d*) *Evidence of House being common Gaming-House.*

House or place kept for playing at unlawful game, with bank kept, &c., to be deemed a common gaming-house.

In default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is used or kept for playing therein at any unlawful game, and that a bank is kept there by one or more of the players, exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house and place shall be deemed a common gaming-house.

Obstruction of officer entering the house, or contrivance to prevent or delay such officer entering, or for giving an alarm in case of such entry, &c., to be evidence of house being common gaming-house.

By 17 & 18 Vic. c. 38, s. 2, "where any constable or officer, authorised as aforesaid (under the provisions of 8 & 9 Vic. c. 109), to enter any house, room, or place, is wilfully prevented from, or obstructed or delayed in entering the same, or any part thereof, or where an external or internal door or means of access to any such house, room, or place so authorised to be entered, shall be found to be fitted or provided with any bolt, bar, or chain, or any means or contrivance for the purpose of preventing, delaying, or obstructing the entry into the same or any part thereof of any constable or officer authorised as aforesaid, or for giving an alarm in case of such entry, or if any such house, room, or place, is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing, or destroying any instruments of gaming, it shall be evidence, until the contrary be made to appear, that such house, room, or place, is used as a common gaming-house within the meaning of this act, and of the former acts relating to gaming, and that the persons found therein were unlawfully playing therein."[1]

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keep and maintain a certain common gaming-house, and in the said common gaming-house, for lucre and gain, on the said first day of June, in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come, to play together at a certain unlawful game called *rouge et noir:* and in the said common gaming-house on the said first day of June, in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain, playing and gaming at the same unlawful game called *rouge et noir*, for divers large and excessive sums of money, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen, to the evil example of all others in the like case offending, and against the peace of our Lady Queen, her crown and dignity.

(2d count). And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S. afterwards, to wit, on the said first day of June, in the year aforesaid, and on divers other days and times, between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, unlawfully did keep and maintain a certain common gaming-room in the house of one J. N., there situate, and in the said common gaming-room, &c., [*as in the last count, only substituting* "gaming room" *for* "gaming-house"]. *R. v. Rogier*, 2 D. & R. 431; 1 B. & C. 272. In *R. v Taylor*, 3 B. & C. 502, *Holroyd, J.*, said that, in his opinion, it would be sufficient merely to have alleged that the defendant kept a common gaming-house. Fine or imprisonment, or both, and, by 3 Geo. 4, c. 114, hard labour. The indictment shall not be removed by *certiorari* (25 Geo. 2, c. 36, s. 10), unless on the part of the Crown (*R. v. Davies*, 5 T. R. 626); and it shall be determined at the same sessions or assizes at which it is preferred, unless the court, upon cause shown, think proper to adjourn the same. 25 Geo. 2, c. 36, s. 10.

[1] On a conviction under this act half the penalty, which is not payable to the informer, is payable to the receiver of the metropolitan police. *Wray v. Ellis*, Ell. & Ell. 276; 28 L. J. M. C. 45.

(E) *Betting-Houses Illegal, and deemed Gaming-Houses.*

Betting-houses illegal, and a common nuisance.[1]

By 16 & 17 Vic. c. 119, "no house, office, room, or other place, shall be opened, kept, or used, for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured, or employed by, or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid; as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law." See *Reg. v. Crawshaw*, 1 Bell, C. C. 303; and as to information and conviction, *Onley v. Gee*, 30 L. J. M. C. 222; 4 L. T. (N. S.) 338.

(F) *Statutory Provisions for the Suppression of Gaming-Houses under the 2 & 3 Vic. c. 47*;[2] *8 & 9 Vic. c. 109*;[3] *16 & 17 Vic. c. 119*;[4] *17 & 18 Vic. c. 38*.[5]

[1] By 25 Geo. 2, c. 36, s. 10, no indictment is to be moved by *certiorari*.

By 16 & 17 Vic. c. 119, betting-houses are to be deemed gaming-houses within 8 & 9 Vic. c. 109.

[2] By the 2 & 3 Vic. c. 47, s. 48, commissioners of police may authorise superintendents and constables to enter places which there are good grounds for believing to be used as common gaming-houses, and seize and destroy tables, &c.; owner, or keeper, banker, croupier, and other persons in any manner acting in the conduct of the house, liable to a penalty not exceeding 100*l.*, or six months' imprisonment; parties found in the house without lawful excuse, liable to a penalty not exceeding 5*l.*

[3] By 8 & 9 Vic. c. 109, s. 3, the powers possessed by justices (except within the metropolitan police district) to enter places where unlawful games are suspected to be holden may be exercised under their warrant by constable.

By sect. 4, the owner, keeper, or any other person who acts in any manner in conducting the business, is liable to a penalty of not more than 100*l.*, or may be committed to prison, with or without hard labour, for not more than six calendar months.

By sect. 5, not necessary to prove that persons were playing for money.

By sect. 6, similar powers to those already mentioned by the 2 & 3 Vic. c. 47, s. 48.

By sect. 7, police may search for instruments of gaming.

By sect. 20, party convicted may appeal to quarter sessions.

By sect. 21, distress for penalty not unlawful for want of form.

[4] By 16 & 17 Vic. c. 119, s. 3, the owner or occupier of any house or place, and any person having the care or management of a betting-house, is made liable to a penalty not exceeding 100*l.*, or to be imprisoned, with or without hard labour, for not exceeding six calendar months.

By sect. 4, any such person who shall receive any money, &c. on condition of paying money on event of any bet, is made liable to a penalty of 50*l.*, or to be imprisoned for not more than three months.

By sect. 5, money, &c. so received may be recovered from the persons receiving the same.

By sect. 7, persons exhibiting placards or otherwise advertising betting-house, are made liable to a penalty not exceeding 30*l.*, or to be imprisoned for not more than two months.

By sect. 8, penalties and costs may be levied by distress.

By sect. 9, the application of penalties is provided for.

By sect. 10, on neglect to prosecute any summons, justices may authorise some other person to proceed.

By sect. 11, justices may authorise search of suspected houses.

By sect. 12, commissioners of police may authorise superintendent of police to enter and search suspected houses.

By sect. 13, appeal to quarter sessions.

By sect. 14, no objection in matter of form and *certiorari* taken away.

By sect. 15, distress not unlawful for want of form.

By sect. 17, limitation of actions.

[5] By 17 & 18 Vic. c. 38, s. 1, any person obstructing or delaying the entry of con-

(G) *Billiards.*[1]

GAOL. *See post*, Prison.

GARDENS. *See* 7 & 8 Geo. 4, c. 29, ss. 39, 42.

GARNISHEE. *See* Attachment, vol. i. p. 575; Foreign Attachment, *ante*, p. 488.

GAS. *See post*, Lighting and Watching.

(A) *Enactments respecting Gas*, p. 601.
(B) *Contracts to Supply*, p. 601.
(C) *Liability of Gas Companies for Injuries*, p. 602.
(D) *Laying down Pipes in Highways*, p. 603.

(A) *Enactments respecting Gas.*

The 10 & 11 Vic. c. 15, consolidates the provisions usually contained in acts authorising the construction of gas-works. The measures used in the sale of gas are regulated by the 22 & 23 Vic. c. 66.

The 23 & 24 Vic. c. 125, regulates the supply of gas to the metropolis by the different companies within that district; and the 23 & 24 Vic. c. 146, amends the 22 & 23 Vic. c. 66, for regulating the measures used in the sale of gas, as to the time appointed for its coming into operation.

(B) *Contracts to Supply.*[2]

stable to be liable to a penalty not exceeding 100*l.*, or to be imprisoned, with or without hard labour, for not exceeding six calendar months.

By sect. 3, any person found in such house or place refusing to give his name and address, or giving a false one, is liable to a penalty of 50*l.*, or to be imprisoned for not exceeding one month.

By sect. 4, persons owning, or occupying, or conducting the business of any gaming-house or place, or advancing money for the purpose of gaming with persons frequenting such house, are made liable to a penalty not exceeding 500*l.*, or to be imprisoned, with or without hard labour, for not exceeding twelve calendar months.

By sect. 5, justices may require any of the persons apprehended to be sworn and give evidence, and he is not to be excused on the ground that his answers may tend to criminate himself.

By sect. 6, persons required to be examined as witnesses, and making a full discovery, to be freed from all penalties.

By sect. 7, penalties and costs may be levied by distress.

By sect. 8, application of penalties.

By sect. 9, on neglect to prosecute any summons, justices may authorise some other person to proceed.

By sect. 10, appeal to quarter sessions.

By sect. 11, no objection allowed to information whereon conviction has taken place, &c. in matter of form. Judgment not removable by *certiorari*.

By sect. 12, distress not unlawful for want of form.

By sect. 13, tender of amends.

By sect. 14, limitation of actions.

[1] By 8 & 9 Vic. c. 109, s. 10, justices may grant billiard and bagatelle licenses at licensing sessions.

By sect. 11, all places kept for public billiards or bagatelle must be licensed, and notice of such license must be put up in a conspicuous place outside the house mentioned in such license, or the keeper will incur a penalty of not more than 10*l.* for every day on which the billiard-table, &c. shall be used, or may be committed to prison for not more than one calendar month. He will also be liable to be proceeded against as the keeper of a common gaming-house.

By sect. 13, billiards, &c. may not be played at any public place after one and before eight o'clock in the morning of any day, or at any time on Sunday, Christmas-day, or Good Friday, or on a public fast day.

There is no appeal to the quarter sessions against the refusal of justices, at their general annual licensing meeting, to grant a license to a person to keep a public billiard-table, under the 8 & 9 Vic. c. 109, s. 10. *Ex-parte Chamberlain*, 4 Jur. N. S. 477, Q. B.

[2] A gas company had supplied A. with gas for several years, and he had hired of them a meter by the year, and payment both for the meter and the gas supplied was demanded and made quarterly. A. had also incurred expense in fitting his premises for the reception of gas. A dispute having arisen between them as to the amount of gas consumed, and the accuracy of the charge made by the company during the last quarter, the latter gave A. notice that if he did not pay the amount claimed within a week, the supply of gas would be discontinued. A. not having paid the amount within the week, the dispute still pending, the company discontinued the supply:—

Held, that the company was at liberty to do so, and that there was no evidence from which a contract could be implied binding the company to continue to supply gas for any specific period, or requiring the company, before discontinuing the supply, to give A. notice of their intention to do so. *Hoddesdon Gas and Coke Co. v. Haselwood*, 5 Jur. N. S. 1013; 28 L. J. C. P. 268; 7 W. R. 415; 33 L. T. 184.

[1] A declaration stated that the plaintiff was possessed of certain premises; that the defendant was employed in laying on gas to certain premises adjoining; and that he did the work so negligently that the gas escaped and ignited, and the premises adjoining the plaintiff's were set on fire and burnt:—*Held*, that the declaration disclosed a good cause of action; that it was unnecessary to negative negligence in the owner of the adjoining house in putting out the fire before it communicated with the plaintiff's premises; and that the plea of not guilty would put in issue the negligence of the defendant. *Blenkeron v. Gt. Cent. Gas-Consum. Co.* 3 L. T. (N. S.) 317, Q. B.; 2 F. & F. 437. A plaintiff brought an action to recover damages for an injury to his business occasioned by the erection of gas-works; the action was referred to arbitration; nearly two years elapsed before the award was made, in the course of which time alterations in the mode of carrying on the business complained of were effected; two months after the date of the award an injunction was applied for:—*Held*, that there had not been any such acquiescence as to deprive the plaintiff of his right to the injunction. *Imperial Gas-Light and Coke Co. v. Broadbent*, 7 H. L. Cas. 600. A gas company was incorporated by a statute, which was repealed by a subsequent one in all respects, except the incorporation of the company. The latter act, after giving the company various powers, enacted, "if the company shall at any time cause or suffer to be conveyed, or to flow into any stream, reservoir, aqueduct, pond, or place for water, within the limits of the act, or into any drain, sewer, or ditch communicating therewith, any washing substance or thing which shall be produced by making or supplying gas, or shall do any act to the water contained in any such stream, reservoir, aqueduct, pond, or place for water, whereby the water therein shall be fouled or corrupted, then the company shall forfeit for every such offence 200*l.*" The previous statute contained a similar provision, extending also to "wells." By sect. 161 of the subsequent act, "the penalty of 200*l.* shall be recovered, with full costs of suit, in any of the superior courts, by action of debt or on the case, by the person in whose water such washing substance or thing shall be conveyed, or shall flow, or whose water shall be fouled or corrupted thereby: Provided always, that the penalty shall not be recoverable unless the same be sued for within six months after the offence in respect of which such penalty shall have been incurred shall have ceased." And by sect. 162, "in addition to the penalty of 200*l.* (and whether such penalty shall have been recovered or not), the company shall forfeit 20*l.* (to be recovered in like manner, and with the like proviso, as to the time of suing for the same) for each day such washing substance or thing shall be conveyed, or shall flow as aforesaid, or the act by which such water aforesaid shall be fouled or corrupted, shall continue after the expiration of twenty-four hours from the time at which notice of the offence shall have been served on the company by the person into whose water such washing substance or thing shall be conveyed, or shall flow, or whose water shall be fouled or corrupted thereby; and such penalty shall be paid to such last-mentioned person." Sect. 163 contained a somewhat similar provision:—*Held*, first, that the fouling or corrupting water in a "well" came within the 160th section. *Hipkins v. Birmingham and Staffordshire Gaslight Co.* 5 H. & N. 74; 6 Jur. N. S. 173; 29 L. J. Ex. 169; 8 W. R. 182; 1 L. T. (N. S.) 303; affirmed in error, 30 L. J. Ex. 60:—*Held*, secondly, that in an action against the company under sect. 160, it was no defence to show that the mischief did not arise from the fault of the company, or from causes of which they had no knowledge, or from the acts of others over whom they had no control. (Id.) But, in the absence of any express statutory enactment, there is no precise duty imposed upon a gas company supplying gas to a dwelling-house to construct a stop-cock on the pipe outside the house, so that, upon receiving a notice no longer to supply the gas, the company may cut off the supply completely from the house. *Holding*, or *Holden, v. Liverpool Gas Co.* 3 C. B. 1; 10 Jur. 883; 15 L. J. C. P. 301. And when a gas company was incorporated by a statute for the purpose of supplying a town with gas, some years afterwards another company was formed, and registered under the Joint-Stock Company's Registration Act, for a like purpose, and commenced opening up the streets and highways to lay down their pipes, &c.; some of the inhabitants approving and some disapproving of the works. Upon an information and bill by the incorporated company, the court (*Knight Bruce, L. J., dissentiente*) refused an injunction to restrain the new company from continuing their works, the nuisance or damage being trivial. *Attorney-General v. Sheffield Gas Consumers' Co.* 17 Jur. 677; 22 L. J. Ch. 811. But the decision of *Wood, V. C.*, 2 Jur. N. S. 1132, granting a perpetual injunction restraining a gas company from manufacturing gas so as to injure the plaintiff's gardens, affirmed. *Broadbent v. Imperial Gas Co.* 3 Jur. N. S. 221; 26 L. J. Ch.

(D) *Laying down Pipes in Highways.*[1]

GAVELKIND.[2]

GAZETTE.[3]

REX v. HOLT, 5 T. R. 436.

Per Cur. That the *Gazette* is evidence of many acts of state is not doubted; that it is evidence of the king's proclamation seems not to be disputed in this case; and that it is evidence of a proclamation for the performance of quarantine cannot be doubted. In order to encounter this general proposition (a doctrine adopted at all times), cases have been put at the bar which have no reference to the state-grants by a king to a subject of a tract of land, or of presentations; but these are the evidence of private titles, and become parts of the private muniments of the families to whom they are granted. But they have no resemblance whatever to the acts which have been the subject of discussion in this case, acts done by and to the king in his general character; they

The *Gazette* is evidence of acts done by or to the king in his regal character; and is proof of articles of war purporting to be printed by the king's printer.[4]

276: *Cranworth, C., Crompton and Willes, JJ.*

[1] In a town there was a gas company, established by a local act, which incorporated the Gasworks Act, 1849. There were also commissioners under a local act, with powers to lay down mains and pipes for the public lighting of the town, but with no powers to supply or lay down pipes for the supply of private houses. The commissioners, who had formerly been supplied with gas by the old company, duly transferred their powers to the Longton Gas Company, who were a company, but without any parliamentary powers as a gas company. Upon an indictment against them for obstructing the public highway, by opening trenches, and laying down pipes, and conveying gas to the public lights and to private houses:—*Held*, that they were not indictable for the acts done for the public lighting of the town, those acts being authorised by the powers transferred to them by the commissioners; but that the taking up the pavement, and digging trenches, in one instance across the street, and in other instances across the footway of the street, in order to lay down service pipes to private houses from the mains, could not be justified as acts done in the exercise of the right of each householder to make such a slight temporary obstruction on the highway as may be necessarily incidental to the enjoyment of his property; and that therefore the company, having no parliamentary powers for the purpose, and a householder who authorised the acts, were indictable. *Reg. v. Longton Gas Co.* 8 Cox, C. C. 317; 6 Jur. N. S. 601; 29 L. J. M. C. 118, Q. B.

A municipal corporation was empowered by act of parliament to construct gasworks, and to supply gas, and sell and dispose of the coke, the surplus profits to go in reduction of the water rates, and otherwise towards the improvement of the town. In an action against the corporation, the declaration alleged that the corporation employed workmen to lay down pipes, who so negligently conducted themselves that a piece of metal was projected against the plaintiff. *Plea*, that the grievances were *bonâ fide* done by the corporation in the course of executing the powers conferred on them by their act, and without any neglect, misconduct, or default of the corporation, otherwise than by their workmen, or one of them, and that the workmen were all skilled, and qualified, and proper persons to be employed:—*Held*, by the Exchequer Chamber (affirming the judgment of the Exchequer, 1 H. & N. 59; 26 L. J. Ex. 132), that the plea was no answer to the action. *Scott v. Manchester (Mayor, &c.)*, 2 H. & N. 204; 3 Jur. N. S. 590; 26 L. J. Ex. 406.

[2] Is a tenure or custom annexed and belonging to lands in Kent, of which the court takes judicial notice (*Clements v. Scudamore*, 2 Ld. Raym. 1025), whereby the lands of the father are equally divided at his death amongst all his sons, or the land of the brother amongst all the brethren, if he have no issue of his own. Litt. 210; *see post*, Tenures: and *see* Robinson on Gavelkind, by Norwood, and *Consuetudines Kantiæ*, by Sandys.

All lands in Kent are presumed to be gavelkind, unless proved to be disgavelled (*Burridge v. Sussex*, 2 Ld. Raym. 1292), which is done by act of parliament. *Wiseman v. Colters*, 1 Sid. 138; 1 Lev. 80. Lands in Kent formerly belonging to one of the dissolved monasteries are the subject of gavelkind, but tithes are not (*Doe d. Lushington v. Landaff*, 2 N. R. 491), though rents are. *Randall v. Writtle*, 2 Lev. 87; 3 Keb. 216. The adverse possession of one of several coheirs in gavelkind is not the possession of the other. *Davenport v. Tyrell*, 1 Black. 675. A co-heir may distrain without consent of co-heir. *Leigh v. Shepherd*, 2 B. & B. 466.

Under the 8 & 9 Vic. c. 118, s. 47, the Inclosure Commissioners have power to confirm an exchange of gavelkind lands in Kent for common socage lands in Middlesex. *Minet v. Leman*, 7 De Gex, M. & G. 340; 1 Jur. N. S. 692; 24 L. J. Ch. 545.

[3] The state or official newspaper.

[4] And it has been held that a proclamation for the discovery of offenders may be proved by the *Gazette*, in order to show that such outrage had been committed. *Rex v. Sutton*, 4 M. & S. 546. *Attorney-General v. Theakstone*, 8 Price, 89. But the *Gazette* cannot be received to prove facts between individuals, as the appointment of an officer

are the addresses of different bodies of subjects going to offer their loyalty at the foot of the throne, and received by the king in his public capacity. They then become acts of state; and of such acts, announced to the public in the *Gazette*, it is admitted that the *Gazette* is evidence in the courts of justice.

GENERAL Average.

See Average, vol. ii. p. 70; *post*, Insurance.

Issue.[1]

See Particular Heads, and *post*, Pleading.

GIFT.[2]

See Donatio Causâ Mortis, *ante*, p. 128.

SMITH v. SMITH, 2 Stra. 955.

A gift by parol without some delivery does not pass the property.[3]

The intestate of the plaintiff lodged with the defendant, and had furniture and plate there. He was proved to have said, that what things he brought into these lodgings he never intended to take away, but to give them to the defendant's wife. In an action of trover for the goods which were there at the in-

in the army (*Kirwan v. Cockburn*, 5 Esp. 233. *R. v. Gardiner*, 2 Camp. 513), or dissolution of partnership, unless supported by other evidence. *Godfrey v. Turnbull*, 1 Esp. 371; *see* 2 Tayl. Ev. 1090.

And where a declaration alleged the division of a parish into several district parishes, by order of the king in council (under 58 Geo. 3, c. 45):—*Held*, that the allegation could not be proved by production of the *Gazette* containing a copy of such order. *Greenwood v. Woodham*, 2 M. & Rob. 363; and *see* Evidence, vol. iv. p. 339.

[1] Consists of an entry on paper of all the pleadings in the cause (demurrers included, whether they have been argued or not. *Ferguson v. D'Arcy Mahon*, 2 Jur. 829), ranged under their respective dates. Where there are also issues in law (*Vide* Demurrer) to be tried after the issues in fact, insert at the end of the pleadings, "including the demurrer and joinder." A suggestion that the jury shall assess the damages as well as try the issue. It is the plaintiff's duty to carry the cause to trial, and consequently to make up and deliver the issue, which he may do as soon as the pleadings are concluded, by issue having been joined on all the pleas.

[2] A gift of real estate is properly applied to the creations of an estate tail, as a feoffment is to that of an estate in fee; of personal estate, is a gratuitous transfer of such property from one person to another. 1 Pres. Shep. T. 227.

[3] To make such gift binding there must be delivery, or it must be by deed (*Ward v. Audland*, 16 Mee. & W. 862, 871. *Lunn v. Thornton*, 1 C. B. 379, 381. *Irons v. Smallpiece*, 2 B. & A. 551. *Hewlins v. Shippam*, 5 B. & C. 228; 2 Saund. 47, n. a. *Clay v. Willis*, 1 B. & C. 364; S. C. 2 D. & R. 539), even although the party to whom the gift is made have possession of the chattel at the time. *Shower v. Pilck*, 4 Ex. 478; 19 L. J. Ex. 113.

Where upon the death of a testator ten Austrian bonds were found, amongst other securities, in a box at his house, with the following indorsement:—"The first five numbers of these Austrian bonds belong to and are H. D.'s property;" signed by the testator. H. D. was the testator's housekeeper, and the key of the box was given into her custody:—*Held*, that as there had been no actual transfer or delivery of the bonds to H. D., they still remained part of the testator's assets. *Trimmer v. Danby*, 25 L. J. Ch. 424. And where letters written by a mortgagee to the mortgagor, and persons interested under him, containing the expressions, "I now give this gift, to become due at my death, unconnected with my will. I hereby request my executors to cancel the mortgage-deed, &c. I again direct and promise that my executors shall comply with my former request, that is, to cancel all deeds and papers I may have chargeable on the R. estate:"—*Held*, not to operate either as a declaration of trust or as a valid gift. *Scales v. Maude*, 6 De Gex, M. & G. 43; 1 Jur. N. S. 1147; 25 L. J. Ch. 133.

But where, on the 20th July, 1840, M., then *in extremis*, executed the ordinary bank power of attorney, and delivered it to her sister E., whereby the latter was empowered to transfer into her own name government stock standing in the name of M.; M. died on the 21st July, 1840, and on the 23d the transfer was made under the power:—*Held* (the evidence showing a clear intention on the part of M. to give the legal and beneficial interest in the stock to her sister), that the gift was valid and effectual in favour of E., as against the other next of kin of the donor. *Kiddill v. Farnell*, 3 Jur. N. S. 786; 26 L. J. Ch. 818. So where A., in 1852, signed a memorandum, in which he particularised some Russian bonds, and to whom he should give them. In 1853 he made his will, not noticing the bonds. In November following he signed another memorandum, to the same effect as the former, and at the same time delivered the bonds to B., and under a declaration verbally that he was to pay A. the interest for life, and hold the bonds for the persons named in the paper after his death:—*Held* (differing from the opinion of *Stuart, V. C.*), that there was a valid delivery and disposition of the bonds in favour of the parties named in the memorandum. *Langley v. Thomas*, 26 L. J. Ch. 609. And so where A. from time to time purchased debentures amounting altogether in value to between 2000*l.* and 3000*l.*, and deposited them with B., who

testate's death, it was held that a parol gift, without some delivery, would not alter the property, and such an act as that was necessary to establish a *donatio causâ mortis*. After this opinion, the question was, whether there was any delivery? To prove one, it was shown by the defendant that the intestate, when he went into the country, always left the keys of his room with the defendant; and that was contended to be such a mixed possession, that the law will adjudge the possession to be in him who has the right. It was held so, and verdict for defendant.

GLASS.[1]

GLEANING.[2]

GOLD and Silver Wares.

As to the stamping and duty on gold and silver wares, *see* 12 Geo. 2, c. 26; 30 Geo. 3, c. 31; 55 Geo. 3, c. 185; 9 Geo. 4, c. 49. And as to the exporting and importing thereof, *see* 52 Geo. 3, c. 59; 5 & 6 Vic. c. 47, ss. 59, 60; 5 & 6 Vic. c. 56, s. 6.

GOOD Behaviour. *See* Articles of the Peace, vol. i. p. 562.

GOODS Bargained and Sold. *See ante*, Frauds, Stat. of, p. 535; *post*, Goods Sold and Delivered, p. 606; Sale of Goods; Set-off; Stoppage in Transitu.

Atkinson v. Bell, 8 B. & C. 277; S. C. 2 M. & R. 292.

No action can be sustained as for goods bargained and sold, without showing a part acceptance or the assent of the defendant as the purchaser.[3]

K., a patentee, received orders for machines from the defendant, and employed the plaintiff to make them, which he did, and delivered them on K.'s premises; they were subsequently altered to a newer plan, and other machines intended by K. also for the defendant were, by K.'s direction, altered to correspond, and the whole, after being packed in boxes for the defendant, remained on the plaintiff's premises, and the defendant was subsequently required to take them, but refused so to do.

The court held, that although the goods were intended for the defendant, yet until his assent given, or even actual delivery, no property vested in him, and therefore the action for goods bargained and sold was not maintainable against

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lived with him as his wife. As they were purchased B. received the stockbroker's receipt. She cut off the coupons as they were wanted, and accompanied A. to receive the dividends. Before purchasing the debentures A. had promised them to B., and had said she must keep them; and subsequently he had frequently alluded to them as her property. A. bequeathed 3000*l.* to B. during her life and widowhood, and 3000*l.* for her daughter by him:—*Held*, that there was a good gift *inter vivas*. *Bland v. Macculloch*, 9 W. R. 65.

A gift of a specialty may be good although there is no legal transfer of the debt or property of which it is the security. *Barton v. Gaines*, 27 L. J. Ex. 390.

A gift by a father to his son under age, made absolutely, and accepted, cannot be reclaimed without the consent of the son. *Smith v. Smith*, 7 C. & P. 401.

A statement made by a party as to a gift is evidence as part of the *res gestæ*. *Hayslep v. Gymer*, 1 Ad. & E. 162. It is not necessary that there should be any formal delivery. It suffices if the donee take possession as owner in pursuance of the gift. *Winter v. Winter*, 4 L. T. (N. S.) 639.

[1] Under 6 Geo. 4, c. 117, s. 2, the lading out of glass can only take place at the termination of each particular journey or making. *Att.-Gen. v. Bell*, 2 Y. & J. 431.

Where there has been allowance for glass not new, the party will not be deprived of such allowance because the glass is afterwards mixed with other materials. *Attorney-General v. Bell*, 1 C. & J. 237.

[2] The right by law or custom of gleaning or leasing might formerly have been exercised under proper circumstances and restrictions (*Rex v. Price*, 4 Burr. 1925); but now trespass lies against any person who gleans, since no such right exists at common law. *Steel v. Houghton*, 1 H. Black. 51. *Worlledge v. Manning*, cited in 1 H. Black. 53; *see* Woolf, L. & T. 231; 4 T. R. 217; 4 Burr. 1926; 7 & 8 Geo. 4, c. 29.

[3] This count lies when the property has passed by sale to the purchaser, and the contract is complete in every particular, except delivery actual or implied (*Simmons v. Swift*, 5 B. & C. 857. *Boulter v. Arnott*, 1 C. & M. 333), but not if anything remains to be done except delivery. The declaration must then be special. The property must have legally passed, and the contract performed in all respects. *Elliot v. Pybus*, 10 Bing. 512; 4 M. & Scott, 387. *Scott v. England*, 2 D. & L. 520; 9 Jur. 87; 14 L. J. Q. B. 43. A. sold shipped goods to B., who

him by the plaintiff:—*Held*, also, that as the work and labour were bestowed on articles which had never become the property of the defendant, it could not be said to have been done for his benefit, to render him liable.

GOODS Sold and Delivered.

See *ante*, Goods Bargained and Sold; Sale of Goods; Set-off; Stoppage in Transitu.

BROOKE v. WHITE, 1 N. R. 330. S. P. SWANCOTT v. WESTGARTH, 4 East, 75. S. P. HANKEY v. SMITH, Peake, N. P. 58.

The price of goods sold and delivered, though under a special contract, where the agreement is to pay in money and the credit expired, may be recovered under the common *indebitatus* count.[1]

Assumpsit for goods sold and delivered. It appeared that the goods in question were originally sold at two months' credit, to be paid for by a bill at twelve months; that more than fourteen months had elapsed between the delivery of the goods and the commencement of the action, and that the goods had not been paid for.

Per Cur. When a person sells goods upon a certain credit, to be paid for by a bill at a certain date, he can maintain no action for goods sold until the expiration of the period at which such bill would become due, because the goods are not agreed to be paid for till that time: if the bill be not given, he may bring an action on the special contract, because he is deprived of the particular security agreed upon; but when the whole time is expired, and no bill has been given, why may he not bring an action for the money, which is then due?

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accepted the bill of lading, &c. During the voyage the goods were lost:—*Held*, that A. might sue B. for goods bargained and sold. *Alexander v. Gardner*, 1 Bing. N. S. 671.

Action for shares bargained and sold. *Plea*, *Non assumpsit*. The shares were knocked down to the defendant at an auction, by plaintiff. It was a condition of sale that the shares might be re-sold if the purchase-money was not paid on the following day, the bidder so making default being answerable for the loss on re-sale. On default the plaintiff re-sold the shares at a loss:—*Held*, that the sale was not absolute, and that this defence was admissible under *non assumpsit*. *Lamond v. Devall*, or *Devalle*, 9 Q. B. 1030; 11 Jur. 266; 16 L. J. Q. B. 136.

The form of the count for goods bargained and sold is as follows:—"Money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant."

[1] And so, even after a reasonable time, the price of goods sold on sale or return. *Benley v. Gouldsmith*, Peake, N. P. C. 56. *Moss v. Sweet*, 20 L. J. Q. B. 167. *Beverly v. Lincoln Gas Co.* 6 Ad. & E. 829. Or the price of goods fraudulently procured may be recovered under such a count. *Hill v. Perrott*, 3 Taunt. 274. *Strutt v. Smith*, 1 C., M. & R. 312. But if a party elects to sue for goods sold, he cannot maintain an action till the credit is expired, although he might have treated the sale as a nullity, on the ground of fraud. *Ferguson v. Carrington*, 9 B. & C. 59. So where the goods were to be paid for by bill, and the defendant has refused to give it, and the time during which it was to run has expired (*Webb v. Fairmaner*, 3 Mee. & W. 473. *Helps v. Winterbottam*, 2 B. & Adol. 434. *Paul v. Holmes*, 2 C. B. 850); or where, if given, it has been dishonoured. *Fry v. Hill*, 7 Taunt. 397.

But where a defendant, in payment of goods, accepted two bills drawn on him by the vendor, and returned them to him by post, the vendor in a letter, to which a receipt-stamp was affixed, acknowledged the receipt of the bills, and that they had been placed to the defendant's credit. He afterwards sent the same bills by post to the defendant in a letter, requesting him to accept the bills, payable at a banker's, and then to return them. The bills never were returned; the defendant denied having received them back, but there was other evidence that he had so received them. It was found, as a fact, that the vendor had not accepted the bills as payment:—*Held*, that he might recover the price of the goods without producing the bills. *Widders v. Gorton*, 1 C. B. (N. S.) 576; 26 L. J. C. P. 165.

Where the law implies a contract of sale, from the fact of the defendant having obtained possession of the plaintiff's goods, and refused to return them, the value is recoverable under this count (see *Hill v. Perrott*, 3 Taunt. 274. *Russell v. Bell*, 10 Mee. & W. 352); but not if the defendant had no notice that the goods were the plaintiff's, and had no option of returning them; as where the defendant had consumed them, supposing they belonged to a third party. *Boulton v. Jones*, 27 L. J. Ex. 117; 2 H. & N. 564. Where goods were consumed under a contract to pay for them at a valuation, which subsequently became impossible, the defendant was held liable to pay the value of the goods. *Clarke v. Westrope*, 25 L. J. C. P. 287; 18 C. B. 765. The defendant bought goods upon the following terms of payment: "Four-months bill on the 10th of the month following delivery, or 20*s.* for cash." After the delivery of the goods he paid part of the price in cash:—*Held*, that he had exercised his option of paying ready money, and therefore that the plaintiff might sue him for goods sold and delivered, without waiting for the expiration of four months. *Schneider v. Foster*, 2 H. & N. 4. Upon a contract of exchange of goods with a sum

GOODWILL.[1]

GRACE, Days of. *See* Bills and Notes, vol. ii. p. 400.

GRAMMAR-School. *See post*, School.

GRAND Jury. *See post*, Jury.

GRANT. *See* Custom, vol. iii. p. 532; Deeds, *ante*, p. 1; Easement, *ante*, p. 149; *post*, Prescription; Way.

(A) *What is*, p. 608.
(B) *Form of*, p. 608.
(C) *Livery of Seisin on*, p. 608.

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payable for equality of exchange, this count will lie to recover the money, after the exchange has been effected (*Sheldon v. Cox*, 3 B. & C. 420); but not for the value of goods delivered by one party under a mere contract of exchange not performed by the other. *Harrison v. Luke*, 14 Mee. & W. 139. A vendor who receives a specific order, by sending more than ordered, cannot recover the excess in price of what was ordered. *Levy v. Green*, 28 L. J. Q. B. 319.

The form of count for goods sold and delivered is as follows: — "Money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant."

[1] The goodwill of a business means the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It is distinct from the profits of the business, although in determining its value the profits are taken into account, and it is usually estimated at so many years' purchase. *Austen v. Boys*, 4 Jur. N. S. 719; 27 L. J. Ch. 714. *Churton v. Douglas*, 1 Johnson, 174; 5 Jur. N. S. 887; 28 L. J. Ch. 841; 7 W. R. 365. It is recognised at law as an existing valuable interest. *Ex-parte Farlow*, 2 B. & Adol. 341. *R. v. Hungerford Market Co.* 4 id. 592, 596. And by the conveyance of a shop the goodwill passes, although not specifically mentioned. *Chassun v. Dewes*, 5 Russ. 29. *England v. Downs*, 6 Beav. 269. And a sale of stock and goodwill for 60*l.* requires a stamp, not being a mere sale of goods. *South v. Finch*, 3 Bing. N. C. 506. It has also been often recognised by the courts of equity. *Morris v. Moss*, 25 L. J. Ch. 194. Therefore, when property to which it attaches is sold under their decrees, they will direct that steps be taken to impress the purchaser with a just notion of its value. *Cooke v. Collingridge*, Jac. 607. The goodwill of a business carried on by a wife before marriage, and afterwards by the husband and wife, survives to her. She may dispose of it, and receive the purchase-money for her own benefit, even though it is carried on upon leasehold premises, forming a part of the estate of the testator which were disposed of by his will. *Morris v. Moss, supra.* And the estate of a deceased partner is entitled to participate in the goodwill of a business which does not belong to the surviving partners, except by express agreement. *Wedderburn v. Wedderburn*, 22 Beav. 84; 2 Jur. N. S. 674; 25 L. J. Chan. 710. The goodwill in a partnership business does not on the death of one partner survive beneficially to the others; when it has any value, a due proportion belongs to the estate of the deceased partner, but the surviving partner has still the right to carry on the same business and at the same place. *Smith v. Everett*, 27 Beav. 446; 29 L. J. Ch. 236. But the claim of a retiring partner to a share in the value of the goodwill of a business was disallowed. *Hall v. Hall*, 20 Beav. 139.

Where, however, the profits of the business result almost entirely from confidence placed in the personal skill of the party employed, as in the case of surgeons, the goodwill is often of little value. *Farr v. Pearce*, 3 Madd. 78. *Spicer v. James*, Rolls, M. T. 1830: reported Coll. on Partn. 82. *Bozon v. Farlow*, 1 Mer. 459. *Whitaker v. Hone*, 3 Beav. 390. *Austin v. Bays*, 2 De Gex & J. 626; 4 Jur. N. S. 715; 27 L. J. Ch. 714. And the goodwill of a tobacco-broker, whose brother had been actively engaged in the business, and survived him, and continued the business, was held to be valueless. *Davies v. Hodgson*, 25 Beav. 177.

The sale of a goodwill in the absence of any express stipulation, does not preclude the seller from setting up the same kind of business again in the same neighbourhood, if he do not describe himself as setting up the identical business that has been purchased. *Rannie v. Tivine*, 7 Man. & G. 969. *Farr v. Pearce*, 3 Mad. 74. *Crutwell v. Lye*, 1 Rose, 123. *Churton v. Douglas*, 1 Johnson, 174; 28 L. J. Ch. 841. And there is no equity to prevent a surviving partner or clerk who is appointed executor from continuing the same trade; and a purchaser of the testator's goodwill must take, subject to the chance of obtaining the customers of the old establishment. *Davies v. Hodgson*, 25 Beav. 177. It is however usual, on the sale of a goodwill, for the vendor to undertake not to carry on the same business within prescribed limits. *See post*, Trade, and *Mallan v. May*, 11 Mee. & W. 653. *Rawlinson v. Clark*, 14 id. 187. *Green v. Price*, 16 id. 346. *Galsworthy v. Street*, 1 Ex. 659. *Reynolds v. Bridge*, 26 L. J. Q. B. 12. *Mercer v. Irving*, 27 id. 291. *Hitchcock v. Coker*, 6 Ad. & E. 438. *Archer v. Marsh*, id. 959. *Turner v. Evans*, 2 E. & Bl. 512; 22 L. J. Q. B. 412.

(D) *What may be Conveyed by*, p. 608.
(E) *Operation of*, p. 608.
(F) *Incidents and implied Conditions of*, p. 608.
(G) *Presumption of*, p. 609.
(H) *Construction of*, p. 609.
(I) *What passes by*, p. 609.
(J) *Grant from the Crown*, p. 610.
(K) „ *a Private Person.* *See* Deeds, *ante*, p. 1.

(A) *What is.*[1]
(B) *Form of.*

HEWLINS v. SHIPPAM, 5 B. & C. 221.

The grant of an easement in land must be by deed.[2]

In an action for stopping up a drain leading from plaintiff's premises through the defendant's yard, the declaration claiming the right under a license by parol, granted to the plaintiff's landlords, "their heirs and assigns," to make the drain across the defendant's premises,—

The court held, that the right claimed by the declaration being a freehold right, and, even if considered as an easement only, and not an interest in the land, that it could not be created without deed, the plaintiff was properly non-suited.

(C) *Livery of Seisin on.*[3]
(D) *What may be Conveyed by.*[4]
(E) *Operation of.*[5]
(F) *Incidents and implied Conditions of.*[6] *See* also Easement, *ante*, p. 152.

[1] A grant is a conveyance so far similar to a feoffment, that the operative words of it are *dedi et concessi*—given and granted; and as a feoffment was the regular mode of conveying corporeal hereditaments, so a grant is the proper mode of transferring incorporeal ones. It has also been taken generally for every gift and grant of anything whatsoever. 1 Inst. 172; 3 Rep. 63.

[2] To make a grant, the particular word "grant" need not be used; any other showing the intention suffices. *Shove v. Pincke*, 5 T. R. 124. Thus, where A. entered into an article with B., by which he granted and agreed that, in consideration of a certain rent, B. should have a way for himself and his heirs over certain lands; this was held to be a good grant of a right of way, not merely a covenant for enjoyment. Although a feoffment might formerly have been made by parol only, yet a grant in general could not be made without deed; because, as the possession of those things which are the subject-matter of a grant could not be transferred by livery, there could be no other evidence of a grant but the deed. *See* Easement, *ante*, p. 149.

[3] Livery of seisin after twenty years will be presumed. *Rees d. Chamberlain v. Lloyd*, Wightw. 123. *See* Easement, *ante*, p. 154.

As the objects of a grant are not capable of corporeal delivery, it follows that livery of seisin cannot be given upon a grant; but still it has always been held, that a grant accompanied with the attornment of the tenant was as effectual as a feoffment with livery of seisin, and now the necessity of an attornment is taken away by the 4 & 5 Anne, c. 16. *See* Attornment, vol. i. p. 63.

[4] A person cannot grant or change that which he has not at the time of the grant, though he acquire it afterwards. But manors, advowsons, rents, and all other incorporeal hereditaments, may be conveyed by grant, though a bare right or possibility cannot be granted. Estates in remainder or reversion, consisting in a vested right, may also be conveyed by grant.

[5] The operation of a grant, by which anything already in existence is conveyed, is materially different from that of a feoffment, for a feoffment operates immediately on the possession, without any regard to the estate or interest of the feoffee; whereas a grant only operates on the estate or interest of the grantor, and will pass no more than what he is by law enabled to convey. A grant cannot in any case create a discontinuance or a forfeiture. 1 Inst. 251, b.

[6] A conveyance of land to a railway company for the purpose of the line, gives a right by implication to all reasonable subjacent and adjacent support connected with the subject-matter of the conveyance; and therefore, although in the conveyance to the railway company the minerals are reserved, the grantor is not entitled to work them, even under his own land, in any manner calculated to endanger the railway. *Cale-*

(G) *Presumption of.*[1]

(H) *Construction of.*[2]

(I) *What passes by.*

DOE D. PELL v. JEYES, 1 B. & Adol. 593.

Where the terms of a grant are general, a re-

A party, entitled under a settlement to an estate at W. for his life, remainder, with a reversion in fee, after certain limitations, to his wife and eldest son for life, his son's wife and their children, by deed expressing his intention of advancing his two sons, granted the estate at W., and all other messuages,

donian Railway Co. v. Sprot, 2 Macq. H. L. Cas. 449; 2 Jur. N. S. 623, S. P. *Caledonian Railway Co. v. Belhaven (Lord)*, 3 Macq. H. L. Cas. 56; 3 Jur. N. S. 573. If an owner of a house conveys the upper story, reserving all below, the purchaser will be entitled, on the same general doctrine, without stipulation, to prevent any damage to the walls underneath. (Id.) But if I grant a meadow to A. for grazing purposes, retaining the minerals and the adjacent land; and if A., having no warranty against subsidence, thinks fit to build a house on the edge of a meadow, and the house falls, he is without remedy against me, and has himself alone to blame for the consequences. (Id.) If, however, the grant were made expressly for building purposes, there would then be an implied warranty of support both subjacent and adjacent. (Id.) *Bilboy v. Carter*, 28 L. J. Ex. 182. *Solomon v. Vintners' Co.* id. 370.

In the case of a grant to a railway company for the purposes of the railway, if the line which divides the land retained traverses a quarry, it may be that no adjacent support is necessary, and that the grantor may dig or remove the whole contiguous soil. (Id.) But if the dividing line traverse a bog or bed of sand, it will be incumbent on the grantor to leave untouched such an intervening measure of lateral support as will prevent any part of the land granted from retreating. (Id.)

At common law, where A. has two interests in the same hereditament, as houses or minerals, or a watercourse and also a mill, or two stories in a house, and demises one part, *e. g.* the lower portion of a house, reserving to himself the upper part, the grantee either for years or in fee will not, except by express stipulation or very direct implication, be permitted to use the portion held by him, so as to interfere with the enjoyment by the grantor of the portion of which he has retained possession. *Dugdale v. Robertson*, 3 Jur. N. S. 687.

A clause in a lease of land from the plaintiff to the defendant, reserved to the plaintiff power to enter upon the demised land, and to dig and make a covered sewer or watercourse through it, in order to convey the waste water from the premises of the plaintiff to a river. In pursuance of this power the plaintiff did make a covered sewer across the demised land, after which the defendant made a drain from his own premises into the plaintiff's sewer, and through an opening which he made in it sent in water from his own premises: — *Held*, in an action by the plaintiff, that he was entitled to recover, as by the grant he had a right to the exclusive use of the sewer which he had made under the power reserved to him. *Lee v. Stevenson*, 4 Jur. N. S. 950; 27 L. J. Q. B. 263. *See* also Easement, vol. iv. p. 152; and *White v. Bass*, 31 L. J. Ex. 283. Such rights may cease with the secession of the purpose for which it was granted. 28 L. J. Ex. 185.

[1] A right founded upon length of enjoyment originates in a grant which is presumed from the owner; but the presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant. *Chasemore v. Richards*, 5 Jur. N. S. 873; 7 W. R. 685, H. L. The mere non-user by one tenant in common of that which belongs to both him and his co-tenant in common, cannot raise the presumption of a grant. *Beauman v. Kinsella*, 8 Ir. Com.-Law Rep. 291, Q. B.

[2] In construing grants, the words used must be taken in the sense which the common usage of mankind has applied to them, as well in reference to the context in which they are found as the circumstances in which they are used. *Lord v. Sydney City Commissioners*, 12 Moore, P. C. C. 473. This rule of construction equally applies, whether the subject-matter is a grant from the Crown or a subject. (Id.) The principle that a grantor, knowing the purpose for which his conveyance is accepted, cannot derogate from his own grant, applies a compulsory conveyance, under an act of parliament, to a company. *North-Eastern Railway Co. v. Elliott*, 6 Jur. N. S. 817; 29 L. J. Ch. 808; 8 W. R. 603. The act is sufficient notice to the grantor of the purposes for which the conveyance is made. (Id.) The principle that a grantor cannot derogate from his own grant (Gale on Easements, 50) does not apply to an accidental state of circumstances — the flooded state of a mine, for instance — existing at the time of the conveyance. (Id.) *See* Deed, *ante*, p. 23; and 2 Pres. Shep. T. 205; Smith, R. & P. P. 532. If owner of two houses sells one, the purchaser is entitled to, and subject to, all drains existing at the time of the conveyance (*Pyer v. Carter*, 27 L. J. Ex. 258), but such implication only applies to appa-

versionary interest will pass.[1]

lands, &c.,' at W. and elsewhere, and the reversion, &c., and all his estate and interest whatever, to the use that he should receive thereout an annuity of £ —— for his life, and that after his decease his eldest son should receive thereout an annuity of £ —— for his life, and subject to the said annuities, to the use of his youngest son in fee; and by the same deed, in consideration of the youngest son covenanting to pay £ —— to his elder brother within three months after his, the settlor's, death, he also assigned all his goods, &c., to his younger son, absolutely. The elder son and his wife survived, but died before the action commenced, never having had any issue.

The Court held, that the terms of the grant being general, and there being nothing to exclude the reversionary estate from their general operation, it passed by the deed.

(J) *Grant from the Crown.*[2]

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rent and continuous easements. *Glove v. Harding*, 27 L. J. Ex. 286; and *Frewin v. Phillips*, 30 L. J. C. P. 356.

[1] But a grant of an office to a person disqualified by interest from holding it is void. *Arkwright v. Coutrell*, 7 Ad. & E. 565.

Charles I. as lord of the manor of E., by letters patent, dated in 1636, granted to B. and K., in fee, all those coals and coal-mines found or to be found within the commons, waste lands, or marish grounds within the lordship of E., with full power and authority to dig and search for and sink pits, and open the mines in all places convenient within the commons, waste grounds, and marishes, for getting of coal within the lordship:—*Held*, that on the true construction of the letters patent, the coals under the foreshore or land between high and low-water marks, called the "White Sands," passed to the grantee. *Attorney-General v. Hanmer*, 4 Jur. N. S. 751; 27 L. J. Ch. 837. The word "waste" is a sufficient description of the soil between high and low-water marks. (Id.)

By lease dated 1827, D. demised to W. a dwelling-house and fifteen closes of land, and granted all streams of water that might be found in four of those closes, called "The Clough," "The Moorin Clough," "The Brow," and "The Masleds," excepting out of the demise all "timber and other trees, mines and minerals, stone, gravel, sand and clay, and all streams of water, except those above granted, then being or thereafter to be found in or upon the premises demised, with power for D., his heirs and assigns, and his and their servants and workmen, from time to time to enter upon the premises, and to crop, fall, search for, and make marketable, all or any of the before-mentioned articles, to make any clay into bricks or tiles on the premises, and to direct or alter the course of any river, brook, spring, or water." There was a plan annexed to the lease, showing a stream of water on the north side of the premises, and flowing through their whole extent from west to east. "The Clough," "The Moorin Clough," "The Brow," and "The Masleds," were situate on the banks of this stream. There was no other stream on the surface, but certain wells were in existence in these closes, and others were subsequently found:—*Held*, that the wells and all water in "The Clough," "The Moorin Clough," "The Brow," and "The Masleds," passed by the grant to W., and that neither D. nor his lessees could work the mines so as to cut off the springs in the closes in question. *Whitehead v. Parks*, 2 H. & N. 870; 27 L. J. Ex. 169.

[2] The grant by King Edward III. in 1377, to his son, John of Gaunt, duke of Lancaster, of a county palatine within his duchy of Lancaster, "*et quæcumque alia libertates et jura regalia ad comitem palatinum pertinentia, adeo integrè et liberè sicut comes Cestriæ dignoscitur obtinere,*" carried the right to *bona vacantia* as a *jus regale* to the county palatine; and the queen, being entitled to the duchy of Lancaster separate from the crown of England, is entitled to the goods of intestates dying without next of kin, as *jura regalia* in right of the duchy. *Dyke v. Walford*, 5 Moo. P. C. C. 434; 12 Jur. 839. The court would presume the enjoyment of the right to *bona vacantia* by the Earl of Chester, unless some evidence were offered to the contrary. (Id.)

Grants from the Crown may be avoided upon three grounds:—First, where the Crown professes to give a greater estate than it possessed in the subject-matter of the grant; secondly, where the same estate, or part of the same estate, has already been granted to another; thirdly, where the Crown has been deceived in the consideration expressed in the grant. *Gledstanes v. Sandwich* (*Earl*), 5 Man. & G. 995; 5 Scott, N. R. 689; 12 L. J. C. P. 41.

King Charles I. by letters patent, granted certain mills, subject to a fee-farm rent, with a proviso that if the mills should at any time thereafter be in decay, his majesty and his successors should have a right of re-entry. Subsequently, under 22 Car. 2, c. 6, the fee-farm rent was sold. It did not appear that the right of re-entry had ever been specially granted or released:—*Held*, that having regard to the sale of the fee-farm rent, no right of re-entry capable of being enforced remained in the Crown; and that such right did not pass to the purchaser of the rent. *Flower v. Hartopp*, 6 Beav. 476; 7 Jur. 613; 12 L. J. Ch. 507.

The office of chamberlain and collector of revenues payable to the Crown out of Ettrick

GRATUITOUS Promise.[1]

GROUND-Landlord. *See post*, Landlord and Tenant.

GROUSE. *See* Game, *ante*, p. 571.

GROWING Crops. *See* Distress, *ante*, p. 101; Fieri Facias, *ante*, p. 455.

GUARANTEE. *See ante*, Frauds, Statute of, p. 535; *post*, Indemnity; Surety.

I. Nature and Form of, p. 612.

II. Parties to, p. 612.

III. Consideration for, p. 613.

(A) *Need not be in Writing*, p. 613.

(B) *What sufficient*, p. 614.

IV. Operation of the Statute of Frauds on, p. 614.

(A) *The Promise must be Collateral*, p. 614.

(B) „ *Statute does not apply where Promiser is originally Liable*, p. 614.

Forest was granted by Geo. IV. to Lord D., for his life, with a salary, as well in consideration of the office as out of royal bounty and favour, to be paid out of the monies of the collection, and if they should be insufficient, out of the Crown revenues of other lands in Scotland. The salary exceeded the monies collected, and was paid out of them and the other Crown revenues for several years after the demise of Geo. IV.:—*Held*, that the grant, under disguise of a grant of an office, was in reality a grant of a pension to endure beyond the life of the royal grantor, and was so far an illegal alienation of the Crown property. *Advocate (Lord) v. Dunglass (Lord)*, 9 Clark & Fin. 173. Henry VIII. being seised of lands in fee, in right of his Crown, granted them by letters patent in tail male to W., reserving rent to himself, and his heirs and successors. After the passing of the 22 Car. 2, c. 6, and 22 & 23 Car. 2, c. 24, Charles II. by letters patent referring to and professing to pursue the former statute, granted the rent to trustees named in sect. 2 of the 22 & 23 Car. 2, c. 24, their heirs and assigns, and the trustees granted the rent to a dean and chapter and their successors for ever:—*Held*, in Q. B. and by the Exchequer Chamber on error, that the grant to the trustees was not authorised by either statute, the rent being reserved upon an estate whereof the reversion was in the Crown, and therefore being within the exception in sect. 3 of the 22 Car. 2, c. 6. *Vigers v. St. Paul's (Dean)*, 14 Q. B. 909; 14 Jur. 1017; 19 L. J. Q. B. 84:—*Held*, in Q. B. and *semble* by the Exchequer Chamber, that on demurrer to an avowry for a distress on the land by the dean and chapter, stating the conveyances as above, but not setting out the recitals or the terms of the grants, it was to be taken that the truth appeared on the face of the grant of the rent to the trustees, and therefore that the Crown did not appear to be deceived (as not having power to grant the rent in fee-simple), nor was the grant void on that account, but that it operated, not as a grant in fee-simple, but of a rent determinable on the failure of the estate tail; and further, that there was no ground for the objection, that a subject might have a right to distrain on the Crown when the reversion fell in, although the avowry alleged that the trustees became seised in fee of the rent. Also, that the grant in effect, by severing the rent from the reversion, converted it from a rent-service to a rent-seck, which, if paid for three years of the space mentioned in the 4 Geo. 2, c. 28, s. 5, might be distrained for. (Id.)

Although the king can never be put out of possession, in point of law, by the wrongful entry of a subject, yet there may be an adverse possession in fact, against the Crown; therefore, after such an adverse possession by a subject for twenty years, the Crown could only recover the land by an information of intrusion; consequently, ejectment would not lie at the suit of the grantee of the Crown, notwithstanding the rights of the Crown are not barred by the Statute of Limitations. *Doe d. Wall*, or *Watt, v. Morris*, 2 Scott, 276.

[1] Where a promise is merely gratuitous it is not binding in law. *Parker v. Baylis*, 2 B. & P. 73. Thus, if the master of a ship promise his crew an addition to their fixed wages, as an incitement to extraordinary exertions in case of any emergency on the voyage, it is *nudum pactum*, as it was already legally incumbent upon them to use such exertions. *Clutterbuck v. Coffin*, 4 Scott, N. R. 509. *Harris v. Watson*, Peake, R. 72. *Newman v. Walters*, 3 B. & P. 612.

(C) *Promise must be made to the Person to whom the original Debtor is Liable*, p. 615.

(D) *When Promise made on New Consideration*, p. 615.

V. Stamp on, p. 615.

VI. Guarantor, how Discharged. *See post*, Indemnity; Surety.

VII. „ Rights of. *See* Id.

VIII. „ Extent of Liability. *See* Id.

IX. Continuing Guarantee, p. 615.

I. Nature and Form of.[1]

A guarantee must be in writing.[2]

By 29 Car. 2, no action shall be brought whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. 29 Car. 2, c. 3, s. 4.

II. Parties to.[3]

No guarantee given by or to a firm to be binding after change in,

By 19 & 20 Vic. c. 97, s. 4, "no promise to answer for the debt, default, or miscarriage of another, made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons,

Stilk v. Myrick, 2 Camp. 317. *Herring v. Dorell*, 8 Dowl. 604. *Jackson v. Cobbin*, 8 Mee. & W. 790, 797. Add. Cont. 12, 4 ed. So a promise by a creditor to accept less than the full amount of his claim, or to give time, unless there be some new consideration, is void. *Philpot v. Briant*, 4 Bing. 717. *See* also Consideration, vol. iii. p. 177; Contracts, id. p. 193. Where amount of remuneration is to be left to employer no action is sustainable. *Roberts v. Smith*, 28 L. J. Ex. 164; *see* 1 M. & S. 290; 1 H. & N. 305; 26 L. J. Ex. 81; *ante*, Gift, p. 604: but see *Jewry v. Bush*, 5 Taunt. 304, where it was held a promise to make a handsome present entitled plaintiff to recompense.

[1] A guarantee is a contract to be answerable for the payment of some debt or performance of some other act by another person, who is in the first instance liable to the payment or performance. At common law no particular form is essential to the validity of such engagement, and it requires no written contract. But the consideration of a contract of guarantee is an incident necessary to its validity at common law, and must, as in other cases, be either a matter of advantage to the party promising, or detriment to the other party, or both, brought about in consequence of the previous request, express or implied, of the promisee; or, in other words, any damage, or any suspension of right, or any possibility of loss occasioned to one party by the promise of another, is a sufficient consideration for such promise, and will make it binding, though no actual benefit accrues to the party promising. *Morley v. Boothby*, 3 Bing, 113. *See* Burge on Suretyship; Theobald on Principal and Surety.

[2] As this statute speaks only of special promise and agreement, a bond, or other contract under seal, or of record, is not within the act; and a verbal guarantee, made in a foreign country, if binding there, may be enforced in this country (*Le Roux v. Brown*, 22 L. J. C. P. 1; 12 C. B. 801); and it is to be observed, that the statute only prevents an action being brought upon the guarantee, and a verbal guarantee is so far good that if money be paid upon it it cannot be recovered back. *Shaw v. Woodcock*, 7 B. & C. 73. And by paying money into court on a count upon a guarantee, proof of a written instrument is dispensed with. *Middleton v. Brewer*, Peake, 15. *See* also *Rondeau v. Wyatt*, 2 H. Black. 63.

The name of the party to whom the guarantee is given must appear and form part of the instrument. *Williams v. Lake*, 29 L. J. Q. B. 1. An indemnity for an accommodation acceptance creates an original liability. *Batson v. King*, 28 L. J. Ex. 327.

[3] *Dry v. Davey*, 10 Ad. & E. 30. The guarantee should state to whom the credit was to be given. *Champion v. Plummer*, 1 N. R. 252. The defendant wrote the following: — "I beg to inform you that I shall see you paid to the sum of 800*l.* for the ensuing building, which you undertake to build for Messrs. Thomas & Owens, of Cap. Cock. (Signed), Thomas Lake." He intended that it should be given to Thomas Jones, who had contracted to build some houses for Thomas & Owens; but the contract having fallen to the ground, Thomas & Owens afterwards agreed with the plaintiff to build for them, and Owens handed to him the gua-

or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding, notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise." unless specially provided for.[1]

III. Consideration for.

(A) *Need not be in Writing.*

By the Mercantile Law Amendment Act, 1856, 19 & 20 Vic. c. 97, s. 3, "no special promise to be made by any person after the passing of this act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." Consideration for need not be in writing.[2]

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rantee of the defendant, although he had no authority from the defendant to do so:—*Held*, in an action upon the guarantee, that inasmuch as the name of the plaintiff did not in any way appear upon it, there was no sufficient agreement or memorandum, or note of agreement, within the 4th section of the Statute of Frauds, and therefore that the plaintiff could not recover. *Williams v. Lake*, 29 L. J. Q. B. 1; 1 L. T. (N. S.) 56. *See ante*, Frauds, Statute of.

[1] A guarantee was addressed in the alternative "To Messrs. A. & Co., or the person or persons for the time being carrying on the business" of that firm:—*Held*, no objection, no change in the firm having in fact taken place; or that if there were any variance, such variance would be amendable under the 3 & 4 Wm. 4, c. 42, s. 23. *Boyd v. Moyle*, 2 C. B. 644. A declaration by A. against B. upon a guarantee, stated that, in consideration of advances already made by A., and that A. would from time to time make advances to C., B. promised to repay A. the last-mentioned advances. The consideration on the face of the guarantee was in consideration of advances made and to be made by A., or by any other person of whom A.'s firm might from time to time consist:—*Held*, a variance. *Chapman v. Sutton*, 2 C. B. 634; 15 L. J. C. P. 166. A guarantee was given in these terms:—"In consideration of advances made and to be made by A. and B., or by any other persons of whom their firm may from time to time consist, in the way of loan, we jointly and severally hereby guarantee to A. and B. the repayment of the advances, and to indemnify them against any loss by reason of such advances, our liability not to exceed 1000*l.*; this guarantee to be a continuing guarantee, and to be a security to A. and B. to the extent of 1000*l.*, for the whole of any balance which may from time to time, or at any time, become due to A. and B., or to the persons for the time being constituting the firm:—*Held*, that this instrument disclosed a sufficient consideration for the defendants' promise, though there had been no change in the firm. (Id.) Under a guarantee given to a banking-house, consisting of several partners, for the repayment of such bills, drawn upon them by one of their customers, as the bank might honour, and any advances they might make to the same customer, within a certain time:—*Held*, that the guarantee ceased upon the death of one of the partners in the bank before the expiration of the time to which the guarantee was expressed to extend. *Holland v. Teed*, 7 Hare, 50. That bills accepted before the death of the partner, and payable afterwards, were within the guarantee; that the amount guaranteed could not be increased by any act of the continuing firm and the customer after the death of the partner, although such amount might be diminished by such act; that, in the particular form of the guarantee, the amount guaranteed in respect of the bills honoured by the bank was not to be reduced by the amount of a balance owing from the bank to the customer when the guarantee ceased, such balance having been afterwards paid in the course of business between the continuing firm and the customer. (Id.)

[2] A party signed a document in the following terms:—"According to Mr. H.'s request, the land at B., under Mr. E., I will be bound for till next Lady-Day: rent, 48*l.*;" and having paid the rent under it, he sought to recover back the amount, as money paid to the use of the tenant of the land:—*Held*, that the document required a stamp under the 55 Geo. 3, c. 184, sch. 1, tit. Agreement, and that the 19 & 20 Vic. c. 97, s. 3, made no difference in this respect. *Glover v. Hackett*, 2 H. & N. 487; 3 Jur. N. S. 1083; 26 L. J. Ex. 416. Since the 19 & 20 Vic. c. 19, s. 3, though parol evidence may supply the consideration for a gua-

(B) *What sufficient.*[1]

IV. Operation of the Statute of Frauds on.

(A) *The Promise must be Collateral.*[2]

(B) „ *Statute does not apply where Promiser is originally Liable.*[3]

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rantee, it cannot be admitted to explain the promise. *Holmes v. Mitchell*, 7 C. B. (N. S.) 361.

[1] Although the consideration need not, as we have seen, be in writing, the guarantee must, nevertheless, be founded on a legal consideration, which may shortly be defined as being some legal benefit to the promiser, or detriment to the promisee. And *see* Consideration, vol. iii. p. 177; Contracts, id. p. 193. The consideration for a guarantee must be of *some* value in contemplation of law; but the courts will not inquire into its adequacy. *Edwards v. Baugh*, 11 Mee. & W. 641. *Semple v. Pink*, 1 Ex. 74. *Brooks v. Haigh*, 10 Ad. & E. 323. *Boyd v. Moyle*, *ante*, p. 613. *Westhead v. Sproson*, 30 L. J. Ex. 265. *Price v. Richardson*, 15 id. 345; 15 Mee. & W. 539.

[2] In order that a contract may fall within the terms of the Statute of Frauds, for which *see ante*, p. 612, it is essential that it should be for the payment or performance of some thing for which another person is liable. *Read v. Nash*, 1 Wils. 305. Thus, if the person for whose use goods are furnished upon the defendant's guarantee be liable to the vendor, the defendant's engagement, though it may have been the chief inducement to the plaintiff to supply the goods, is collateral, and must be reduced into writing. *Simpson v. Penton*, 2 C. & M. 430, 433. So, where A., in consideration that B. would not sue J. S., promised to pay the money due from J. S., this was held to be within the statute (*Rolling v. Currie*, Bull. N. P. 281); for J. S. was liable to pay the debt both before and after the promise of A., which therefore was to "answer for the debt" of J. S. But it is otherwise where there is no debt to which a third party is liable; as where the defendant, in consideration that the plaintiff would discharge out of custody a person whom he had taken on a *ca. sa.*, promised to pay the debt on a certain day or render that person. The court held the promise not to be within the statute, because the debt was gone by the discharge of the debtor out of custody. *Goodman v. Chase*, 1 B. & A. 297. *Butcher v. Stewart*, 11 Mee. & W. 857. So, if a third party be not by law liable for the demand, as in the case of goods, not being necessaries, furnished to an infant, the defendant's promise cannot be considered as collateral, and consequently need not be in writing. *Harris v. Huntbach*, 1 Burr. 373. *Duncomb v. Tickridge*, Aleyn. 394; 3 Bac. Abr., Gwill. ed. And in a word, the question by which it must be tested whether a contract be or be not within the statute is, Is the promise one to answer for the debt, default, or miscarriage of another, for which that other remains liable? If so, it must be in writing. 1 Wms. Saund. 211. *Bushell v. Beavan*, 1 Bing. N. C. 103. If the credit was originally given to the party sued as guarantor, he would be liable as a principal, and the contract would not fall within the statute. And as to the question as to whom in the particular instance credit was originally given, must be decided by a jury from a consideration of all the circumstances of the case (*Taylor v. Hilary*, 1 C., M. & R. 741. *Keate v. Temple*, 1 B. & P. 158. *Darnall v. Tratt*, 2 C. & P. 82. *Storr v. Scott*, 6 id. 241. *Simpson v. Penton*, 2 C. & M. 430; 4 Tyr. 315. *Andrews v. Smith*, 2 C., M. & R. 627); and for additional cases in which the promise has been held to be collateral, and therefore within the statute, see *Gull v. Lindsay*, 4 Ex. 45; 18 L. J. Ex. 355. *Brunton v. Dullens*, 1 F. & F. 450. *Ruins v. Storry*, 3 C. & P. 130. *Barber v. Fox*, 1 Stark. 270. *Tomlinson v. Gill*, 6 Ad. & E. 564. The statute applies to engagements to answer for damages recovered or recoverable against another, as well as to a contract to be answerable for a debt of another. If the person to whose use goods are delivered is liable at all, any promise by a third person, whether made before or after such delivery, to pay such debt for valuable consideration, must be in writing. *Matson v. Wharam*, 2 T. R. 80. *Anderson v. Hayman*, 1 H. Black. 120. *Birkmyr v. Darnell*, 1 Salk. 27. *See* 28 L. J. Ex. 327; 29 id. Q. B. 1.

[3] The statute does not apply if the defendant were himself, either alone or jointly with others, originally liable for the demand which forms the subject of his subsequent promise. Thus, if the credit was given entirely to the defendant, and it was agreed that he alone should be responsible, then, although the goods were delivered to or for the use of another person, the statute does not apply, and the defendant is liable on his parol agreement, under the common count for goods sold. *Macrory v. Scott*, 5 Ex. 907, 914. *Croft v. Smallwood*, 1 Esp. R. 121; 1 Wms. Saund. 211, n. a. *Edge v. Frost*, 4 D. & R. 243. *Langdale v. Parry*, 2 id. 337. *Barber v. Fox*, 1 Stark. R. 270. *Wood v. Benson*, 2 C. & J. 94. *Dixon v. Hatfield*, 2 Bing. 439. *Darnell v. Tratt*, 2 C. & P. 82. *Hodgson v. Anderson*, 3 B. & C. 842. *Bushell v. Beavan*, 1 Bing. N. C. 103. *Green v. Creswell*, 10 Ad. & E. 458. A testator appointed his son and three other persons his executors and trustees. The son disclaimed and renounced probate, and afterwards purchased a portion of the testator's property. The other legatees raised a claim for losses incurred by the trustees,

(C) *Promise must be made to the Person to whom the original Debtor is Liable.*[1]

(D) *When Promise made on New Consideration.*[2]

V. Stamp on.

Where the principal contract requires a stamp, so does the guarantee, and *vice versâ*. *Glover v. Halkett*, 2 H. & N. 487. *Martin v. Wright*, 6 Q. B. 917. *Watkins v. Vince*, 2 Stark. 368. 55 Geo. 3, c. 14; 13 & 14 Vic. c. 97.

VI. Guarantor, how Discharged. *See post*, Indemnity; Surety.

VII. „ Rights of. *See* Id.

VIII. „ Extent of Liability. *See* Id.

IX. Continuing Guarantee.

Allan v. Keaning, 9 Bing. 618; S. C. 2 M. & Scott, 768.

The terms of an undertaking, after reciting, that "C. is indebted to you in a sum of money, and may have occasion to make purchases from you, as an inducement to you to sell him such goods, and continue your dealings with him, I hereby guarantee you in the sum of £ in default on the part of C., for two months."

Words showing that a guarantee is given in reference to further purchases will be construed as continuing.[3]

The court held this to be a continuing guarantee.

GUARDIAN.

See post, Infant; Poor; Ward.

GUERNSEY.

(A) *The Authority of the Governor.*[4]

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and the son's solicitor wrote in his behalf to the claimants, agreeing to pay 300*l.* in satisfaction of the losses:—*Held*, that this letter was not within the Statute of Frauds, as an agreement to answer the debt, default, or miscarriage of another; and that it was not invalid for want of consideration. The claim was therefore allowed against the son's estate. *Orrell v. Coppock*, 2 Jur. N. S. 1244; 26 L. J. Ch. 269. *See* also *Batson v. King*, 4 H. & N. 739; 28 L. J. Ex. 327.

[1] The statute only applies to a promise to be answerable for a debt of, or a default in, some duty by that other towards the promisee. *Hargreaves v. Parsons*, 16 Mee. & W. 561, 570. *Eastwood v. Kenyon*, 11 Ad. & E. 438. But a promise by a surety to a third person to indemnify him if he also will become surety for the principal, appears to be within the statute. *Green v. Creswell*, 10 Ad. & E. 453. *Ikin v. Brook*, 1 B. & Adol. 124.

[2] It has been said that a man may bind himself to pay another's debt by a parol promise founded on a new consideration. *Williams v. Leper*, 3 Burr. 1886. *Bampton v. Paulin*, 4 Bing. 264; 12 Moore, 497. *Edwards v. Kelly*, 6 M. & S. 204. But it can hardly be so, as the nature of the consideration cannot affect the terms of the promise itself, unless it be an extinguishment of the liability of the original party. 1 Wms. Saund. 211, c. n. 1. *Thomas v. Williams*, 10 B. & C. 664. *Clancy v. Pigott*, 2 Ad. & E. 473.

[3] "Any bill you may draw on him on account thereof," is a continuing guarantee. *Mayor v. Isaac*, 6 Mee. & W. 605. A guarantee to pay according to the custom of the trade, of a monthly auditing, will be deemed a continuing guarantee. *Hargrave v. Smee*, 6 Bing. 244. So an undertaking "for any goods he hath or may supply my brother A. with, to the amount of 100*l.*," is a continuing guarantee. *Mason v. Pritchard*, 12 East, 227; S. C. 2 Camp. 436. *See* also *Merle v. Wells*, 2 id. 413. *Bastow v. Bennett*, 3 id. 220. *Simpson v. Manley*, 2 C. & J. 12, 13, n. *Allan v. Keaning*, *supra* in text.

But a guarantee "to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by A. of the plaintiff," is not a continuing guarantee. *Melville v. Hayden*, 3 B. & A. 593. *See* also *Kay v. Groves*, 6 Bing. 276. *Nicholson v. Paget*, 1 C. & M. 48. As to whether a guarantee given to or by a firm continues binding after a change in its constitution, the Mercantile Amendment Act, 19 & 20 Vic. c. 97, s. 4, provides, we have seen (*ante*, 612) that no such promise made to or for a firm, consisting of two or more persons, or a single person trading under the name of a firm, shall be binding on the promiser in respect of anything done or omitted to be done, after a change in any one or more of the persons constituting the firm, or in the person so trading, unless the intention that the promise shall continue to be binding notwithstanding such change, shall appear, either by express stipulation, or by necessary implication from the nature of the firm, or otherwise.

[4] The advice of the bailiff and jurats of the royal court, in the island of Guernsey, is not necessary for authorising the governor or lieutenant-governor to exercise the power

GUNMAKERS' Company.[1]

GUNPOWDER. *See ante*, Destructive Substance, p. 65; Fireworks, id. p. 466; *post*, Malicious Injuries Act, 24 & 25 Vic. c. 97, ss. 9, 10, 45, 54, 55; Offences against the Person Act, 24 & 25 Vic. c. 100, ss. 12, 28, 29, 30, 64, 65.

The 23 & 24 Vic. c. 139, amends the law concerning the making, keeping, and carriage of gunpowder and compositions of an explosive nature, and concerning the manufacture, sale, and use of fireworks.[2]

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of deportation of aliens domiciled in the island. *Guernsey (Bailiff and Jurats), In re*, 5 Moo. P. C. C. 49. The bailiff and jurats are individually entitled to take part and speak in all conferences with the governor or lieutenant-governor, and have the sole authority to appoint the time and place for such conference. (Id.) A writ of pardon under her majesty's sign-manual, addressed to the lieutenant-governor and keeper of the gaol, to discharge from custody a person undergoing imprisonment, does not require to be verified and registered by the royal court before it is executed. (Id.) The refusal of a gaoler to discharge a prisoner, on the production of a writ of pardon under the sign-manual, will not warrant the lieutenant-governor in enforcing obedience to the writ by the threat of military force. (Id.)

[1] Previously to the 18 & 19 Vic. c. 148, there were two independent companies for the proof of firearms, viz. the Gunmakers' Company and the Birmingham Company. That act, passed for the proof of small arms by the two companies, and in order to avoid the inconvenience of several acts relating to the same matter, but without amalgamating the two companies, requires double barrels to be proved, first by provisional, and afterwards by definitive proof. The act declares that "each of the two companies shall receive all barrels brought to the proof-house of that company in the proper state for proof, and whether or not theretofore proved, and shall duly prove the same thereat, according to the scale in force, and shall duly mark such barrels, when proved (if found of proof), as duly proved according to such scale;" and that "a barrel shall not be used in making any small arm unless the barrel has been duly proved at the Gunmakers' Company or at the Birmingham proof-house:"—*Held*, that in the absence of any provision in the act making it obligatory on one company to receive and prove guns by the definitive proof, which have been provisionally proved by the other company, the Gunmakers' Company could not be compelled to prove by definitive proof double barrels provisionally proved at the Birmingham proof-house, but which had not been provisionally proved by the Gunmakers' Company. *Goodman v. Spencer*, 2 C. B. (N. S.) 93; 3 Jur. N. S. 414; 26 L. J. C. P. 177.

[2] 23 & 24 Vic. c. 139, s. 1, repeals 9 & 10 Wm. 3, c. 7; 5 Geo. 2, c. 12; and 12 Geo. 3, c. 65; and fixes time for operation of the present act at 31st August, 1861.

By sect. 2, *the following regulations shall be observed with regard to the manufacture and keeping of gunpowder;* (that is to say),—

"No such manufacture shall be carried on except in mills and other places lawfully used for such manufacture at the time of the commencement of this act, or in places licensed for that purpose as hereinafter mentioned:—

"The quantity of gunpowder, or materials to be made into gunpowder, to be at one time under any single pair of millstones, or rollers, or runners, shall not exceed fifty pounds as respects sporting and government powder, and sixty pounds as respects all inferior powders, and every incorporating mill, or group of incorporating mills, shall be provided with a charge-house, for the store of mill-charges, properly constructed of stone or brick, and situate at a safe and suitable distance from each incorporating mill, or group of incorporating mills:

"The quantity of gunpowder to be subjected to pressure at any one time in any press-house shall not exceed ten hundred weight:

"The quantity of gunpowder to be corned or granulated at one time in any corning or granulating-house shall not exceed twelve hundred weight:

"The quantity of gunpowder to be dried at one time in one stove, or place used for the drying of gunpowder, shall not exceed fifty hundred weight:

"The respective quantities to be at any one time in any press-house, or corning or granulating-house, shall not exceed twice the respective quantities hereby allowed to be subjected to pressure, and to be corned or granulated at one time; and the quantity to be at any one time in any drying-house or dusting-house shall not be more than is necessary for the immediate supply and work of such house; and for the purposes of this provision any building used with any such press-house, corning or granulating-house, drying-house or dusting-house, shall be deemed part thereof, save only magazines constructed of stone or brick, and situate forty yards at least from every such press-house or other house as aforesaid (hereinafter distinguished as expense magazines), and

save only the stove in which the powder which has been dried may be cooling:

"Every person keeping or using any mill for the making of gunpowder, shall have (in addition to the expense magazines) a good and sufficient magazine or magazines, at least one hundred and forty yards distant from the mill or mills; and every press-house, or other house and place used for or in the making of gunpowder, for the receiving and safely keeping of all gunpowder made at such mill or mills, as soon as such gunpowder can from time to time be conveniently removed to such magazine or magazines, such magazine or magazines to be well and substantially built with brick or stone, and situate in such place as may have been lawfully used, or duly licensed by justices, before the commencement of this act, or may be licensed as hereinafter mentioned, which magazine or magazines is and are hereinafter distinguished as a store-magazine or magazines:

"Every maker of gunpowder shall, with all due diligence, cause all finished gunpowder made at his mill or mills to be removed accordingly from such mill or mills, and the other places used by him for or in the manufacture of gunpowder, or any magazines or storehouses used therewith, to the said store-magazine or magazines required by this enactment, to be distant one hundred and forty yards as aforesaid:

"Every maker of gunpowder shall cause to be erected or provided good and sufficient thunder-rods or lightning-conductors, in connexion with every store-magazine where gunpowder is kept by him, for the protection of such magazine from the effects of lightning."

By sect 3, power is given to the Secretary of State, on application and sufficient cause shown, to sanction the continuance or construction of any magazine within the prescribed distance.

By sect. 4, all gunpowder made or kept in contravention to the provisions of this act to be forfeited, and in addition party to pay, for every offence, not exceeding two shillings for every pound of powder so forfeited. Persons making gunpowder, without having store-magazine distant as required, to forfeit not exceeding 25*l.* per month, and for delaying to move finished gunpowder to store-magazine, not exceeding 5*l.* per day.

By sect 5, no charcoal to be kept within twenty yards of any mill, &c., under penalty of not exceeding 5*l.* per week.

By sect. 6, *the following regulations shall be observed with regard to the manufacture of loaded percussion caps, and the manufacture and keeping of ammunition, fireworks, fulminating mercury, or any other preparation or composition of an explosive character;* (that is to say),—

"No such manufacture shall be carried on without such license for that purpose as hereinafter mentioned, or within the respective distances hereinafter mentioned, and set opposite to the descriptions of the respective articles; (that is to say),—

"Percussion caps	50 yds.
"Ammunition	100 „
"Fireworks	50 „
"Fulminating mercury or other preparation or composition of equally explosive power . . .	100 „

from any dwelling-house or any building in which persons not connected with the same manufacture are employed:

"No such articles as aforesaid, except percussion caps, exceeding the respective quantities hereinafter mentioned, and set opposite to the descriptions of the respective articles; (that is to say),—

"Ammunition containing five pounds of gunpowder,	
"Fireworks containing ten pounds of explosive compound,	
"Fulminating mercury or other preparation or composition of equally explosive power	1 oz. dry or 8 oz. mixed with 25 per cent of water,

shall be kept in any place not licensed for that purpose as hereinafter mentioned, and no such article shall be kept in any place so licensed in excess of the respective quantities specified in the license in that behalf.

"The operation of mixing the composition for percussion caps shall be performed in a building situate at a distance not less than twenty yards from any other workshop, and no greater quantity than five pounds of cap composition shall at any one time be in the building where the operation of mixing is performed.

"No fulminating mercury, except that which is being used in the actual preparation of the cap composition, shall be kept in any building where the operation of preparing such composition is performed, without being mixed with at least twenty per cent of water.

"The operation of loading percussion caps shall be performed in a building where no other explosive material than that employed in loading percussion caps is used or kept; and no greater quantity than twenty-four ounces of cap composition shall at any one time be in the building where the operation of loading is performed.

"The operation of filling or charging cartridges shall be performed in a building situate at a distance not less than twenty yards from the other workshops connected with the manufacture; and no greater quantity than fifty pounds of gunpowder, either loose or made up into cartridges, or what is equivalent as regards explosive power to fifty pounds of gunpowder (if other explosive materials be used), shall at any one time be in any workshop connected with the manufacture.

"The operation of charging or filling fireworks with explosive materials shall be performed in a building situate at a distance not less than twenty yards from the other

workshops connected with the manufacture; and no greater quantity of the ordinary explosive composition used in the manufacture of fireworks than thirty pounds, whether loose or made up, or what is equivalent as regards explosive power to thirty pounds of the ordinary gunpowder, shall at any one time be in any building where the operation of filling or charging is performed.

"The manufacture of such fireworks as contain detonating composition, or composition which is more easily ignited by percussion or friction than ordinary gunpowder, shall be conducted in a building or buildings situate at a distance not less than thirty yards from the other workshops, and no greater quantity than ten pounds of such composition shall at any one time be in any building.

"Every person keeping or using any factory for the making of ammunition or fireworks, shall have, at a distance of not less than fifty yards from any workshop connected with the manufacture, a magazine or magazines, built with brick or stone, for the receiving and safely keeping the gunpowder or other explosive materials used in the manufacture, and the cartridges or fireworks (as the case may be) made at such factory."

By sect 7, percussion caps, &c. made or kept in contravention to this act to be forfeited, and in addition, penalty for every offence not exceeding 10*l.*

For sects. 8 & 9, *see* Fireworks, *ante*, p. 466.

By sect. 10, justices are to license places for making and keeping gunpowder.

By sect. 11, justices are to license places for making loaded percussion caps, and making and keeping ammunition, &c.

By sect. 12, regulations as to notice for license.

By sect. 13, justices may make licenses conditional on precaution prescribed by them being observed.

By sect. 14, in case of refusal of license, the applicant may memorialise the Secretary of State, who shall have power, notwithstanding such refusal, to grant the license.

By sect. 15, owners of mills may make rules for their servants and workmen for preventing accidents.

By sect. 16, penalty for doing any act in any mill, &c., tending to cause explosion, not exceeding 5*l.*

By sect. 17, Secretary of State may authorise persons to inspect mills, &c.

By sect. 18, "no person shall have or keep at any one time, being a dealer in gunpowder, or manufacturer of cartridges, fireworks, or rockets, more than two hundred pounds of gunpowder, and, not being such dealer or manufacturer, more than fifty pounds of gunpowder, in any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other building or place (and for the purposes of this enactment all buildings and places adjoining to each other, and occupied together, shall be deemed one house or place), or on any river or other water (except in carriages loading or unloading, or passing on the land or in ships, boats, or vessels, loading or unloading, or passing on any river or other water, or detained there by the tide or bad weather), within the following limits, being the limits within which gunpowder mills or magazines may not be licensed under this act; (that is to say), within the city of London or Westminster, or within three miles of either of them; or within any borough or market-town, or one mile of the same; or within two miles of any palace or house of residence of her majesty, her heirs or successors; or within two miles of any gunpowder magazine belonging to the Crown; or within half a mile of any parish church; or in any place beyond the limits aforesaid, except in mills or other places which at the commencement of this act shall be lawfully used for the making of gunpowder, and the magazines, storehouses, and offices near and belonging thereto, and in the magazines in which greater or unlimited quantities of gunpowder may be lawfully kept at the commencement of this act: and in the places where it shall be lawful to make gunpowder, or to keep greater or unlimited quantities of gunpowder, under the provisions of this act; and all gunpowder kept beyond the quantity hereby allowed, and the barrels or receptacles in which such gunpowder shall be kept, shall be forfeited, and any person keeping the same shall for every such offence forfeit not exceeding two shillings for every pound of gunpowder kept beyond the allowed quantity."

By sect. 19, gunpowder may be kept for mines under certain conditions.

By sect. 20, "no person shall have or convey at one time more than thirty barrels of gunpowder in any waggon, cart, or other carriage by land, except in a van specially constructed for that purpose, inclosed on every side with wood, and then not more than forty barrels, and unless such carriage form part of a railway train, and then not more than a hundred barrels in any carriage forming part of such train; and no person shall have or convey at one time within the United Kingdom, more than five hundred barrels of gunpowder in any barge, boat, or other vessel by water, except in vessels with gunpowder imported from or to be exported to any place beyond the sea or going coastwise; and all gunpowder conveyed on land or water (except in such vessels for importation or exportation of gunpowder, or going coastwise) shall be in barrels, close joined and hooped, or in copper, zinc, or tin cases or canisters, inclosed in wooden boxes or barrels, without any iron about such boxes or barrels, and so secured that no part of the gunpowder be scattered in the passage; and each barrel shall contain no more than one hundred pounds of gunpowder; and every carriage in which gunpowder shall be conveyed by land shall have a complete covering of wood, painted cloth, tarpaulin, or wadmill tilts, over all the gunpowder therein contained; and no gunpowder shall be conveyed by

H.

HABEAS Corpora Juratorum. Abolished by C. L. P. Act, 1852, s. 104.

HABEAS CORPUS. *See* also Husband and Wife; Infant; Prisoner.

I. What it is, p. 620.
II. To what Places it Runs, p. 620.
III. By whom Issued, p. 620.
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(A) *How Impeached*, p. 622.
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(B) „ *Returnable*, p. 623.
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IX. „ Satisfaciendum, p. 623.
X. „ Testificandum, p. 623.
(A) *When Obtainable*, p. 623.

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water in any barge, boat, or other vessel not having a close deck (except in vessels with gunpowder imported, or to be exported, in manner aforesaid, or going coastwise); and as soon as any gunpowder is put on board any vessel, all such gunpowder shall be covered with raw hides or tarpaulins; and where any gunpowder conveyed by land or water is contained in any receptacles hereby authorised other than barrels, no greater quantity shall be so conveyed than shall be equivalent to what might lawfully have been so conveyed, if the same had been contained in barrels. And all gunpowder which shall be carried or conveyed (except in such vessels with gunpowder for importation or exportation as aforesaid, or going coastwise) within any part of the United Kingdom, in greater quantity or in other manner than is hereinbefore prescribed, and the barrels or other receptacles in which such gunpowder shall be, may be seized by any person who shall have the same authority to remove such gunpowder, and barrels, or receptacles, and to use for that purpose, during the space of twenty-four hours after seizure, the carriage or vessel in which such gunpowder shall be seized, and the tackling, beasts, and accoutrements belonging thereto, on the terms of paying a recompense for the use thereof, and to detain such gunpowder, and barrels or receptacles, as is hereinafter given to persons searching under a warrant of a justice of the peace, sheriff, or magistrate, and such seizure shall be for the use of the person making the seizure, on conviction of the offender or offenders."

By sect. 21, no gunpowder to be loaded or brought down until that condemned be unloaded, on pain of forfeiting all gunpowder so loaded or brought down.

By sect. 22, penalty for smoking, &c., on board vessels loaded with gunpowder, for every offence not exceeding 5*l.*

By sect. 23, penalty for undue delay in loading or unloading gunpowder, for each offence not exceeding 10*l.*

By sect. 24, foregoing provisions to extend only to carriage of more than one hundred pounds of gunpowder.

By sect. 25, power to justices to issue warrants to search.

By sect. 26, regulations for the security of the vessels in the river Thames.

By sect. 27, Conservators of the River Thames to appoint searchers.

By sect. 28, "forfeitures and penalties recoverable summarily; one moiety to the queen, and one moiety to the informer.

By sect. 29, the Lord-lieutenant or chief Secretary in Ireland to have the like authorities as are before given to the Secretary of State.

By sect. 30, act not to extend to mills erected on Crown lands, &c.

By sect. 31, act not to affect 54 Geo. 3, c.

(B) *When not Obtainable*, p. 624.
(C) *How Obtained*, p. 624.

XI. Habeas Corpus ad Subjiciendum, p. 624.
XII. Prisoner, how Brought up, p. 624.
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XIV. Habeas Corpus ad Deliberandum et Recipiendum, p. 625.

I. What it is.[1]
II. To what Places it Runs.[2]
III. By whom Issued.[3]
IV. How Obtained.[4]

159, or gunpowder, &c. on board her majesty's ships, &c.

By sect. 32, saving for proof-houses under 18 & 19 Vic. c. 148 (local).

By sect. 33, not to extend to hinder unlimited quantities of gunpowder being conveyed from ships below Blackwall.

By sect. 34, saving of enactment for protection of London Docks.

By sect. 35, saving for provisions of Police Acts.

By sect. 36, 2 & 3 Vic. c. 47, and 9 & 10 Vic. c. 25, to be construed as referring to this act.

By sect. 37, meaning of the word "borough."

[1] The name given to a variety of writs (of which *habeas corpus*, "you have the body," were anciently the emphatic words) having for their object to bring a party before a court or judge. The common *capias* is, in this general sense, a *habeas corpus*, the writ in the original Latin commanding the sheriff to take the defendant, "so that you have his body." The term, however, is now exclusively used to designate a few special writs, to inquire into the cause of a person's imprisonment or detention by another with a view to obtain his liberation, technically called a *habeas corpus ad subjiciendum*. Bacon's Abr. Hab. Corp. vol. iii. p. 421.

The writ of *habeas corpus* was originally ordained by the common law (*In re Besset*, 9 Jur. 66; 14 L. J. M. C. 17). as a remedy for such as were unjustly imprisoned to procure their liberty; and it is a mistaken notion that the writ is of modern date, and introduced in the reign of King Charles II. But before the stat. 31 Car. 2, c. 2, it was very difficult to be obtained, because the judges, who had authority to issue it, pretended to have arbitrary power either to grant or deny it; and the sheriffs and gaolers, to whom the writ was directed, frequently put poor prisoners to the charges of a second and third *habeas corpus* before they would yield obedience to the first, which being grievous to the people, the stat. 31 Car. 2, c. 2, was enacted to prevent abuses of this nature, and improve the laws for the benefit of the liberty of the subject, and which is usually called the Habeas Corpus Act. 3 Bl. Com. Step. ed. 695; Burnet's Hist. 4 Ch. Cr. L. 121–126. The corresponding act in Scotland is 1701, c. 6.

[2] The writ formerly ran to any part of the dominions of the Crown. Bac. Abr. Hab. Corp. b. 2. *See* 25 & 26 Vic., *post*, p. 625. But not to foreign dominions which belong to a prince who succeeds to the crown of England. Thus it cannot be sent to Scotland, or to the Electorate; but it may to Ireland, the Isle of Man (*Re Crawford*, 18 L. J. Q. B. 225); and formerly to the Plantations, Guernsey and Jersey (*In re Carus Wilson*, 7 Q. B. 984; 14 L. J. Q. B. 105, 201. *In re Dodd*, 4 Jur. N. S. 291), and Canada (*In re Anderson*, 30 L. J. Q. B. 129). At one time it lay to Calais. *R. v. Cowle*, 2 Burr. 836. *See* also *post*, 624.

[3] It issues by order of the Chancellor (*In re Belson*, 14 Jur. 631; 7 Moo. P. C. C. 114. *Crowley's case*, 2 Swanst. 1), or of one of the superior courts, or one of the judge's thereof in term or vacation (2 Inst. 53. *Watson's case*, 9 Ad. & E. 731), and by a judge of one of the superior courts sitting in vacation under the 1 & 2 Vic. c. 45, s. 1; and, in exercise of the common-law power, may issue a writ returnable in another court in term time, and in that case the affidavits may be entitled in either court. *In re Wilson*, 7 Q. B. 984; 9 Jur. 393; 14 L. J. Q. B. 105. But if issued in vacation it is usually returnable before the judge who awarded it (*R. v. Clarke*, 3 Burr. 1362), unless a term intervenes, and then it may be returned in court. (Id.) *R. v. Shebbeare*, 1 Burr. 460.

A writ of *habeas corpus ad subjiciendum*, if granted by a judge of the Queen's Bench, must issue from the Crown side. *In re Easton*, 4 Per. & D. 558; 12 Ad. & E. 645.

[4] Though it be a writ of right it is not grantable as of course, but only on motion upon affidavit, stating a probable cause for the application (*Hobhouse's case*, 3 B. & A. 420. *Ex-parte Knight*, 2 Mee. & W. 106); but if a probable cause be shown that the party is imprisoned without cause, the *habeas corpus* is then a writ of right (Wilmot's *Opinions*, 58; 2 Inst. 615), "which may not be denied, but ought to be granted to every man that is committed or detained in prison, or otherwise restrained, though it be by command of the king, privy council, or any

V. When it lies in General.[1]

other." Com. Journ. April 1, 1628. As to the penalty for denying the writ, *see* 31 Car. 2, c. 2, s. 10. But the writ does not lie on behalf of an alien-enemy or prisoner of war. *Spanish Sailor's case*, 2 Black. 1324. *Rex v. Schiever*, 2 Burr. 765.

If the application be by a prisoner it must be accompanied with a copy of the commitment, verified by affidavit (Corner. C. O. Pr. 112); and where the *certiorari* is taken away, and the validity of the conviction is contested, by a copy of that also. *R. v. Elwell*, 2 Stra. 794. *R. v. Mellor*, 2 Dowl. 173. *Ex-parte Boothroyd*, 15 Mee. & W. 8. It also must be made on an affidavit of the party applying, or it must be shown that he is so coerced as to be unable to make one. *Re Parker*. 5 Mee. & W. 32. *Canadian Prisoner's case*, 9 Ad. & E. 731. And if the prisoner be in custody under process from an inferior court, the affidavit may be entitled in the court out of which the writ issues. *Perrin v. West*, 3 Ad. & E. 405.

Upon *habeas corpus* to discharge a prisoner out of custody who has been committed by virtue of an order of magistrates, under the 8 Vic. c. 8, s. 25 (the Mutiny Act), for assisting to conceal a deserter, notice of the rule should be served upon the Secretary of War. *Ex-parte Gale*, 3 D. & L. 114; 10 Jur. 334; 14 L. J. Q. B. 316.

Upon the argument for a rule *nisi* for a *habeas corpus*, the case is to be treated in the same manner as if the prisoner was brought up upon a *habeas* granted in the first instance, and the court will look to the whole cause as appearing upon a return. *Ex-parte Bull*, 1 B. C. Rep. 141; 8 Jur. 827; 15 L. J. Q. B. 235.

Where, after a rule for a *habeas corpus* has been granted, a warrant is issued, which renders the custody lawful, the court will discharge the rule. *Ex-parte Dauncey*, 8 Jur. 829, Ex.

A wife may move for a *habeas corpus* on the behalf of her husband. *Cobbett v. Hudson*, 15 Q. B. 988. The court granted a rule *nisi* for a *habeas corpus* to bring up a prisoner (access to whom being denied by the gaoler), on the application of the prisoner's father. *In re Thompson*, 30 L. J. M. C. 19. A prisoner who sues out a *habeas corpus ad subjiciendum* is not bound by the decision of any one court, but is entitled to take the opinion of all as to the propriety of his imprisonment. *Ex-parte Partington*, 2 D. & L. 650; 13 Mee. & W. 679; 9 Jur. 92. The rule giving precedence to motions affecting the liberty of the subject only holds where a person in custody is brought up by *habeas corpus*, and does not extend to showing cause against a rule for an *habeas corpus*. *In re Thompson*, 6 Jur. N. S. 1121.

[1] *See* also *post*, Habeas Corpus ad Testificandum, p. 623; and *post*, 624.

A *habeas corpus* will not lie unless the party be in actual or constructive custody. *Palmer v. Forsyth*, 4 B. & C. 401; S. C. 6 D. & R. 497. A *habeas corpus* lies to restore children to their guardian. *See post*, Infant. *Rex v. Foley*, 5 Ad. & E. 441. So, a *habeas corpus* lies to remove a defendant from one county, in custody on an attachment, into another county, to take his trial. (*In re Wetton*, 1 C. & J. 459); but will not lie to enable a party to exercise his elective franchise. *In re Jones*, 2 Ad. & E. 436; S. C. 4 Nev. & M. 340. So the court will not grant a *habeas corpus* where a party has been found guilty of perjury, and a warrant issued, and the party apprehended thereon in a foreign country. *Ex-parte Scott*, 9 B. & C. 446.

A commission of rebellion is not within the 31 Car. 2, c. 2, that writ not being a criminal matter, and the statute applying to misdemeanors. *Cobbett v. Slowman*, 4 Ex. 747; 19 L. J. Ex. 270.

The Common Pleas has no power to discharge upon a *habeas* a prisoner from custody under process of the Court of Chancery, and cannot entertain any question as to the irregularity of such process. *Ex-parte Andrews*, 4 C. B. 226.

A court of equity committed a party under a writ of rebellion. The commitment, which was regular in other respects, omitted the date of the return to the writ of rebellion, and it was suggested on motion for *habeas corpus* that this omission had the fact of concealing the falseness of the return: — *Held*, no ground for a *habeas corpus*, but only for an application to the court of equity. *In re Cobbett*, 7 Q. B. 187.

The court refused to grant a *habeas corpus* in order to discharge a defendant who was detained in custody on a warrant of a judge belonging to a court of competent jurisdiction, which set out an adjudication, on which, if erroneous, a writ of error might be brought. *Ex-parte Dunn*, 5 D. & L. 345; 5 C. B. 215; 12 Jur. 99; 17 L. J. C. P. 97; nor will it in general be granted to bring up a prisoner duly committed to appear before a coroner's jury (*Re Wakley*, 7 Q. B. 653; 14 L. J. M. C. 188); nor a party in custody, unless on attachment to enable him to move to set it aside. 9 Mee. & W. 793. *See* 3 C. B. 984; 10 id. 369.

Where a person supposed to be improperly in custody is brought up on *habeas corpus*, the court, if there appear no ground for restraint, will order that such person be at liberty to go where he pleases, and will, if necessary, give him the protection of an officer in going. But if the party be a legitimate child, too young to exercise a discretion, the legal custody is that of the father. *Rex v. Greenhill*, 4 Ad. & E. 624; 6 Nev. & M. 244.

The Court of Exchequer will grant a rule calling on a committing magistrate to show cause why a writ of *habeas corpus* should not issue to bring up a prisoner, in order that the validity of the warrant of commitment may be discussed on showing cause. *Ex-parte Cross*, 2 H. & N. 354.

VI. Of the Return.[1]

(A) *How Impeached.*[2]

Where a wife is, by her own desire, living apart from her husband, and is under no restraint, the court will not grant a *habeas corpus*, on the application of the husband, for the purpose of restoring her to his custody. *Reg. v. Leggatt*, 18 Q. B. 781.

[1] The return will not be invalid for mere want of form, if it disclose a good cause of detainer. *R. v. Bethell*, 5 Mod. 19. *Nash's case*, 4 B. & A. 295. It should state the cause of the arrest and detention, and the causes and warrants on which he is detained, and if it appear that he is detained without sufficient cause, the court will order his discharge. *Ex-parte Bessett*, 6 Q. B. 481; 2 Ins. 55. It is enough if there appear to have been a commitment by a court of competent jurisdiction (*R. v. Sheriff of Middlesex*, 11 Ad. & E. 273. *Ex-parte Fernandez*, 30 L. J. C. P. 321. *R. v. Suddis*, 1 East, 306), or of the House of Commons (*R. v. Hobhouse*, 2 Ch. Rep. 207. See *Howard v. Gossett*, 10 Q. B. 359; 16 L. J. Q. B. 345); and the court will not receive affidavits impeaching the sentence of a court of competent jurisdiction, though they might show that, in fact, there was no such sentence. *Wilson's case*, 7 Q. B. 984. *Re Clarke*, 2 id. 619. *Re Crawford*, 18 L. J. Q. B. 225; *see* 2 F. & F. 292.

The return of the Governor of the Milbank Penitentiary to a *habeas corpus* set forth a certificate of the greffier of the Royal Court of Jersey, that the prisoners had been convicted of burglary by that court, and sentenced to be transported, and alleged that it was a court of competent jurisdiction to try and punish for the crime; also an order in council directing the transportation of the convicts from Jersey to Van Diemen's Land, and a warrant of a secretary of state for removing them from Jersey to the prison, in order to carry the sentence into effect:—*Held*, first, that the affidavits filed for the purpose of obtaining the writ were not admissible to contradict the return, and that the court could not enter into an inquiry of what the law of Jersey is. *In re Brenan*, 10 Q. B. 492; 11 Jur. 775; 16 L. J. Q. B. 289. *Carus Wilson's case*, 7 Q. B. 984; 14 L. J. Q. B. 105–201; *see* 2 De Gex & J. 510.

Return, committal by order of the Vice-Chancellor of England for breach of an injunction ordered by the Lord Chancellor. The order was signed C. C., which, it was suggested, were the initials of Cottenham, Chancellor. On a motion on behalf of the prisoner for time to file affidavits for the purpose of showing that Lord Cottenham had a personal interest in the cause, and, therefore, as the prisoner contended, that his injunction was void:—*Held*, that the Queen's Bench will not grant time to file affidavits for the purpose of disclosing matters not apparent on the return to a *habeas corpus*, unless the nature of the facts to be sworn to is suggested; and it appears such affidavits might be available. And in this case, liberty to file the proposed affidavits was refused, as the order of committal was that of the Vice-Chancellor, who had jurisdiction to decide whether there was a proper ground for a committal, and the Queen's Bench could not review such decision. *Dime's case* 14 Q. B. 554; 14 Jur. 198; 19 L. J. Q. B. 158. *Semble*, on the motion for the discharge of a prisoner on a return of *habeas corpus*, who is not in custody under a commitment or detainer on any criminal, or supposed criminal matter, or for debt, or any process upon civil suit, affidavits may be used to show facts not apparent on the face of the warrant. *In re Martin*, 2 B. C. Rep. 33.

Where a prisoner has been lodged in gaol under a bad warrant of commitment, even in the nature of a conviction (as where the commitment is under the Vagrant Act, 5 Geo. 4, c. 83, s. 4), a good warrant of commitment subsequently delivered to a gaoler, but before a rule for a *habeas corpus* has been obtained, is a good answer to the rule. *Ex-parte Cross*, 2 H. & N. 354; 26 L. J. M. C. 201.

Where a warrant of commitment, setting out a conviction, is good on the face of it, it is doubtful whether, on the return to a writ of *habeas corpus*, affidavits are admissible, raising objections not appearing upon the warrant; as, for instance, disclosing a former conviction for the same offence. *Ex-parte Baker*, 2 H. & N. 219; 3 Jur. N. S. 937; 26 L. J. M. C. 155.

A return that the defendant was not in the sheriff's custody at the coming of the writ is good (*R. v. Bethuen*, Andr. 281); and so it is good to return that, before the coming of the writ, the defendant was discharged out of his custody by an order of sessions, without saying what sessions, what order, or that he was discharged by due course of law. A return that the defendant is sick in prison, or a lunatic, is good. *R. v. Clarke*, 3 Burr. 1362. *R. v. Fell*, 3 Dowl. & L. 373. An amendment before or after the return is filed is allowed. *Watson's case*, 9 Ad. & E. 731. *In re Clarke*, 2 Q. B. 619. *R. v. Batchedor*, 1 Per. & D. 516. *Ex-parte Davies*, 4 Bing. N. C. 17.

[2] The return is *primâ facie* taken to be true, and there seems to be doubt whether, in criminal cases, it can be impeached on affidavit. It would appear, however, that the court would receive such affidavits on motion for an attachment, or to quash the return. *Watson's case*, 9 Ad. & E. 794; Corner, C. O. Pr. 116. *De Vine's case*, O. Bridgman, 288. *Re Douglas*, 12 L. J. Q. B. 49; 2 Hawk. P. C. 116. *See post*, Return, p. 623.

If, however, the writ be under 55 Geo. 3, c. 100, by s. 3, affidavits may be used. *R. v. Beeching*, 4 B. & C. 136. *Aliter* if it issued under 31 Car. 2, c. 2. *Wilson's case*, 7 Q. B. 984. *R. v. Batchelor*, 1 Per. &

VII. Habeas Corpus cum Causa.

(A) *When it lies.*[1]

(B) *When Returnable.*[2]

(C) *How Executed.*[3]

VIII. Habeas Corpus ad Respondendum.[4]

IX. „ Satisfaciendum.[5]

X. „ Testificandum.[6]

(A) *When Obtainable.*[7]

D. 516. *R. v. Sheriff of Middlesex*, 11 Ad. & E. 273. *Re Brenan*, 10 Q. B. 492.

[1] This writ (sometimes called *habeas corpus ad faciendum ut recipiendum*) lies for the defendant to remove himself, or for the plaintiff to remove him, from the custody of the sheriff, or other officer by whom he was arrested, in the custody of the keeper of the queen's prison, even although he should, at the same time, be detained upon process of other courts. *Gurney v. Hallen*, 25 L. J. Ex. 277. And by suing out the writ, the defendant is not estopped from disputing the legality of the custody. *Pearson v. Yewens*, 7 Scott, 435. This writ also lies to remove the proceedings from an inferior court of record, where the defendant is actually or virtually in the custody of such inferior court. *Michell v. Mitchenham*, 2 D. & R. 722. *Palmer v. Forsyth*, 6 id. 407; 4 B. & C. 401. But as, by the 1 & 2 Vic. c. 110, a defendant can no longer be held to bail in an action in an inferior court, this writ is now no longer of any use for the removal of a cause which is now always done by *certiorari*.

[2] It is grantable of course, and may be made returnable *immediate*. *Betteswortb v. Bell*, 3 Burr. 1875. *Rex v. Batchelor*, 1 Per. & D. 516; 9 Ad. & E. 731. It must be signed by the chief justice, or in his absence by some other judge of the court. 1 & 2 Ph. & M. s. 7. *Rex v. Roddam*, Cowp. 672.

[3] The officer to whom the writ is directed must obey it on pain of attachment (*R. v. Winton*, 5 T. R. 89); and he must be careful that the prisoner do not wander about while being conveyed to judges' chambers, or escape, or be rescued. *Balden v. Temple*, Hob. 202. *Crompton v. Ward*, 1 Stra. 429. The sitting judge will at once commit the prisoner to the queen's prison. *In re Salisbury*, 5 B. & A. 266.

[4] Formerly this writ was used for the purpose of removing a prisoner to the prison of the court in which an action against him was pending, in order to declare against him, but it is now unnecessary and obsolete. *Guiseppe v. Haynes*, 10 L. J. (N. S.) Ex. 425. It is also used to bring up a prisoner in custody on a charge of felony to answer to another charge of felony before justices. *R. v. Isaacs*, 7 P. R. 255; 20 L. J. Q. B. 395.

[5] This writ is issued in order to charge in execution on a judgment of a superior court a prisoner in the sheriff's custody in another action. If the defendant is in the prison of the court in which the action in which he is to be charged is pending, the writ is not necessary, and the charging may take place by a judge's order. C. L. P. Act, 1852, s. 127. The writ must bear *teste* in term, and be returnable in court upon a day certain in term. It would seem, however, that it may be tested on a different day to that on which it is issued. *Newton v. Rowe*, 7 Scott, N. R. 543.

[6] A writ for bringing up a prisoner to a court or trial to give evidence. In Scotland, a warrant to produce a prisoner.

[7] By 43 Geo. 3, c. 140, "any judge of the courts at Westminster may award a writ of *habeas corpus* for bringing up prisoners for trial, or examination before courts-martial, commissioners of bankruptcy," &c. Long before this statute the writ of *hab. corp. ad testif.* was granted upon affidavit that the prisoner was a material witness (Fortes. 396. *Standard v. Baker*, M. 26 Geo. 3, K. B.; Tidd, Pr. 9th ed. 809); and that he was willing to attend (*R. v. Roddam*, Cowp. 672); and the court has issued such writ to bring up a prisoner to give evidence before an election committee of the House of Commons on affidavit of service on the different parties concerned (*Re Price*, 4 East, 587. *Re Pilgrim*, 3 Ad. & E. 485); so to bring up a sailor on board a man-of-war, if he be willing to attend and has been served with a subpœna (*R. v. Roddam*, *supra*); so it may be obtained to bring up the body of a confined lunatic to give evidence in a cause, upon an affidavit showing that he is not a dangerous lunatic, and that he is in a fit state to be brought up. *See* Com. Dig. Testm. A. I. The court, or a judge, has power to order a *habeas corpus* to bring up a prisoner who is in execution for debt, for the purpose of being examined as a witness before an arbitrator, appointed under the 17 & 18 Vic. c. 125, s. 5, for the purpose of stating the facts in dispute between parties in a special case for the opinion of the court (*Graham v. Glover*, 5 El. & Bl. 591; 2 Jur. N. S. 160; 25 L. J. Q. B. 10); and the court granted a *habeas corpus ad testificandum* to bring up a prisoner in criminal custody for the purpose of giving evidence before an arbitrator. *Marsden v. Overbury*, 18 C. B. 34; 25 L. J. C. P. 200. *See* also 16 & 17 Vic. c. 30, s. 9. Where a plaintiff

(B) *When not Obtainable.*[1]
(C) *How Obtained.*[2]
XI. Habeas Corpus ad Subjiciendum.[3]
XII. Prisoner, how Brought up.[4]

in an action is in lawful custody for debt, he is not entitled as of right to a *habeas corpus* to bring him up to conduct his own cause at the trial, though possibly the court would grant him one if a proper case were shown. *Ex-parte Cobbett*, 27 L. J. Ex. 199; 4 Jur. N. S. 145. But if his evidence is necessary at the trial of a cause, he is entitled to a *habeas corpus ad testificandum* for himself as much as for any other witness. (Id.) Where a plaintiff is thus brought up on a *habeas corpus ad testificandum*, he may conduct his own cause if he please. (Id.) This writ is also obtainable under the 1 Wm. 4, c. 22, s. 6, for the production of a prisoner.

[1] But the court will not allow the writ to issue to bring up a prisoner before a coroner without a strong case of necessity (*Ex-parte Wakley*, 14 L. J. 188, M. C.; 7 Q. B. 653), nor will it be granted to bring up a prisoner of war (*Farey v. Newnham*. Dougl. 403), or a prisoner in custody for high treason (*Langston v. Cotton*, Peake, Ad. Ca. 21), nor where the application appeared to be a mere contrivance to remove a prisoner in execution. *R. v. Burbage*, 3 Burr. 1440.

[2] The application for the writ ought to be made to a judge at chambers (*Graham v. Glover*, 25 L. J. Q. B. 10. *Browne v. Gisborne*, 2 Dowl. N. S. 963. See *Gordon's case*, 2 M. & S. 582; and *Fennel v. Tait*, 1 C., M. & R. 584), upon affidavit, stating the witness to be material, in custody, and willing to attend (*R. v. Murray*, 2 Tidd, Pr. 9th ed. 908); it must be signed by the judge (*R. v. Roddam*, Cowp. 672. *Gibb v. King*, 1 C. B. 1; 1 & 2 Ph. & M. c. 13, s. 7); and should be left with the officer in whose custody the prisoner is detained, who will bring him up on being paid his reasonable charges. 2 Tidd. Pr. 9th ed. 810.

[3] The *habeas corpus ad subjiciendum* is that which issues in criminal cases, and is deemed a prerogative writ, which the king may issue to any place, as he has a right to be informed of the state and condition of the prisoner, and for what reasons he is confined. It is also in regard to the subject deemed his writ of right; that is, such an one as he is entitled to *ex debito justitiæ*, and is in nature of a writ of error to examine the legality of the commitment, and therefore commands the day, the caption, and cause of detention to be returned. Bac. Ab. Hab. Corp. A. A writ of *habeas corpus* is not grantable in general where the party is in execution on a criminal charge, after judgment on an indictment, according to the course of common law. *Ex-parte Lees*, El. Bl. & El. 828. Nor where justices having admitted to bail on a charge of felony, afterwards, on additional evidence, commit to prison. *Ex-parte Allen*, 3 H. & M. 35. This writ lies where a prisoner cannot be detained at common law, and where, in consequence of his prison having been changed, the keeper detaining him has no legal warrant for so doing. *Re Allen*, 31 L. J. Q. B. 28. In the case of delay of prosecution, the courts will in general immediately discharge the prisoner on bail. *Rex v. Wyndham*, 1 Stra. 4. After examining the depositions, &c. (*Rex v. Horner*, 1 Leach, C. L. 270), from which, if it appear that the offence charged be manslaughter and not murder, the accused will be admitted to bail. *Rex v. Dalton*, 2 Stra. 911. But if a *corpus delicti* appear on the depositions, the court will remand the prisoner. *Rex v. Marks*, 3 East, 162. As, though an *alibi* be supported by the strongest evidence (*Rex v. Greenwood*, 2 Stra. 1138), or it be stated that the prisoner has been committed for the same offence, the court will not examine the commitment in order to bail him. *Rex v. Acton*, id. 851. An ambiguous return should be fortified by affidavit, clearing up all doubt. 2 F. & F. 272.

[4] After the *habeas corpus* has been served on the officer, or any other person who detains the applicant in his custody, or left at the gaol or prison with any of the underkeepers, or deputy of the officers or keepers, the party to whom the writ is awarded shall, unless the commitment is for treason or felony, plainly and specially expressed in the warrant of commitment, upon payment or tender of the charges of bringing up the prisoner, not exceeding one shilling per mile, upon security being given by his own bail to pay the charges of carrying him back, if he shall be remanded by the court or judge to which he shall be brought (1 Keb. 272, 280; 55 Geo. 3, c. 50); and that he will not make any escape by the way, make return of such writ, and bring the body of the party under restraint before the Lord Chancellor or Lord Keeper for the time being, or the judges or barons of the court from whence the writ of *habeas corpus* issued, or the other magistrates before whom it was made returnable; and at the same time shall certify the true causes of his detainer or imprisonment, within three days after the writ has been served upon him, unless the commitment of the party be in any place beyond the distance of twenty miles from the place where it is to be returned; and if beyond the distance of twenty miles, and not above one hundred miles, within the space of ten days; and if beyond the distance of one hundred miles, within the space of twenty days after such delivery. 31 Car. 2, c. 2, s. 2. And if the party to whom it is directed refuse to return it within the specified time, he is liable, for the first offence, to a penalty of 100*l.*, and

XIII. Costs of.[1]

XIV. Habeas Corpus ad Deliberandum et Recipiendum.[2]

HABERE facias Possessionem. *See* Ejectment, *ante*, p. 179.

for the second to a penalty of 200*l*. But of late, where the court think, upon hearing affidavits, that the party imprisoned will be discharged or bailed, and especially if he be unable to bear the expense of being brought before the court or judge, the Court of Queen's Bench will grant a rule to show cause why he should not be bailed by a magistrate in the country, with a *certiorari* to return the depositions before them (*Rex v. Jones*, 1 B. & A. 209); but where the validity of the commitment is to be discussed, the party must appear in court, and the court will never dispense with his presence. *Ex-parte Martins*, 9 Dowl. 194. On motion to discharge the prisoner, the practice is that the counsel for the prisoner should be first heard, then the counsel for the Crown, and then the counsel for the prisoner in reply. *R. v. Baines*, 12 Ad. & E. 213, n. *Carus Wilson's case*, 7 Q. B. 984; 14 L. J. Q. B. 105, 201. As to justifying under the writ, see *Herring v. Hudson*, 3 Ex. 107.

[1] The court has authority to give to the functionary who brings up the prisoner the expenses of so doing, but not his general costs. *Dod's case*, De Gex & J. 510. Where a party who brought two actions against another succeeded in one and failed in the other; the plaintiff, who was a prisoner under the Insolvent Debtors' Act, was brought by *habeas corpus ad testificandum*, in the cause of which he failed:—*Held*, entitled to a proportionate part of the costs of the *habeas corpus*. *Griffin v. Hoskyns*, 1 H. & N. 95.

[2] This writ lies to remove a person to the proper place or county where he committed some criminal offence, both at common law and by stat. 38 Geo. 3, c. 52. Bac. Ab. Hab. Corp. A. 422. It has been held to lie to remove thither a person who has committed a crime in the colonies (*Ex-parte Anderson*, 30 L. J. Q. B. 129; 7 Jur. N. S. 122; 3 L. T. (N. S.) 622), or in Ireland (*Warner's case*, 3 Keb. 566. *R. v. Kimberly*, 2 Stra. 848), or where a prisoner, having been committed to a county or town corporate, and it is intended that he should be tried in the adjoining county. Corner, C. Pr. 121. But now by 25 & 26 Vic. c. 20, s. 1, "no writ of *habeas corpus* shall issue out of England by authority of any judge or court of justice therein into any colony or foreign dominion of the Crown where her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion."

Sect. 2 not to affect right of appeal to her Majesty in council.

When the writ issues at the instance of the Crown, no notice to the opposite party is necessary; but it is required when issued at the instance of the prisoner. *R. v. Hall*, Corn. C. Pr. 122; *see* Arch. Pr. Crown Officer, 329, &c.

A warrant of commitment being bad, a second warrant was allowed to be substituted for it, or the return to the *habeas corpus*. *Ex-parte Smith*, 27 L. J. Ex. 340.

END OF VOL. IV.

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